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184 Cal. 462

PACIFIC GOLD DREDGING CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9524.)

(Supreme Court of California. Dec. 6, 1920. Rehearing Denied Jan. 3, 1921.)

1. Master and servant 🔑388—Child, awarded to custody of disappearing mother, held "dependent" on father, within Workmen's Compensation Act.

Though, under Civ. Code, § 196, making the parent entitled to a child's custody liable for his support, a divorce decree awarding custody of a boy to the mother, without requiring the father to contribute to his support, relieved the father from liability for the time being, where the mother abandoned the boy, and disappeared, and was presumptively dead, the father was under a legal duty to provide for him, making the boy "dependent" on him, within the Workmen's Compensation Act (St. 1917, p. 844).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependent.]

2. Parent and child 🔑3(1)—Exemption from liability for support of child awarded to another's custody not unconditional or permanent.

Where a parent is deprived of the custody of a child, and therefore of its services and earnings, he is no longer liable for its support and education; but this exemption is not unconditional, and may not be permanent.

3. Parent and child 🔑3(1)—Statute merely makes parent, given custody, primarily liable for support.

Civ. Code, § 196, providing that the parent entitled to the custody of a child must support him, merely means that such parent is primarily liable for the child's support, and that between such parent and the one deprived of such custody the latter is absolved from liability, in the absence of any decree requiring contribution to such maintenance.

4. Divorce 🔑324—Father, denied custody by divorce decree, may voluntarily resume responsibility for support.

Though a divorce decree awarded custody of a child to the mother, and found that the father was not a fit person to have such custody, where the mother abandoned the child, and disappeared for such time as to be presumptively dead, there was nothing to prevent the father from voluntarily resuming responsibility for the child's support.

5. Master and servant 🔑405(5)—Finding of dependency, within Workmen's Compensation Act, held warranted.

In a workmen's compensation proceeding, evidence *held* to justify the conclusion that deceased, denied custody of a minor child by a divorce decree, had voluntarily resumed his parental relations and obligations, and assumed the burden of the child's maintenance, education, and support.

6. Master and servant 🔑388—Son a dependent, within Workmen's Compensation Act, where divorced father resumed responsibility for support.

Where a father, deprived of the custody of a son by a divorce decree, had voluntarily resumed responsibility for the son's support and had taken the boy to live with him, the relation of parent and child was restored, and the child was dependent on the father, as though the relation had never been disturbed.

7. Master and servant 🔑388—Child under 18 conclusively presumed dependent, within Workmen's Compensation Act, though working out for board.

Under Employers' Liability Act, § 14, providing that a child under 18 is conclusively presumed dependent on the parent legally liable for his maintenance, there being no surviving dependent parent, where deceased was divorced from his wife, and the custody of a boy was awarded to her, but he voluntarily resumed responsibility for the boy's support, the boy was dependent on him, though at the time of the death working for a third person for his board.

In Bank.

Proceeding under the Workmen's Compensation Act by Kenneth Frank Fruit for compensation for the death of his father, John A. Fruit, opposed by the Pacific Gold Dredging Company and others. Compensation was awarded, and defendants bring certiorari. Affirmed.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

SLOANE, J. This is a proceeding to review the action of the Industrial Accident Commission in awarding compensation to the respondent Kenneth Frank Fruit, a minor, 15 years of age, under the Workmen's Compensation Act of 1917 (St. 1917, p. 831), on account of the accidental death of his father, John A. Fruit. The commission awarded the maximum amount for total dependency, being three times the annual earnings of the father. The only points in controversy arise upon the question of dependency of the minor upon his father.

It is urged that dependency was not shown, either actual or presumptive. The undisputed facts disclose that the mother of the minor had, on May 16, 1908, procured a decree of divorce from John A. Fruit for extreme cruelty and habitual intemperance, and the custody of the minor son was therein awarded to the mother, on the finding that she was a fit and proper person to have such custody and that the father was not. About two years later the mother placed the boy, the respondent here, in an orphanage in Portland, Or., where they resided when the decree of divorce was obtained, and then disappeared, and since that time neither the directors of the orphanage nor members of her family have had any information or knowledge of her existence or whereabouts.

About the time of the divorce the father also disappeared, and it was not until some 10 years later that the son had any knowledge of or connection with him. In 1918, through a letter from an uncle, the son located his father, who was then employed with a dredging company near Trinity Center, Trinity county, Cal. As a result of correspondence between them, the father sent Kenneth a present of a watch and contributed money to him on several occasions. Subsequently, about April, 1918, the father outfitted the boy with clothing and sent him money for his traveling expenses from Oregon to Trinity county, where he joined his father in May, 1919. They lived together in a cabin on the properties of the dredging company during May, June, and July of 1919; the father providing the boy with his board, clothing, and spending money. From the conversations and relations between them it was apparent that the father manifested his intentions of resuming parental relations with his son and affording him support and education. It was tentatively agreed between them that the father would give up his present employment and move to the town of Westwood, in Lassen county, where he would obtain work and send the boy to school. Before any change of location was made, and 3 or 4 days before the father's death, Kenneth, apparently with his father's consent, left the cabin where they were living and went to Trinity Center, some 2 or 3 miles distant, where he entered the home of a Mrs. Miles, with the understanding that he was to work for his board, and at the beginning of the school term go to school. He was also to receive $1 per day for extra work that Mrs. Miles had in contemplation. No definite duration for this arrangement with Mrs. Miles was agreed upon. This was the situation of the parties when the father met with the accident resulting in his death.

[1, 2] It is probably clear that the decree giving the custody of the boy to the mother relieved the father from all legal responsibility for support of his son and removed all relation of dependency, at least for the time being. Section 196 of the Civil Code provides that—

> "The parent entitled to the custody of a child must give him support and education suitable to his circumstances."

No requirement was made in the decree that the father should contribute anything to the boy's maintenance. When a parent is deprived of the custody of his child, and therefore of its services and earnings, he is no longer liable for its support and education. Selfridge v. Paxton, 145 Cal. 713, 79 Pac. 425; Ex parte Miller, 109 Cal. 648, 42 Pac. 428; McKay v. McKay, 125 Cal. 65, 57 Pac. 677; Matter of McMullin, 164 Cal. 504, 129 Pac. 773; People v. Hartman, 23 Cal. App. 72, 137 Pac. 611. This exemption, however, is not unconditional, and may not be permanent. In divorce proceedings power is reserved by section 138 of the Civil Code to the court, at the hearing of the case or at any time during the minority of children of the marriage, to "make such order for the custody, care, education, maintenance and support of such * * * children as may seem necessary or proper, and it may at any time modify or vacate the same"; and section 139 of the Civil Code provides that "where a divorce is granted for an offense of the husband the court may compel him to provide for the children of the marriage," and "may from time to time modify its orders in these respects," and this irrespective of the fact that the control and custody of the children are taken from him. Similarly, section 199, Civil Code, provides for an action between husband and wife without divorce to determine the custody of children of the marriage, with authority in the court to make such order in the decree as to their support, education and maintenance as may be just, and to amend, vary, or modify such decree as the natural rights of the parties, including the children, may require.

[3] The requirement of section 196, Civil Code, means no more than that the parent who is entitled to the custody of the child is primarily liable for its support and education, and between such parent and the one

who has been deprived of such custody the latter is absolved from liability, in the absence of any decree of court requiring contribution to such maintenance. It is true that it has been held that a father, deprived of the custody of his child in divorce proceedings, without requirement that he contribute to its support, is not liable to a third party furnishing such child with the necessaries of life (Selfridge v. Paxton, supra); but, under section 207, Civil Code, third persons seeking such recovery are limited in their right of action to the parent in charge of the minor. It is also held, in People v. Hartman, supra, that the defendant was not liable to prosecution, under section 270 of the Penal Code, upon a charge of willfully, unlawfully, and feloniously failing to furnish necessary food, clothing, shelter, or medical attendance for his infant child. In that case the infant had been given into the custody and control of the mother in a divorce action, without a requirement that the father contribute to its support, and no showing was made that its legal custodian was not abundantly able to care for it. In fact, the opinion states that "there is no evidence that the child failed to receive all 'necessary food, clothing, shelter, or medical attendance.'"

We find no authority for holding that, as between parent and child, the father is absolved from his legal duty to provide support to his minor child, who has no other source of maintenance, because, on account of his own fault, he has been deprived of the custody of such child. Both a legal and moral obligation rests upon a father to support his minor children. And while, as between himself and third parties, that obligation may be shifted in proceedings of divorce or guardianship, and he may by misconduct forfeit his right to the custody of his child, it may be doubted if by such proceedings, to which he is not a party, a minor can be deprived of his natural right to turn to his father for maintenance, if the substituted source of supply fails. It has been held that such right to look to a father for maintenance cannot be taken from the infant by contract between the parents (Fernandez v. Aburrea, 183 Pac. 366), and it certainly would be a reproach upon the law if a father, by his own misconduct making him an unfit custodian of the child, could absolve himself from legal responsibility for its support. He, at least, may voluntarily resume his legal responsibility.

[4] Conceding in this case, that the minor was not a dependent upon his father during the period he remained in the custody of his mother, there was nothing in the legal status of the parties at the time Kenneth joined his father in California to prevent the latter from voluntarily resuming responsibility for his son's support. It has been repeatedly held by this court that on the death of the mother, to whom the custody of a child has been given in divorce proceedings, the right to such custody reverts to the father. Schammel v. Schammel, 105 Cal. 258, 38 Pac. 729; Matter of Allen's Estate, 162 Cal. 625, 124 Pac. 237; Bell v. Krauss, 169 Cal. 387, 146 Pac. 874. It is urged that the father in this instance has been divorced for cruelty and intemperance and adjudged an unfit custodian of his child. On the other hand, the mother has been shown to have abandoned the child. Under section 224 of the Civil Code neither of them perhaps could have interfered with the adoption of Kenneth by a third party, but nobody has manifested any desire to adopt him. Is he to be left a waif in the community with no right to parental care, because both his parents have been derelict in their duty toward him?

The mother abandoned him 2 years after her divorce by leaving him in an orphan asylum, where he remained several years without provision for his support. She is presumptively dead, not having been heard from for more than 7 years. Code Civ. Proc. § 1963, subd. 26. The evidence on this point is not very full, but Kenneth testified that both he and his mother's other relatives had made persistent search and inquiry for her without avail.

[5, 6] It is clear that the boy was without means of support and had no legal guardian. Whatever the father's rights were to his son's custody, his duty to provide for him was clear, both legally and morally. The commissioners were justified by the evidence on this point in concluding that the father had voluntarily resumed his parental relations and obligations and had taken the boy to live with him and assumed the burden of his maintenance, education, and support. This being the fact, the relations of parent and child had been restored. The condition of dependency existed at the time of the father's death as though it had never been disturbed, unless it was again suspended by the fact that the boy had taken up a fortuitous residence and employment outside the father's home, some 3 or 4 days before the latter's death.

[7] In considering the relations of the parties at the time of the father's death, if we accept the fact that the duty of support and maintenance had been restored, we must treat the situation precisely as if this relation had never been disturbed. Would it, under the usual relationship between a father and his 15 year old son, be considered for a moment that the status of dependency had been destroyed or interrupted by the fact of such a casual outside employment as is shown here? In any event, the provisions of the Compensation Act are conclusive on this point. Section 14 of the Employers' Liability Act provides:

> "(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (2) A child or children under the age of eighteen years * * * upon

the parent with whom he or they are living at the time of the death of such parent or for whose maintenance such parent was legally liable at the time of death, there being no surviving dependent parent."

Assuming that the first condition of this conclusive presumption is avoided by the temporary residence and employment of Kenneth with Mrs. Miles, we have left the alternative condition, that of a minor under 18 years of age, whose father at the time of his death was liable for the minor's maintenance, with no other dependent parent. We are of the opinion that the fact of the child being left without any other means of support, whether by abandonment by or death of his mother, restored him to his right of dependency upon the father, and that, in any event, the Industrial Accident Commission was justified in reaching a conclusion favorable to the minor from the evidence showing a voluntary resumption of his parental obligations by the father. The only issue presented here is on the question of dependency, and the findings of the Commission expressly cover that issue.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

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184 Cal. 448

In re KELLEY'S ESTATE. (L. A. 6368.)

(Supreme Court of California. Dec. 4, 1920.)

1. Insane persons 🔑44 — Guardian cannot dispose of property after ward's death.

After the death of the ward, an incompetent, his guardian has no power to dispose of any property of the estate; but, until he is legally discharged, he is charged with the care and preservation of the ward's property.

2. Insane persons 🔑41 — Compensation of guardian must be confined to time during which he had custody of estate as such.

Where guardian of an incompetent served as such, having custody and control of the incompetent's estate, for 7 months and 16 days from January 28, when he was appointed and qualified as guardian, to September 13, when he turned over all property of the estate to himself as special administrator, the ward having died, and on his first accounting received compensation for 6 months of his guardianship at the rate of $150 a month, any further compensation to which he may be entitled for his services as guardian must be confined to compensation for the remaining month and 16 days during which he had custody of the estate.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Thomas Jasper Kelley, an incompetent. From an order allowing compensation to his guardian, R. L. Bocock, A. W. Dewey and others, legatees and devisees, and David Beeson, executor and trustee, under the incompetent's will, appeal order reversed, with directions to modify allowance.

Lucien Gray and Leon F. Moss, both of Los Angeles, for appellants.

E. B. Coil, of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by A. W. Dewey, W. W. Sloss, and Luzetta Sanders, legatees and devisees under the will of Thomas Jasper Kelley, deceased, and by David Beeson, executor and trustee under said will, from a decree allowing respondent, R. L. Bocock, $1,650 for services rendered by him as guardian of the person and estate of the said Kelley, incompetent.

On January 28, 1918, the respondent was appointed and qualified as guardian of the person and estate of Kelley, who had previously been adjudged incompetent. On April 22, by order of court, it was determined that respondent was entitled to reasonable compensation at the rate of $150 per month for his services as guardian, and it was ordered that $150 per month to be paid to him out of the funds of the estate "until further notice." Kelley died on August 29, and on September 11 respondent was appointed and qualified as special administrator of his estate. Respondent filed his report of administration as guardian on September 13, together with his first and final account, which contained, inter alia, this charge:

> "Aug. 28. Paid salary for services to R. L. Bocock, 6 mo. at $150.00, $900.00."

Regarding this item, the respondent testified:

> "In my account * * * I have paid myself the allowance made, $900, being for the first 6 months of my services."

August 1, 1919, the court made a decree settling the account. It is from the following portions of this decree that the present appeal is taken:

> "(4) The court further finds that heretofore it made an order allowing the said guardian the sum of $150 per month for services rendered as such guardian, and that such amount should continue until the further order of court; that such services have continued to the date of this order, and that he is entitled to such compensation as such guardian to this time, namely, from the date of the last order, being for the month of August, 1918, amounting to the sum of $1,650, to be credited on said final account. * * *
>
> "(6) The said account should be and is hereby settled and allowed; * * * that he pay to himself as such guardian the sum of $1,650 in full of services rendered."

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appellants contend that the evidence does not justify an allowance of $1,650 to respondent for his services subsequent to Kelley's death. This position is thus set forth in their brief:

> "The court should not have allowed the guardian for services in excess of one month and one day, being the period from the time to which he had been paid in full up to the date of the death of the ward. The allowance should have been $155 and no more. Therefore Mr. Bocock, as guardian, was erroneously awarded the sum of $1,495 for alleged services subsequent to the death of the ward."

[1] It is the well-established rule that after the death of the ward a guardian has no power to dispose of any property of the estate. Estate of Livermore, 132 Cal. 99, 64 Pac. 113, 84 Am. St. Rep. 37. Until he is legally discharged, however, he is charged with the care and preservation of the property of the ward. Downing v. Whitney, 46 App. Div. 307, 61 N. Y. Supp. 540; Schouler's Domestic Relations, 5th Ed., sec. 312; Spencer's Domestic Relations, § 786; 21 Cyc. 51. But in the case at bar, respondent, testifying in his own behalf, stated that on September 11, 1918, he had—

> "duly transferred and turned over from himself as guardian * * * to himself as special administrator * * * all the property and funds of said decedent and said estate; and that the cash belonging to said decedent had been by him deposited in the Guaranty Trust & Savings Bank * * * in his name as special administrator."

[2] Thus the evidence shows that between January 28, when respondent was appointed and qualified as guardian, and September 13, when he turned over all the property of the estate to himself as special administrator, a period of 7 months and 16 days elapsed, during which he had the custody and control of said estate; that after the last-mentioned date respondent, while not yet legally discharged as guardian, nevertheless had nothing to do in that capacity with the property, and that, according to his first and final account, he had been paid for the first 6 months of his guardianship at the rate of $150 per month. It follows necessarily, we think, that any further compensation to which respondent may be entitled for his services as guardian must be confined to compensation for the 1 month and 16 days during which he had the care and custody of the estate and for which he has not as yet been paid.

It is urged by respondent that in fixing and determining the compensation to which he is entitled as special administrator the probate court has taken into consideration the fact that it had already allowed him compensation as guardian for the period from September 13, 1918, to August 1, 1919, and has therefore refused to allow him compensation for any duties performed by him as special administrator during that period. Respondent argues from this that there is no possibility that he will be allowed double compensation. But it is a sufficient answer to this contention to point out that the probate proceedings are not now before us and that there is nothing in the record to support the statement of respondent to which we have just referred. We are concerned here only with the question whether the court was justified in awarding respondent the sum of $1,650 for his services as guardian after July 28, 1918, and in view of the conclusion we have reached that question must be answered in the negative.

The order is reversed, with directions to modify the allowance in accordance with the views herein expressed.

We concur: SHAW, J.; OLNEY, J.

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184 Cal. 437

In re CARSON'S ESTATE.

WALKER et al. v. CARSON et al.

(L. A. 6424.)

(Supreme Court of California. Dec. 4, 1920.)

1. Wills 🔑155(5)—Deception does not establish undue influence.

Undue influence which invalidates a will involves as an essential element the subjugation of the mind of testatrix, so that an allegation that the will was procured by the fraudulent representations of the residuary legatee that he was the lawful husband of testatrix does not establish undue influence.

2. Wills 🔑160(½)—Fraud of residuary legatee held to affect only clauses benefiting him.

Fraudulent misrepresentations by the residuary legatee that he was the lawful husband of testatrix, whereby testatrix was induced to make him the residuary legatee and executor, do not invalidate the will as to other legatees, in the absence of any showing that the bequests to them were affected in any way by the misrepresentations.

3. Appeal and error 🔑927(3)—On reviewing nonsuit, evidence must be given its utmost effect.

On reviewing an order of nonsuit, the evidence offered on behalf of appellant must be given its utmost effect.

4. Wills 🔑153—Deception into unlawful marriage is fraud which avoids legacies thereby procured.

One who deceived testatrix into marrying him by fraudulent misrepresentations that he was free to contract a lawful marriage was guilty of fraud, which avoided any bequests by testatrix, procured or induced by the fraud.

5. Wills 🔑324(3) — Evidence held to raise jury question whether bequest was procured by fraudulent marriage.

In proceedings to contest a will for the fraudulent representations of the residuary legatee to testatrix that he was free to marry her, evidence that the will was executed about a month after the marriage, and that testatrix died a year thereafter without ascertaining the truth, is sufficient to warrant an inference that the legacy to contestee was the result of the fraud by which the marriage was procured, though such inference might not be warranted if the marriage relation had continued for a long period of time, and it was error for the court to nonsuit contestants.

6. Wills 🔑166(12)—Fraud as procuring cause of bequest need not be proved by direct evidence.

It is not necessary that parties contesting a will on the ground it was procured by fraudulent representations that the residuary legatee was free to marry testatrix prove by direct evidence that the bequest was induced by the belief of testatrix that the legatee was her legal husband, and that it would not have been made except for that belief, but that fact may be established by inference from circumstances.

7. Wills 🔑285—Discretion in refusing amendment to petition contesting will must be reasonable.

Though the granting of leave to file an amended petition for the contest of a will rests within the discretion of the trial court, that discretion must be reasonably exercised, so that the case may, so far as possible, be determined upon the real facts.

8. Wills 🔑285—Refusal of amended petition for revocation of probate held error.

Where the original petition for contest of a will alleged fraud by the residuary legatee in representing that he was free to marry testatrix, whereas in fact he then had a wife living and undivorced, it was error for the trial court, in the absence of any showing of inexcusable delay by contestants or surprise to contestee, to refuse leave to file an amended petition, alleging that at the time of his marriage to testatrix contestee had several wives living and undivorced.

9. Wills 🔑165(1)—Declarations of testatrix out of legatee's presence admissible on issue of fraud to show state of mind.

In proceedings to contest a will for fraudulent misrepresentations by the residuary legatee that he was free to marry testatrix, declarations by testatrix out of the presence of that legatee to the effect that she believed her marriage to him was legal are admissible, not as evidence of the facts therein stated, but to show her state of mind.

10. Evidence 🔑268, 269(1)—Declarations admissible to show mental state.

Whenever the intention, feeling, belief, or other mental state of a person at a particular time, including his bodily feeling, is material to an issue on trial, evidence of such person's declarations at the time, indicative of his then mental state, are admissible, whether made in the presence of the adverse party or not, but such declarations are only competent to establish the mental state, not the facts stated in the declaration.

11. Wills 🔑164(1)—Exclusion of false statements of legatee relied on as fraud held error.

In proceedings to contest a will for fraudulent misrepresentations by the residuary legatee that he was free to marry when he married testatrix, it was error to exclude from evidence statements by the legatee to the testatrix before their marriage as to his previous matrimonial experiences, which were the fraudulent statements relied on by contestants.

12. Witnesses 🔑276—Contestee of will may be examined by contestant under statute.

In proceedings to contest a will for fraudulent misrepresentations by the residuary legatee that he was free to marry when he married testatrix, is was error to refuse to permit contestants to examine the legatee as to his previous marriages and as to his knowledge that he had a wife living when he married testatrix, in view of Code Civ. Proc. § 2055, adopted by St. 1917, p. 58, expressly permitting such an examination of an adverse party, which is only declaratory of an elementary rule of daily application in the trial of cases.

13. Wills 🔑164(1)—Transfer of bank account to supposed husband held admissible to show marriage was cause of bequest.

In proceedings to contest a will for the fraud of the residuary legatee in representing he was free to marry when he married testatrix, evidence that shortly after her marriage testatrix transferred her bank account into the joint names of herself and the residuary legatee was admissible, as tending to show that the bequests to the legatee contained in the will, executed a month after the marriage, were made because of the belief of testatrix her marriage was lawful.

14. Wills 🔑152—Mere mistake is not ground of contest.

Mere mistake, which does not show a want of execution of a will or a want of testamentary intent as to a portion of it, is not ground of contest under Code Civ. Proc. § 1312, so that a mistaken belief by a testatrix, who knew the facts as to the previous matrimonial experiences of the man she married, that he was nevertheless her lawful husband, would not vitiate the will.

Department 1.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Petition by Sarah E. Walker and others against J. Gamble Carson, individually and as executor of the will of Alpha O. Carson, deceased, and others, to contest the will. From a judgment denying revocation of the probate after the contestants were nonsuited at the trial, the contestants appeal. Reversed.

Ford & Bodkin, of Los Angeles, for appellants.

Horace S. Wilson, Daniel M. Hunsaker and Hunsaker & Britt and Le Roy M. Edwards, all of Los Angeles, and Joseph P. Sproul and Le Roy M. Edwards, both of Los Angeles, for respondents.

OLNEY, J. One Alpha O. Carson died, leaving a duly executed will by which she made bequests, aggregating some $35,000, to various relatives, some 41 in number, and left the balance of her estate, something over $100,000 in value, to "my husband J. Gamble Carson." She also nominated the last-named as the executor of the will. The instrument was duly probated, and thereafter and within the statutory time certain of her heirs filed petitions, contesting its validity and asking that its probate be revoked. The residuary legatee, Carson, and some of the other beneficiaries answered the petitions, and trial was had before a jury upon the issues so made. At the trial, the contestants were nonsuited, and judgment was entered denying the revocation of probate. From this judgment the contestants appeal.

The grounds of contest, as alleged, were three: First, a want of due execution; second, undue influence upon the testatrix, alleged to have been exerted by Carson; and, third, fraud upon her, alleged to have been likewise practiced by him. The first ground was abandoned, and may be dismissed from consideration. The substance of both the second and third grounds was that, while Carson had gone through a marriage ceremony with the testatrix a year before her death, and she believed then and always thereafter that he was her husband, and made her will in that belief, yet he was not such legally, because he was already married to a woman who was still living and from whom he had not been divorced. It is also alleged that Carson knew he was not free to marry, and yet represented that he was, and that the testatrix's belief was induced by these false representations. It is also alleged that solely because of this belief she made the will in question, leaving the bulk of her estate to him.

Shortly before the matter came on for trial the contestants offered an amended petition for revocation, and asked for leave to file it. Their application was denied, and the contestants complain of this ruling as error. When it came to the trial, the contestants were also prevented in very large measure from proving their case by rulings of the court excluding their evidence, and of these rulings they also complain. We think the rulings were in truth wrong, but it is apparent that if both the evidence introduced by the contestants and that which they sought to introduce, and were not permitted to, would together not have made out a case justifying the revocation of probate, the result would have been the same, and the errors mentioned were not prejudicial. The first and the most important point in the case, therefore, is, Was the evidence for the contestants, both that which they introduced and that which they sought to introduce, sufficient to justify a revocation of the probate of the will?

[1] In discussing this point, it should be said at the outset that neither the contestants' petition nor their evidence makes out a case of undue influence. The only substantial difference between the second count of the petition, that alleging undue influence, and the third count, that alleging fraud, is that in one it is alleged that the will was executed under the undue influence of Carson, consisting in his deceit, whereby he induced the testatrix to marry him and to assume and maintain the relation of wife and husband with him, and in the other it is alleged that the will was executed through his fraud consisting in the same deceit. There is no allegation of any subjugation of the mind or will of the testatrix to that of Carson, so that in making her will she was not acting freely upon the facts as she believed them to be. Such subjugation of the mind of the testatrix was an essential element of a case of undue influence, and had to be both alleged and proved. It was not alleged, as we have said, nor was there any evidence whatever introduced or offered tending to prove it. It is alleged that the testatrix and Carson lived in closest intimacy and association until her death, but there is no allegation that Carson abused the confidential relation which thus existed. The wrong alleged is the deceit whereby that relation was brought about and came to exist, and not any misuse of the relation as it did exist. The distinction between a case of undue influence and one of fraud is discussed at length in Estate of Ricks, 160 Cal. 467, beginning at page 480, 117 Pac. 539, and it is not necessary to repeat that discussion here. Suffice it to say that it is to the effect mentioned, that in order that there be undue influence there must be a subjugation of the will of one to that of another.

[2] The present case is, then, one of fraud only. Being such, there is another point of which we would speak before taking up the sufficiency of the evidence. It seems to have been assumed that in case the contestants showed that the will was induced by the alleged fraud of Carson, the entire will would fail. We do not so understand. There is nothing, either in the allegations of the contestants' petition or in their evidence, which would tend to show that any of the other beneficiaries was a party to Carson's alleged fraud, or that his fraud had any effect upon the testatrix's testamentary intentions other than to induce her to make him her residuary legatee and to appoint him as her executor. So far as the other beneficiaries are concern-

ed, their situation is that the testatrix died leaving behind her a duly executed instrument, expressing her testamentary wishes in their favor unaffected by undue influence, fraud, or other vitiating circumstance. This means nothing more or less than that the will is perfectly valid as to them. The result is that it is only the portions of the will in favor of Carson whose probate should be revoked in case the contestants should succeed, the remaining portions continuing as a valid expression of the testatrix's testamentary intention. 1 Schouler on Wills, Executors, and Administrators, § 248; 14 Cyc. 1149; section 1272, Civ. Code. If it were not possible to separate the portions affected by the fraud from those unaffected, it may be that the whole will would have to fail, but that question is not presented here, for the provisions in favor of Carson are easily and completely separable from the remainder. This being the situation, it is apparent that the beneficiaries, other than Carson, are not affected by the contest, however it may go, and are not interested parties to it.

[3] Passing now to the sufficiency of the evidence, the evidence of the contestants, giving to it its utmost effect as we must do in view of the fact that it is an order of nonsuit which is under review, was confined to showing that the testatrix married Carson under the mistaken belief, induced by his representations, which he knew to be false, that he was free to marry, that she made the will in the belief that he was her lawful husband, and that she was never undeceived upon this point. It also appears that the will was executed about a month after the marriage, and, as we have said, that the parties lived together as husband and wife in closest association until her death at the end of a year. Are these facts sufficient to have sustained a possible verdict by the jury invalidating the will or those portions of it by which Carson benefits? If they are, the order appealed from must be reversed.

[4] We have been cited to but two cases involving substantially the same state of facts as that presented here. They are those of Kenneth v. Abbott, 4 Vesey, Jr., 803, 31 Eng. Reprint, 416, and Wilkinson v. Joughin, L. R. 2 Eq. Cases, 319. In each, the facts were practically identical with those of the present case, and in each a bequest in favor of the supposed spouse was held void for his or her deceit. As authorities to the contrary, we are cited by counsel for Carson to Moore v. Heineke, 119 Ala. 627, 24 South. 374, In re Will of Donnely, 68 Iowa, 126, 26 N. W. 23, Smith v. Diggs, 128 Md. 394, 97 Atl. 712, In re Dries' Will, 69 N. J. Eq. 475, 55 Atl. 814, Taylor v. Higgs, 202 N. Y. 65, 95 N. E. 30, Meluish v. Milton, L. R. 3 Ch. Div. 27, and Rishton v. Cobb, 5 My. & Cr. 145, 41 Eng. Reprint, 326. But in every one of these cases, with the exception of the last, there was either an entire lack of evidence that the deceased spouse was unaware of the true state of facts, or else it affirmatively appeared that he or she knew what it was; in other words, it did not appear that there had been any deceit. This, of course, distinguishes these cases at once from the present. In fact it is fairly implied in all that the bequest would have been void if the facts had been as the contestants claim they are here, and this is directly said in several of them. In the last case, that of Rishton v. Cobb, a bequest to a woman to whom the testator had paid court and made a proposal of marriage, which had been refused, was held valid, although unknown to the testator she was not a single woman. The difference between such a case and the present is evident without discussion.

The weight of authority, then, is distinctly in favor of the sufficiency of the contestants' evidence to avoid a nonsuit, and such also we think is the rational view. The gross fraud upon the testatrix is, of course, apparent. According to the evidence, she was seduced by a marital adventurer into a marriage with him which was no marriage in the eyes of the law because of the fact, which he concealed from her, that he had already had at least one, if not more, spouses, legal and illegal, who were still living and undivorced. There can be no question also that if the bequest to Carson were the direct fruit of such fraud, it is void.

[5] The only question in the case, assuming the contestants' evidence to be true, as we must, is, Was the bequest in fact the fruit of the fraud? This is a question of fact which it was for the jury to determine; and, unless it can be said that the jury could have reasonably reached but one conclusion concerning it, and that was that the bequest to Carson was not the direct fruit of his fraud, the evidence was sufficient to prevent a nonsuit.

Now a case can be imagined where, nothing more appearing, as in this case, than that the testatrix had been deceived into a void marriage and had never been undeceived, it might fairly be said that a conclusion that such deceit had affected a bequest to the supposed husband would not be warranted. If, for example, the parties had lived happily together for 20 years, it would be difficult to say that the wife's bequest to her supposed husband was founded on her supposed legal relation with him, and not primarily on their long and intimate association. It might well be that if undeceived at the end of that time her feeling would be, not one of resentment at the fraud upon her, but of thankfulness that she had been deceived into so many years of happiness. But, on the other hand, a case can easily be imagined where the reverse would be true. If in this case the will had been made immediately after marriage, and the testatrix had then died within a few days, the conclusion would be well-nigh irresistible, in the absence of some peculiar circumstance, that the will was founded on the supposed legal relation into which the testatrix had been deceived into believing she was entering. Between these two extreme cases come those wherein it cannot be said that either one conclusion or the other is wholly unreasonable, and in those cases the determination of the fact is for the jury. Of that sort is the present.

[6] We are not unmindful of the fact that the contestants offered no evidence other than that the testatrix had been tricked into the marriage; that in particular they did not offer any direct evidence that the inducing reason in her mind for her bequest to Carson was her belief that he was her legal husband, and that the bequest would not have been made except for that belief. But such direct evidence is not necessary, and not improbably could not possibly be had. It is not an unreasonable inference, from the fact that she had been so recently married when the will was made, that she left the bulk of her estate to Carson because she believed he was her lawful husband, and would not have so left it if she had believed otherwise. Such inference, of course, was subject to being strengthened or weakened by evidence of other circumstances throwing light upon the matter, such as the views of the testatrix upon the sanctity of marriage, her harmonious or other relations with Carson, and the strength of her affection for him. But in the absence of such circumstances the inference mentioned is yet not an unreasonable one from the facts that appear. Our conclusion therefore is that the order of nonsuit should not have been made.

[7, 8] The conclusion so reached requires a consideration of the rulings of the trial judge refusing the contestants leave to file their amended petition and refusing to permit the introduction of certain evidence by them. As to the amended petition, it stated essentially the same matters as the original. The only difference in substance was as to the number of marriages Carson had gone through with prior to the one with the testatrix; the amended petition alleging several instead of one. The reasons for refusing leave to file it do not appear, and the claim of respondent is that the matter was one within the discretion of the court. This is true, but the discretion exercised must be a reasonable one. It has been said time and again in this state that, in the interest of justice, and in order that every case may so far as possible be determined upon its real facts, the amendment of pleadings to accord with the claimed facts should be freely allowed, unless good reason to the contrary appears. No such circumstance as inexcusable delay on the part of the contestants or their taking the adverse party by surprise appears here, and in the absence of some such circumstance we can see no reason whatever why the contestants should not have been permitted to correct or amplify by amendment their allegations as to the previous marriages of Carson.

[9] As to the rulings upon evidence, at the very outset of the trial the contestants sought to introduce testimony of statements made by the testatrix in conversations with others than Carson, evidencing her belief that her marriage to Carson was legal. The evidence was excluded. Later the contestants again sought to introduce such testimony, and it was again excluded, the court announcing that it would admit no evidence of conversations with the testatrix, i. e., of statements by her, except on occasions when Carson was present, the court giving as his reason that statements of a deceased are not competent in a suit for fraud or undue influence, but are competent in a case of unsoundness of mind. The exclusion of the testimony was erroneous.

[10] The rule is without exception so far as occurs to us at the moment, that whenever the intention, feeling, belief, or other mental state of a person at a particular time, including his bodily feeling, is material to an issue under trial, evidence of such person's declarations at the time, indicative of his then mental state, are admissible in evidence. It is wholly immaterial whether such declarations were made in the presence of an adverse party to the litigation or not, or what the character of the litigation is. The sole tests are, Is the intention, belief, or other mental state of the declarant at the time material to the issues under trial, and does the declaration indicate what the declarant's intention, belief, or other mental state at the time was? Est. of Arnold, 147 Cal. 583, 82 Pac. 252; Adkins v. Brett, 193 Pac. 251. Of course, if, as is frequently the case, and was the case here, the declarations include or are in the form of statements as to past events, the declarations are not competent as proof of such events, and if that is their only bearing, they are not admissible. This was in fact the only bearing of the declarations excluded in such cases as In re Calkins, 112 Cal. 296, 44 Pac. 577, and Estate of Gregory, 133 Cal. 131, 65 Pac. 315, referred to by counsel, and those decisions go upon that ground. In the subsequent case of Estate of Arnold, supra, certain declarations which did not bear on the testatrix's mental state were excluded for this reason, and others admitted which did. It is plain here that the belief of the testatrix at all times prior to her death that Carson was free to marry her, and that their marriage was valid, was material to the issues of the case. This being so, evidence of her declarations at any time indicating her then belief to that effect was competent, and should have been admitted.

The trial court did at first admit evidence of statements by the testatrix in Carson's presence that Carson had been married before and had been divorced, saying that the evidence was admissible only as against Carson. Later this evidence was stricken out, and other evidence of similar import refused admission on the theory apparently that it was not competent as against the beneficiaries under the will other than Carson, and, not being competent as against them, was not admissible at all. There are two answers to this. In the first place, as we have said, the other beneficiaries were not in fact interested parties. The cause was one really between Carson alone and the contestants. In the second place, the declarations, while wholly incompetent to prove the matters related and in fact not introduced for that purpose, were indicative of what the testatrix believed the facts were, and were, as we have said, competent to show that belief, both as against Carson and as against anybody else. Nor was it necessary that the declarations be made in the presence of Carson or any other party to the litigation. They were not sought to be introduced as admissions, but as evidence of the testatrix's belief, and for that purpose were clearly competent.

[11] The court also excluded all evidence of statements by Carson to the testatrix as to what his previous matrimonial experiences had been. Some of the evidence so excluded was even as to statements made at the very moment of their marriage. Upon what possible theory such evidence was excluded we are at a loss to understand. The claim of the contestants was essentially that Carson had deceived the testatrix by lying to her. How they could be expected to prove that he had lied to her, except by evidence of lying statements by him, we do not see. Such statements are not hearsay. They are not introduced to prove the truth of the matters stated or narrated in them. On the contrary, the position of the contestants, who were offering the evidence was that the statements were false. The making of false statements by Carson was an essential fact, which the contestants were entitled to prove, just as much as they were entitled to prove any material fact in the case. That it was a verbal fact, an utterance by some one, does not prevent its being proved, and the only way of proving it is by testimony of some one who heard it. It is also immaterial when these false statements by Carson to the testatrix were made, whether before or after the making of the will. The alleged deception by Carson was one extending to the death of the testatrix, and evidence of this deception at all times to the end was material.

[12] Another inexplicable line of rulings was one whereby the contestants were not permitted to examine Carson as to his previous marriages. The court even refused to permit a question of Carson as to whether he did not know when he married the testatrix that a former wife of his was living, and this on the court's own motion and without any objection to the question being made by counsel. The impropriety of such rulings is beyond argument, and we can conceive of no reasonable excuse for them. The court's attention was specifically called to section 2055, Code of Civil Procedure, adopted in 1917 (St. 1917, p. 58), which expressly permits of just such an examination of an adverse party. Furthermore, the section is but declaratory of a most elementary rule of daily application in the trial of cases. The rulings were nothing less than a flagrant denial of a common, everyday right of every litigant.

[13] The court also excluded evidence that shortly after her marriage the testatrix transferred her bank account into the joint names of herself and Carson. The rejection of this evidence was not particularly prejudicial, but we think it must be evident that in a case of this sort, where one of the vital questions is whether the bequest to Carson was induced by and based upon the belief of the testatrix that he was her lawful husband, or upon her affection for him independently of that belief, any evidence throwing light upon the relations of the parties, or upon her feelings toward him would have some bearing, and that very considerable latitude of examination should be permitted.

[14] The contestants also make the point that, even if the testatrix knew the actual facts with regard to Carson, but mistakenly believed that he was free to marry, such mistaken belief alone would vitiate the will. This, of course, cannot be true. Mere mistake, which does not in effect show a want of execution of the will, or, what is the same thing, a want of testamentary intent as to a portion of it, is not a ground of contest. Section 1312, Code Civ. Proc.; Est. of Benton, 131 Cal. 472, 63 Pac. 775; 40 Cyc. 1143. Furthermore, in Re Will of Donnely, 68 Iowa, 126, 26 N. W. 23, the identical contention under discussion, was presented and denied.

There are no other points which would seem to require consideration.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

(184 Cal. 367)

RHODE v. DOCK-HOP CO. et al.

(L. A. 5189.)

(Supreme Court of California. Nov. 20, 1920. Rehearing Denied Dec. 20, 1920.)

1. Corporations 🔑232(3)—When capital paid in in property, cash value, and not future value, must be taken as basis.

When the capital of a corporation is paid in in something other than money, the thing accepted must be reasonably near its equivalent, and, while the hopes or prospects for a property affect its immediate cash value, it is that cash value, and not the future value, which must be taken as the basis of capitalization.

2. Corporations 🔑232(1)—Holders of stock issued as fully paid up held not liable as subscribers.

Where an owner of mining claims organized a company to work the property and transferred the claims to it for capital stock and then directed such stock to be issued as fully paid to stockholders of a corporation which previously owned the property but lost it on failure to do assessment work, such stockholders were not subscribers, nor liable as such in a creditor's action based on stockholders' liability.

3. Corporations 🔑268(1)—Complaint in action on stockholders' liability held not to state a cause of action.

In an action by a judgment creditor of a corporation against certain stockholders seeking to collect unpaid balances on the par value of their shares, where it appeared that they were not liable as subscribers, the stock having been issued as fully paid when in fact the value given therefor was not equivalent to the value of the stock, a complaint seeking to hold the stockholders as such, failing to allege circumstances other than the mere fact that they were stockholders, *held* not sufficient to state a cause of action.

4. Corporations 🔑144—One accepting partially paid stock liable for unpaid balance.

When one accepts partially paid stock which does not purport to be anything else, he does so on the understanding that it is answerable on call for the unpaid balance on it, and that he as its owner must respond to such call, since, when he enters into relationship with the corporation as a stockholder owning stock of that character, he assumes as an incident of the relationship the obligation to respond to calls for further contributions to the capital of the company until such capital is fully paid.

5. Corporations 🔑230—Owners of "watered stock" issued as fully paid up are liable to creditors of corporation.

Where a person accepts ownership of stock which purports to be fully paid, but which is not in fact and is therefore watered stock, he is liable on the principle that one giving credit to a corporation is entitled to rely on its ostensible capitalization as the basis for the credit given the transaction constituting a constructive fraud on the creditor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Watered Stock.]

6. Corporations 🔑268(5)—Basis of liability of holder of watered stock to creditors of corporation defined.

Liability of a holder of watered stock is based, not on his status as a stockholder, but on a fraudulent transaction, and it is not sufficient in a creditor's action that it be pleaded, proven, and found merely that he is a stockholder owning watered stock.

7. Corporations 🔑244(7)—Transferee of watered stock unaware of character of original issue not liable to creditors.

One who is only a transferee of watered stock, and who did not participate in the transaction whereby it was originally issued, and who took his stock unaware of the character of that transaction, cannot be compelled to make good to a creditor of the corporation the false representation as to the capital of the company which he had no part in making and the responsibility for which he has done nothing to assume.

8. Corporations 🔑244(5) — Innocent transferees of watered stock held not liable to creditor of corporation.

Where a mining company lost its claims for failure to do assessment work, and one interested in the company relocated the claims, organized a new corporation, transferred the claims to it in exchange for stock in excess of the actual value of the claims and directed such stock to be issued to certain stockholders of the former corporation as fully paid up, such stockholders, not being aware of the character of the transaction and being but innocent transferees of the watered stock, *held* not liable to a creditor of the corporation for the alleged unpaid balance on the par value of their stock.

9. Corporations 🔑268(5) — Creditor seeking to subject interest of holders of watered stock must allege and prove them liable as for constructive fraud.

In a judgment creditor's action to subject alleged unpaid balances of the holders of certain watered stock in a corporation, the burden was on plaintiff to allege and prove that the stockholders acquired their stock under circumstances making them liable on the ground of constructive fraud.

10. Corporations 🔑244(5)—To subject holders of watered stock to claims of a creditor, it is sufficient to show that they had notice or knowledge of its real character.

In order that the holders of watered stock issued as fully paid, when in fact it had been issued in excess of the value of the property transferred to the corporation, may be made liable to a creditor, it is sufficient if it be made to appear that when they accepted their stock they had notice or knowledge of its real character.

11. Corporations 🔑265(5)—Creditor seeking to subject interests of holders of watered stock need not join all such holders.

Where a judgment creditor of a corporation seeks to subject to his claim the alleged unpaid balances owing to the corporation by the holders of watered stock issued as fully paid, it is not necessary to join as defendants all stockholders of that class.

12. Corporations ⚷269(2)—Report of mining engineer as to value of property transferred for stock held admissible in action on stockholder's liability.

Where the owner of certain mining claims transferred them to a newly organized corporation in return for stock issued as fully paid and directed such stock to be issued to certain stockholders without charge, in an action by a judgment creditor of the corporation to subject the interests of such holders of watered stock, a written report of a mining engineer as to the claims transferred to the corporation giving a high opinion of their value, while inadmissible as direct evidence of their value, *held* competent as to the belief of the directors or the transferor as to the value of the claims.

Wilbur, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; J. W. Shenk, Judge.

Action by C. D. Rhode against the Dock-Hop Company and others. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Ward Chapman, L. M. Chapman, Stahl & Sayles, and McLucas, Mellen & Lawson, all of Los Angeles, for appellants.

Muhleman & Crump, of Los Angeles, for respondent.

OLNEY, J. This is an action by the judgment creditor of a corporation against certain of its stockholders, seeking to collect from them what are claimed to be unpaid balances on the par value of their shares. The plaintiff had judgment, and the defendants appeal.

No contention is made that the plaintiff's claim against the corporation is not valid. The sole point in the case is as to whether or not the defendants are required, because of that claim, to make up any difference which may exist between what was actually paid in on their stock and its par value. Upon this point, the complaint alleged simply that the defendants were subscribers and stockholders of the corporation in amounts specified, and that only 25 cents on the dollar had been paid in on the par value of their shares. The answers of the defendants, in addition to some other defenses, denied that they were either subscribers or stockholders, or that the full par value of their stock had not been paid.

[1] As to the issue presented by the latter denial, the court found in effect that only five-twelfths of the par value had been paid. This finding is attacked as not supported by the evidence, but we think the evidence is ample. The stock had a par value of a dollar a share, and the shares which it was claimed the defendants owned, and which in fact they did own, were part of a lot of 599,995 shares issued as fully paid up, but in consideration for the transfer to the company of certain unpatented mining claims with the improvements upon them. These claims had been previously worked and abandoned by another company, and then relocated by one Knapp, who had been interested in the former company and was one of the promoters of the present debtor company. The history, character, and condition of these claims were such that it is well-nigh incredible that they had an actual immediate value of $600,000, less $5.00, or that the directors of the company believed they had any such value. The directors may have thought that there was a chance of the claims becoming of that value upon development and consequent demonstration of what they actually contained, but there is a very great difference between capitalizing a mining company upon the basis of what it is hoped its ground may be worth when developed, and capitalizing it on the basis of what its ground is actually worth undeveloped. When the capital of a corporation is paid in in something other than money, the thing accepted in lieu of money must be reasonably near its equivalent, and while the hopes or prospects for a property affect its immediate cash value, it is that cash value, and not the future value of the property if the hopes or prospects are realized, which must be taken as the basis of capitalization. Herron Co. v. Shaw, 165 Cal. 668, 674, 133 Pac. 488, Ann. Cas. 1915A, 1265. In this case, the court found that the directors of the company did not believe the claims to exceed in actual value $250,000, and, if any criticism is to be made of the finding, it is that it is too favorable to the defendants, that the figure found is too great, rather than it is too small.

As to the other denial mentioned, namely, that the defendants were neither subscribers nor stockholders of the debtor company, it was admitted at the trial that the defendants were stockholders almost from the inception of the company. It was insisted, however, on the part of the defendants throughout the trial that they were not subscribers. As to the plaintiff, the cause was tried throughout upon the theory that it made no difference whether the defendants were subscribers or not, that the simple facts that they were stockholders and that the shares they held, although issued as fully paid, were in fact issued for property which the directors did not believe was equal in value to the par value of the shares, were enough to warrant judgment against them. Apparently, judging by what took place at the trial, the court itself accepted this theory, and upon it gave judgment for the plaintiff.

It should be said, however, that the court went further than merely finding that the defendants were stockholders, and made a finding as to how they acquired their stock in the first instance. The finding is that the mining claims were transferred to the company by Knapp as the trustee of certain stockholders of the company which had formerly owned them, that the stock to be issued in consideration for such claims was issued to such stockholders upon instructions from Knapp, and that the stock of the defendants was acquired by them in that manner. It is to be noted, however, that such a finding would not make either Knapp or the defendants subscribers to the stock. It does not find that either subscribed to the stock and then transferred the claims in payment of such subscription or subscriptions. At most, the finding is one that Knapp, and through Knapp the defendants, purchased stock from the company in consideration of the transfer of the claims. The difference between subscribing for stock and then paying the subcription either in money or property and a direct purchase of stock without any antecedent obligation, a purchase of treasury stock in other words, is manifest. It is to be said that there was an omnibus finding that all of the allegations of the complaint are true; but, if this finding is not to be disregarded upon the point of the defendants being subscribers because inconsistent with the special finding under discussion, it is as to that point not supported by the evidence, something which will plainly appear when we come to a discussion of the evidence. The case, then, is not one where the defendants are liable as subscribers, but one where, if they are liable at all, it is as stockholders.

[2, 3] It is also to be noted that unless the defendants are to be held liable merely because they were stockholders, and upon the theory that nothing more was necessary to establish their liability, the finding under discussion is not supported by any allegation in the complaint. The complaint alleges only that the defendants were subscribers and stockholders. That they were not subscribers and liable as such is plain. As to their being liable as stockholders, there is no allegation in the complaint other than that they were such. If it be the law that the owner of stock issued as fully paid, but in reality for a consideration known to the directors of the company to be less in value than the par value of the stock, is not liable for the difference in value merely because of his ownership of the stock, but only when there are further circumstances existing in the case, as, for example, that he knowingly participated in the transaction whereby the stock was issued, then there is in the present complaint no allegation of such circumstances, and, it appearing that the allegation that the defendants were subscribers is not true, the complaint does not state a cause of action.

It is also to be noted that there is no finding that either Knapp or the defendants knew or believed that the value of the claim transferred was less than the par value of the stock issued in return for them. The only finding is that the directors of the company so knew and believed, and there is no finding that either Knapp or any of the defendants were directors. There is very serious question as to whether stock issued as fully paid in return for property conveyed to the corporation can be considered as not fully paid, except where it is found that both parties to the transaction, the transferor of the property as well as the company through its directors, knew or believed that the property was not equal in value to the par value of the stock. If the transferor genuinely believes that his property is fully worth the par value of the stock which he is receiving in return for it, it is difficult to see any reason why the transaction should not stand as it is as to him, no matter what the directors may believe, or why he should be compelled at the suit of creditors of the corporation or otherwise to pay more on account of his stock than he agreed to pay. Because of this lack alone in the findings, it is exceedingly doubtful, therefore, if they are sufficient to sustain the judgment. We need not, however, decide the case upon this point.

Finally, in this connection it is to be noted that if the finding that Knapp transferred the claims and received the stock in consideration therefor as trustee for certain stockholders of the former company, among whom were the defendants, is to be taken as a finding that the defendants participated in the transaction, the finding is contrary to the evidence. There is no real dispute as to the facts and no doubt whatever as to what they really are. Knapp had been interested in the former company, and it can fairly be inferred that he was largely responsible for it. He had at one time managed its operations, and had then ceased to do so, undoubtedly because the company was not prospering. A new management succeeded him, and this management finally abandoned operations and something over a year later permitted its claims to lapse by failure to do the necessary assessment work. After this had occurred, Knapp relocated the claims, and, together with one Earl Stuart Rhode, who subsequently married the plaintiff, organized the present company for the purpose of working the property, and transferred the claims to it in consideration for the issue to Knapp of the stock mentioned. Under these circumstances, Knapp directed that the certificates for certain of these shares be made out in the names of certain stockholders of the former company and sent to them. This was done, and with the certificates went a letter from Knapp to each of the recipients of the certificates, reading as follows:

"Dear Sir: When I surrendered control of the affairs of the Hayden Hill Gold Company in October, 1912, to the management which at that time succeeded me, it was with the distinct understanding that the new management would use every effort in their power to put the affairs of the company on a sound business basis and that at least an attempt would be made to raise money from the sale of the treasury stock to the end that something definite might be accomplished in the way of actual development work at the mine.

"However, no work of a beneficial character was ever even attempted by the new management and after wasting nearly a year in costly and useless delays, the board of directors finally met on August 22d last and practically decided to abandon the property without making any effort to preserve the interests of the stockholders. Abandonment was finally consummated despite the protests of Messrs. Rhode and Lemon, constituting a minority of the board of directors and notwithstanding my own repeated appeals that something be done to protect the interests of the stockholders.

"No assessment work was done on the claims held by the company during the year 1913 as required by law and the property lapsed to the government January 1st, 1914. It was at this juncture that I personally assumed the task of protecting my own interests and that of the stockholders who were unable to protect themselves, with full knowledge that the smaller stockholders of the Hayden Hill Gold Company were not even given an opportunity to protect their investment, and actuated by a sense of justice and fair play I have succeeded in making terms with the Lord Stuart Gold Company which enables me to reimburse you for the loss of your holdings in the Hayden Hill Gold Company by having an equal number of shares of the stock of the Lord Stuart Gold Company issued to you without any cost to you whatever. Herewith inclosed you will find certificates covering same. Kindly acknowledge receipt.

"I will say in conclusion that the property now held by the Lord Stuart Gold Company is in my opinion very valuable and under capable management if backed by sufficient funds could be made to pay well. The many delays in the development of the properties have not shaken my faith in their value and if the new management meets with the support from the stockholders that it deserves good results will follow, but it must be borne in mind that it will take money to prosecute the work of development to the point where the concern can be placed on a self sustaining basis, and the funds to begin this work must come from the stockholders. It therefore behooves the stockholders to protect their holdings and contribute to the success of the enterprise by the purchase of the treasury stock now for sale to the end that the affairs of the company may be placed on a sound financial basis. Assuring you that I will put forth every effort within my power to co-operate with the new management to the end that the enterprise may be made a success, I am,

"Very sincerely yours,"

Now, whether the motive actuating Knapp in so distributing the stock was that stated in the next to the last paragraph of his letter, namely, that he desired to protect the investments of certain stockholders in the former company, or whether it was that which might be inferred from the last paragraph, namely, that he desired to interest them so that they would purchase treasury stock and give the company some money of which it very much stood in need, or whether, as may well have been the case, it was a mixture of the two, we need not stop to inquire. In any case, his action in distributing the stock, instead of keeping it all himself, was not due to any legal obligation which he owed the distributees, or to any legal relation existing between him and them. It was a purely voluntary thing done by him for motives of his own, without consultation with the distributees and without knowledge on their part that he had any intention of doing it. He calls himself a trustee for them, to be sure; but it is perfectly evident that he was a wholly self-constituted trustee, so that his actions in relocating the claims, participating in, if not inspiring, the organization of a new company to take them over, transferring the claims to that company in return for its stock, and then distributing the stock, were purely his own and were not done by him in any representative capacity. There is one circumstance which destroys at once any claim of real trusteeship. If he were in any real sense a trustee for stockholders of the former company, he was certainly a trustee for all of them. Unless his relationship or character in that respect was a purely voluntary thing on his part, no reason appears why he should be trustee for some and not for others. But he recognized no relationship to the old stockholders as a class. It is only certain ones whom he selects, who are the recipients of his doubtful bounty in the way of stock. This is wholly inconsistent with any thought except that he was acting entirely on his own responsibility without any obligation or reason except such as he himself was willing to recognize. The final fact, in other words, appearing unmistakably from the evidence, is that the defendants did not participate in the transaction by which the stock was issued, either directly, or indirectly by way of representation through Knapp, but acquired and held their stock merely as transferees of Knapp.

It is also to be noted that while perhaps there is evidence which would justify a finding that the defendants, when they received and accepted their stock, knew that it was issued for a consideration less in value than its par value, there is no such finding, and the evidence is by no means conclusive, so that the fact must be considered as undetermined.

The facts of the case, then, upon the pleadings, findings, and evidence, are: (1) That the defendants were not subscribers; (2) that they did not directly or indirectly participate in the transaction whereby their stock was issued for a consideration less than its par value; (3) that it does not appear that the defendants knew when they accepted their stock that it had been so issued; and (4) that the defendants acquired their stock merely as the transferees of one of the parties of the original transaction by which it was issued. Upon these facts, if the defendants are to be held liable, it must be because it is the law that one owning stock issued as fully paid but in fact for a consideration less than its par value and known to be so issued by those participating in its issuance is liable for the difference between what the corporation did receive and what it should have received, merely because of the ownership of the stock, regardless of anything further, and in particular regardless of the facts that the stock was acquired by transfer, that its present owner did not participate in the transaction by which it was issued, and did not know that it had been issued for a consideration fictitious in part. Whether such be in truth the law is the prime question presented on this appeal, and the answer to it is determinative as to whether the judgment against the defendants shall be affirmed or reversed. To its consideration we pass.

It is to be noted at the outset that there is a marked difference beween the case of one acquiring and accepting stock which is only partially paid and does not purport to be otherwise, and the case of one acquiring and accepting stock which purports to be fully paid, but is not in fact, which is, in other words, what is commonly known as watered stock. The difference between the two kinds of stock is apparent and is thoroughly well recognized, and the liability of the owner in the one case to make good upon call his share of the unpaid balance of the capital of the company and his liability to do so in the other case depend upon entirely different principles. And yet the two cases are much confused, and it is not infrequently sought to apply to one class of cases the principles applicable to the other.

[4] It is apparent that, when one accepts partially paid stock, which does not purport to be anything else, he does so, or must be taken to do so, upon the understanding that it is answerable upon call for the unpaid balance upon it, and that he as its owner must respond to such a call. When he enters into relationship with the corporation as one of its stockholders owning stock of that character, he assumes as an incident of the relationship, the obligation to respond to calls upon him for further contributions to the capital of the company until such capital is fully paid in. See 3 Clark & Marshall on Private Corporations, § 564a, and authorities there cited; Perkins v. Cowles, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158; Union Savings Bank v. Leiter, 145 Cal. 696, 703, 79 Pac. 441; Geary, etc., Co. v. Bradbury, etc., Co., 179 Cal. 46, 175 Pac. 457.

[5] But where a person accepts the ownership of stock which purports to be fully paid, a very different situation is presented. It cannot be said of him for a moment that he accepts the stock and enters upon the relation of stockholder to the corporation upon any understanding that his stock is liable for further calls on capital account, or that he, as an incident of his ownership and consequent relationship, assumes any such obligation. On the contrary, it is evident that he accepts the ownership of the stock and enters upon the relationship of stockholder with just the contrary understanding. What, then, is the principle upon which the holder of watered stock is, under any circumstances, held obligated to supply substance instead of water, to make good what it is pretended the corporation received but did not? The answer to this question is not in doubt. The stockholder is held upon the principle that one giving credit to a corporation is entitled to rely upon its ostensible capitalization as the basis for the credit given, and that, when the corporation issues watered stock and thereby assumes an ostensible capitalization in excess of its real assets, the transaction necessarily involves the misleading of subsequent creditors, and, whether done with that purpose actually in mind or not, is at least a constructive fraud upon such creditors. In other words, the essence of the right of the creditor to brush aside the issuance of the stock as fully paid, and to show that it was not such and to compel the payment of the balance upon it, is that its issuance as fully paid was as to him a fraud. This is now the view generally accepted in this country. 2 Clark & Marshall on Private Corporations, § 401a, and authorities there cited.

Such likewise is the view which obtains in this state. It is true that some of our earlier decisions put the right of recovery in such a case upon the so-called trust fund doctrine. See Vermont, etc., Co. v. Declez, etc., Co., 135 Cal. 579, 583, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143. It is doubtful if by this doctrine is meant anything other than that the capital of a corporation constitutes a fund upon which its creditors have a right to rely for the payment of their claims, and that if the corporation, by knowingly issuing stock as fully paid when it is not, represents its capital to be greater than it really is, its action is a fraud upon its creditors. If the trust fund doctrine means this, the gravamen of the creditors' right of action to compel the making good of the representation as to the corporation's capital is still fraud, and the trust fund doctrine is but another way of expressing the same underlying idea. Whether this be or be not the true interpretation of the trust fund doctrine, the later decisions of this court place the right of recovery against the owner of watered stock squarely on the ground of fraud, and in one instance at least are wholly inconsistent with any other view. Thus it is said in Harrison v. Armour, 169 Cal. 787, 790, 147 Pac. 1166, 1167:

> "In such cases the rule is that where the corporation and stockholder have agreed upon a given valuation for the property transferred, such valuation is binding and conclusive unless it is fraudulent in purpose or effect. But if the parties have put upon the property a valuation in excess of what they knew or believed to be its true value, this is a constructive fraud upon the creditors and the stock will be deemed paid only to the extent of the actual value of the property received in exchange for it."

See, also, Herron Co. v. Shaw, 165 Cal. 668, 672, 133 Pac. 488, Ann. Cas. 1915A, 1265.

In Sherman v. Harley, 178 Cal. 584, 174 Pac. 901, 7 A. L. R. 950, following an intimation in Herron Co. v. Shaw, just cited, a recovery was refused a creditor where it appeared that at the time he gave the corporation credit he knew that part of its ostensible capitalization was water. Such a holding is inconsistent with any view other than that essentially the creditor's right of action is based on fraud, and that therefore where he has not been misled by the fictitious capitalization he has no cause of action. In fact, the court makes the following quotation from 4 Thompson on Corporations (2d Ed.) § 3983, as stating the reason of the decision:

> "On principle and authority, a creditor who deals with the corporation with full knowledge of the manner in which its shares have been paid for is not defrauded by the taking of overvalued property as payment of stock, and is estopped to raise that question."

It must be taken, then, that the right of a creditor of a corporation, which knowingly issues shares as fully paid when they are not, to compel payment on them in full, proceeds upon the ground of fraud. This ground is entirely different from the ground upon which proceeds his right in the case of shares only partially paid up and issued as such, and it follows that a recovery may be had in the latter case when it cannot be in the former. In the case of partially paid shares issued as such, the stockholder, when he accepts his shares and enters upon the relation of stockholder, does so, as we have said, upon the condition that his shares are subject to call for the unpaid balance upon them, and that he, as their owner, will respond to such call. This obligation is an asset of the corporation which it may enforce, and which, if it does not itself do so, its unpaid creditors may themselves enforce if it be necessary for the full discharge of their debts. It makes no difference, therefore, in such a case, whether any particular stockholder against whom a recovery is sought was a party to the original transaction whereby the stock was issued or is only a transferee of some such party. He is liable simply as the owner of the stock and because of the relationship with the corporation which he voluntarily assumed when he accepted such ownership.

[6] Such, however, is not the situation of the stockholder owning shares ostensibly fully paid but not so in fact. He owes the corporation no duty to make good the difference, and there is no obligation on his part which is an asset of the corporation or which the corporation may enforce. Garretson v. Pac. Crude Oil Co., 146 Cal. 184, 188, 79 Pac. 838, and authorities there cited. He is liable only because of the original transaction whereby the stock was issued for a fictitious consideration, and then only to those who were defrauded thereby. His liability, in other words, is not based upon his relationship to the corporation as a stockholder but upon a fraudulent transaction. Upon the plainest principles, therefore, he cannot be held liable unless he was either a party to the transaction in the first instance or has in effect in some manner made himself a party since. It is not sufficient to justify a recovery against him that it be pleaded, proven, and found only that he be a stockholder owning watered stock. Upon those facts alone the full elements necessary to make a cause of action against him do not appear.

[7] The result is that one who is only a transferee of watered stock, and did not participate in the transaction whereby it was originally issued and who took his stock unaware of the character of that transaction, cannot be compelled to make good the false representation as to the capital of the company which he had no part in making and the responsibility for which he has done nothing to assume. This is now the well-nigh universal rule in this country (3 Clark & Marshall on Private Corporations, § 564f), and it is a necessary result of the underlying principle upon which a recovery is permitted in the case of watered stock. Nor has any different rule been laid down in this state. While perhaps the distinction between the liability of the owner of partially paid shares and that of the owner of watered shares has not always been clearly made in our decisions, it will be found upon examination that in every case where a recovery has been permitted against one acquiring stock by transfer simply because of his ownership of the stock without anything further, the defendant has been the owner of but partially paid stock, that is, stock which did not purport to be fully paid. The most notable instance wherein such a recovery was permitted is that of Perkins v. Cowles, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158. This case is in fact strongly urged

upon us as decisive of the present case in favor of the plaintiff. There the defendants were transferees of the stock of a corporation, and were held liable to make up the balance unpaid upon their shares at the suit of the corporation's trustee in bankruptcy. But, as plainly stated in the opinion, the stock appeared on the books of the corporation as but partially paid. The defense of the defendants was that the parties from whom they bought had represented to them that the stock was fully paid, and that the corporation had itself so represented to them by issuing them certificates which contained no notation that the shares evidenced by them were not fully paid. As to this defense, it was held (and this holding was the real point of the case) that the representation by some one else than the corporation that its shares were fully paid was not binding on the corporation or its creditors, and that the issuance of certificates without any notation as to whether the shares were fully paid or not was not a representation by the corporation that they were fully paid. Upon this latter point the decision differs apparently from the rule generally followed elsewhere (3 Clark & Marshall on Private Corporations, § 564f), but its correctness in this respect is not material here, nor is it of particular importance now because of the subsequent amendment to section 323 of the Civil Code requiring all certificates representing partially paid shares to indicate that fact. For the purposes of our present discussion, the point in connection with Perkins v. Cowles is that the case was one where a fictitious credit by way of payment upon the stock was not given, and where it was held that the defendants must be considered as having acquired their stock upon the basis that it was but partially paid stock. It is also worthy of note that in the case of Herron Co. v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265, involving the liability of the owner of watered stock, and decided very shortly after Perkins v. Cowles, the question as to the liability of such an owner who acquires his stock by transfer is expressly reserved. There was no necessity for such reservation if it had been the intention of the court to decide the question in Perkins v. Cowles. We are free, then, to follow the rule that the transferee of watered stock who takes it in ignorance of its real character is not required, even at the suit of a creditor of the company, to pay in anything more upon it, and we have no hesitation in following it, both as the rule almost universally adopted elsewhere, and as the only one consistent with the principle upon which a recovery is permitted in any case against the owner of stock issued by the corporation as fully paid.

[8, 9] It may be added that any other rule would have the effect of possibly subjecting the innocent purchaser of corporate stock to obligations in large amounts of which he had no conception when he acquired his stock. The injustice of this and the serious hindrance it would be to the free sale and disposal of corporate stocks are strong reasons in addition for the adoption of the rule stated. The conclusion so reached necessitates a reversal of the judgment against the defendants in the present case, since, so far as appears, they were but innocent transferees of the watered stock because of which it is sought to charge them.

It may perhaps be said that the burden was on the defendants to allege and prove as a defense that they did not acquire their stock under such circumstances as would make them liable. The answer to this is that it was an element of any cause of action against them that they be connected in some manner with the fraudulent transaction by reason of which alone they can be charged, and that by the most elementary rules of pleading and proof, the burden rested upon the plaintiff to allege and prove that such element existed. See, also, Finletter v. Appelton, 195 Pa. 349, 45 Atl. 1063; Davies v. Hall, 64 Wash. 292, 296, 116 Pac. 833, Ann. Cas. 1914B, 750.

It may also be said that it clearly appears from the evidence that the defendants gave nothing for their shares and were not purchasers for value. But this is not a case where the doctrine of bona fide purchasers for value has any application. That doctrine is always one applied to protect one who has acquired certain property from some equitable charge against the property. 2 Pomeroy's Equity Jurisprudence, §§ 737–743. The present action is not one to enforce some equitable charge upon the defendants' shares. It is essentially one to compel the defendants to make good a false representation in defraud of the plaintiff; a suit to enforce an alleged personal liability, not a suit to enforce a lien or claim against the stock in the hands of the defendants. As an element of such a cause of action against the defendants, they must be shown either to have participated in the making of the representation or in some manner to have assumed responsibility for it. The mere fact that they received their stock as a gratuity does not show either. The fact may still be that they knew nothing about the representation and had no part in it, and cannot justly be held responsible for it in any way.

[10] In view of the necessity for a new trial, there are three further points which should be determined for the guidance of the court and parties. The first of these is as to what is necessary in order to show that the defendants, acquiring, as they did, their stock by way of transfer from Knapp, assumed responsibility for the fraudulent representation involved in the issuance of the shares as fully paid; is it enough to show

that they acquired their stock with notice or knowledge that it was issued for a consideration fictitious in part, or must something more be shown? As to this, we think it sufficient that it appear that when the defendants accepted their stock they had notice or knowledge of its real character. We can see no reason why one who accepts stock with notice or knowledge that it is but partially paid, although issued as fully paid, should not be held to assume the same responsibility which he would assume if the stock were issued for what it really is, partially paid stock. He knows, or should know, its real character, and should be charged as if its ostensible character were what it really is. This is also we believe the practically universal rule of the decisions in other jurisdictions. 3 Clark & Marshall on Private Corporations, § 564f.

[11] The second point which should be decided for the purposes of a new trial is raised by the fact that it appears that there are other stockholders who stand in exactly the same position as the defendants, and who are liable if the defendants are liable, and yet they have not been made parties to the action. The contention of the defendants is that they should have been made parties defendant with them. But the question presented was carefully considered in Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158, and there decided contrary to the defendants' contention, and that decision has been since approved and followed. See, for example, Blood v. La Serena, etc., Co., 150 Cal. 764, 89 Pac. 1090. It would require the strongest reasons to justify us in now overruling it, even if we had serious doubts as to its correctness, which we have not. It is attempted to distinguish Baines v. Babcock from the present case on the ground that the former was one to compel the payment of unpaid balances on stock subscriptions, while the latter is to compel the payment of unpaid balances on watered stock. But so far as the point under immediate consideration is concerned, the distinction is one without a difference.

It should, perhaps, be said that the question whether a creditor can recover in such a case as the present for the benefit of himself alone, or whether he can recover only by a creditors' bill for the benefit of all creditors who choose to join with him, is entirely different from the question as to the necessity of making other stockholders parties defendant. But the question, while possibly suggested by the parties, is not argued by them, and as a matter of first impression would not seem to be free from doubt. See Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767; Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544; Winchester v. Mabury, 122 Cal. 522, 55 Pac. 393; Daggett v. Southwest, etc., Co., 155 Cal. 762, 103 Pac. 204; In re La Jolla, etc., Co. (D. C.) 243 Fed. 1004. Under these circumstances, we have no opinion to express concerning it, and make mention of it only that it may not be confused with the question we do decide as to parties defendant.

[12] The third point on which it is advisable that we express an opinion for the purposes of a new trial is presented by the refusal of the trial court to receive in evidence a written report on the mining claims transferred by Knapp, made by one claiming to be a mining engineer and painting the prospects of those claims in sunset colors of a vivid hue. As direct evidence of the value of the claims, the report was, of course, pure hearsay, and inadmissible. If, however, it appeared, or there was sufficient to justify the inference, that it was before the minds of the directors of the company, or the mind of Knapp when the claims were transferred in return for the stock, it was competent evidence as to the belief of the directors or Knapp as to the value of the claims. It was open to both sides to show whatever the directors and Knapp had in mind which would affect their judgment in that respect. How far it can reasonably be considered that the particular report could really affect the judgment of any rational man of any experience whatever, is a question as to its weight.

Judgment reversed, with directions that the parties be granted leave to amend their pleadings, if they so desire.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; SLOANE, J.; LENNON, J.

WILBUR, J. I dissent. I think that the finding that Knapp was the agent of the defendants in purchasing the capital stock is sufficiently sustained by the evidence and the inferences properly deducible therefrom. In view of the fact, however, that the finding is a general one and that it is fairly apparent from the record that neither court nor counsel had in mind the difference between the liability of the subscribers and transferee for the unpaid subscription resulting from the overvaluation of the property received in exchange therefor, I am satisfied that a new trial, where that distinction is observed, is desirable. I concur in the main opinion as to the law with reference to the nonliability of transferees of stock, where the stock certificates indicate upon their face that it is fully paid, as the certificates do in this case, by reason of the present requirements of section 323 of the Civil Code, hereinafter quoted. As stated in the main opinion, this court has never before passed upon the rights of transferees under similar conditions. The cases of O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 Pac. 1, Perkins v. Cowles, supra, and Geary Street Railroad Co. v. Bradbury Estate Co., supra, all dealt with stock certificates issued before the 1907 amendment to section 323 of the Civil Code, which provides as follows:

> "*Certificates of Stock, How and When Issued.*—All corporations for profit must issue certificates for stock when fully paid up, signed by the president and secretary, and may provide, in their by-laws, for issuing certificates prior to full payment, under such restrictions and for such purposes as their by-laws may provide, but any certificate isued prior to full payment must show on its face what amount has been paid thereon."

I concur in the main opinion that, where a certificate of stock is issued under this law, a bona fide purchaser, without notice, may rely upon this representation by the corporation, and, in such case, is not liable for the deficiency in payment, for the stock resulting from the constructive fraud in its issuance as fully paid up in exchange for overvalued property. It is true, as stated in Herron Co. v. Shaw, supra, 165 Cal. 674, 133 Pac. 490, Ann. Cas. 1915A, 1265:

> "On principle, we perceive no essential difference between an exchange of full paid stock for property at a known overvaluation and a sale of such stock for money at less than par value, such as was considered in Vermont M. Co. v. Declez."

In either case, as I understand the main opinion, the transferee, if he purchases the stock in reliance upon the representations upon the face of the certificate that it is fully paid up, and without actual or constructive notice to the contrary, is not thereby obligated to make up the deficiency to the creditors of the corporation.

On the other hand, as to stock issued previous to the amendment to section 323 of the Civil Code, the purchaser, without notice that the subscription price was partly unpaid, would nevertheless be liable for the unpaid amount of the subscription therefor, unless there was some affirmative representation by the corporation that the stock was fully paid; and, under the doctrine of Geary Street Railroad Co. v. Bradbury Estate, supra, in the absence of an express representation by the corporation that the stock is fully paid, the purchaser is bound to make inquiry of the officers of the corporation to ascertain whether the stock is fully paid, and unless so informed, is charged with knowledge of the entries in the capital stock account of the corporation with reference to the issuance of the stock. If I have thus correctly interpreted the effect of the main opinion, I concur fully therein. This conclusion is in harmony with our previous decisions and in accord with the general trend of decision throughout the United States.

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184 Cal. 469

YUBA INV. CO. v. YUBA CONSOL. GOLD FIELDS. (Sac. 2797.)

(Supreme Court of California. Dec. 7, 1920. Rehearing Denied Jan. 6, 1921.)

1. Deeds 🔑124(3)—Conveyance sufficient in form to convey fee.

Conveyance from the owner of land in the bed and on the banks of the Yuba river, known to contain placer gold, made to the United States government to enable a commission to preserve the navigability of the Sacramento river, *held* sufficient in form, both in the granting and habendum clauses, to convey the fee to the government; reservation of mining rights in the grantor not being inconsistent with such grant of a fee.

2. Evidence 🔑462—Declarations during negotiations concerning purpose of deeds cannot be considered.

Declarations during the negotiations concerning the purpose of deeds and the rights of the parties with reference to the use of the property cannot properly be considered, for the purpose of modifying or changing the terms of the document itself; the evidence having been ostensibly offered, in view of Civ. Code, § 1625, to place the court in the situation of the parties and enable it to interpret the deed.

3. Easements 🔑1—Declaration of purpose of conveyance would not change conveyance into one of easement.

Though it is apparent, from the negotiations and circumstances surrounding execution of a deed to the United States government, that the purpose of the government in securing the land was to construct certain works to prevent the deposit of mining silt in a river, and to use the particular tract as a settling basin, the fact would have no greater effect than a declaration to the same effect in the deed, and such an express declaration would not convert a deed otherwise conveying a fee into one conveying a mere easement for such use.

4. Easements 🔑14(1)—Provision authorizing deposit on one tract of earth dredged in mining from other, inured to benefit of such other tract.

Provision of contract between owner of land and government, acquiring tract for settling basin, etc., in aid of works to preserve the navigability of a river, authorizing deposit on one tract of 14,000,000 cubic yards of material from the mining operations of the grantor, *held* to have been to make provision for an overload of 14,900,000 cubic yards to be removed in gold-mining dredging from another tract of the land; such right inuring to the benefit of such other tract, which became the dominant estate, to which the easement appertained.

5. Mines and minerals 🔑55(6)—Successor of mining rights of grantor held entitled to extract metals, though destroying surface.

In view of the principle that the right to precious metals implies the right to mine them, the statutory rule that reservations and exceptions in a conveyance are to be construed in favor of the grantor, and the express reservation and exception by the grantor to the government of gold-bearing lands of the right to use the premises in any manner not inconsistent with the use by the government, and the fact that the premises could still be used by the government as a settling basin, the purpose contemplated, in aid of navigation, if the minerals were extracted with due regard to such use, etc., successor of the grantor's mining rights in a tract of the land, fee in which was conveyed to the government, *held* entitled to extract the precious metals, though the effect would be to wholly destroy the surface.

6. Deeds ⚷140, 143—Reservations and exceptions to be construed for grantor.

Reservations and exceptions in a deed by the statutory rule are to be construed in favor of the grantor.

7. Mines and minerals ⚷55(6)—Right of remote grantee, as against successor of grantor, to deposit detritus from mining, limited to reasonable necessity.

Where land was conveyed in fee to the government for use in constructing works in aid of navigation, and the government conveyed to a gold-mining corporation, the right of such corporation to deposit detritus on a tract of the land in which another company has succeeded to the original grantor's mineral rights *held* limited to what was reasonably necessary to enable it to conduct its dredge-mining operations on its own tract, etc.

8. Use and occupation ⚷1—Successor of grantee entitled to recover from grantor only after demand.

Grantee from the United States government of land conveyed to it for use for certain works in aid of navigation, the grantor reserving the use and possession of the premises in so far as not interfering with the use and possession of the United States, can recover from the grantor for the value of the use and occupation of the property by him only after demand was made upon him or his successor for possession, and only for the period subsequent to such demand.

Wilbur, J., dissenting in part.

In Bank.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by the Yuba Investment Company against the Yuba Consolidated Gold Fields. From a judgment for plaintiff, defendant appeals. Reversed.

Charles W. Slack and Chauncey S. Goodrich, both of San Francisco, W. H. Carlin, of Marysville, A. F. Jones, of Oroville, and Thos. H. Breeze, of San Francisco, for appellant.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, and J. E. Ebert, of Marysville, for respondent.

WILBUR, J. This is an action to quiet title. Plaintiff recovered judgment, and defendant appeals.

Both parties claim under James O'Brien, who on December 6, 1901, made a quitclaim deed of the property to the United States of America, containing certain agreements, reservations, and exceptions. The interpretation of this deed forms the basis of this controversy. The title of the United States was conveyed to the defendant October 30, 1911. Whatever interest in the property remained in the grantor, except as noted near the end of this opinion, was conveyed to the plaintiff. The plaintiff contends, and the trial court held, that the deed to the government merely conveyed an easement; that this easement was abandoned by the government, and consequently its subsequent conveyance to the defendant was of no effect. The defendant, on the other hand, claims that the deed of O'Brien conveyed the fee to the government, and that the proper decision of the case turns on the nature and extent of the rights reserved to O'Brien and conveyed by him to the plaintiff. The pivotal question in the case is whether or not the government acquired a mere easement. Such facts as are necessary to the determination of that preliminary question will now be stated, and later, in considering the other questions involved, such additional facts will be stated as are necessary to an understanding and decision of such points.

At the time of the conveyance O'Brien was the owner of a large amount of land in the bed and on both banks of Yuba river, a tributary to the Sacramento river. Some of this land was known to contain placer gold. The California Débris Commission, in order to preserve the navigability of the Sacramento river, planned to impound the detritus in the Yuba river resulting from mining operations, thus preventing its deposit in the Sacramento river, by constructing certain reclamation works, including dams and levees, to form a settling basin on the land of O'Brien. For that purpose negotiations were entered into with him with a veiw to acquiring the necessary land and rights for such purposes. The deed in question resulted. It covered, not only the parcel of land involved in this suit, but by separate description and different reservations and exceptions certain other large tracts of land. These various parcels of land are separated into three tracts, with different reservations applying to each. These tracts are designated "First," "Second," "Third." Tract "First," the land in controversy, contains over 1,000 acres, and most of it is designated, upon a plat attached to and made a part of the deed, as "South Basin." Tract "Second" in large part lies between the official banks of the Yuba river. Tract "Third" contains 442 acres, and is bounded on the north by the official left bank of the Yuba river, and on the south by the Linda levee, and is marked "Dredging Ground" on such plat. This tract is owned by the defendant and is spoken of throughout the brief as the "442-acre tract." The granting clause of the conveyance is the usual quitclaim, stating that the grantor "has remised, released, and forever quitclaimed," etc., to the United States of America the parcels of land shown upon the attached map and thereinafter more particularly described. The habendum clause is in the usual form, to the grantee and its successors. The reservations and exceptions relate to the precious metals, the right to extract the same, the deposit of detritus, and the use and occupation of the premises.

The Reservation and Exceptions Concerning Use.

The reservation of the use of tract "First" is as follows:

> "But reserving and excepting unto said party of the first part, his heirs and assigns, * * * the use and possession of such premises in so far as the same may not interfere with the use and possession of the premises by said party of the second part, its authorized agents, employees or contractors, for any and all purposes that it or they may see fit to use the same, said use and possession so reserved to be subject to all the rules and regulations and orders of the said party of the second part, its agents and employees."

In tract "Second," which was covered by placer mining claims, the reservation with reference to the use is as follows:

> "But reserving and excepting unto said party of the first part, his heirs and assigns, the use and possession of said premises in so far as the party of the first part would otherwise be entitled to by virtue of said mining claims."

Then follows a proviso similar to that with reference to tract "First" above quoted, to the effect that such use must not interfere with the use and occupation by the government. But it is also stated that:

> "This reservation shall in no wise be construed as granting, confirming, or conceding to the grantor the validity of said mining claims."

There is no specific reservation of the right to use tract "Third," except that there is also reserved "the right to extract precious metals therefrom."

The Reservation of Precious Metal.

The reservations and exceptions with reference to precious metals are different in the different tracts. In tract "First" the grantor reserves and excepts "all precious metals in or on said premises and the use and possession of said premises," etc. In tract "Second" the grantor merely reserves the right to the use and possession of the same as mining claims. In tract "Third" the grantor reserves and excepts all precious metals in or on said premises, with the right to extract the same.

There is nothing in the granting clause of the deed which in any wise limits the title conveyed, nor do the reservations or exceptions expressly limit it. No right reserved is at all inconsistent with the grant of a fee in tract "First," except the right to the use and occupation of the premises, which, according to the terms of the reservations and exceptions, is at all times subject to the grantee's use, for any and all purposes for which it may see fit to use the same. If, in the reservation of the right to the use and occupation of the premises, such right was merely subordinate to the use of the same premises by the government as a settling basin, or for works erected for the purpose of impounding detritus in the Yuba river, the argument that the deed merely conveyed an easement to the government for that purpose would be much stronger. Before finally determining the proper construction of the deed, it remains to be considered whether the other provisions of the deed, and the facts and circumstances relied upon by respondent in connection with the execution of the instrument, now to be stated, aid in such determination.

Gold mining in this neighborhood is conducted by dredgers, floating on an artificial pond, which handle all the material from the surface to the bedrock. Tract "Third," designated upon the map as "Dredging Grounds," is to be completely surrounded by banks and levees constructed by the grantor. This tract is referred to in the deed as the tract of land "to which said mining privilege applies," and it is provided that the embankments constructed by the grantor surrounding this parcel "shall be sufficiently thick and strong to permit the land surrounding the same to be safely used as a settling basin." Tract "First," in controversy, it is to be remembered, bounds this dredging ground on the south. It is provided that the embankments and levees around tract "Third," as fast as constructed by the grantor, shall become the property of the grantee, and that the grantor shall construct a drainage cut, and that the grantee "shall have the right of constructing outlets to conduct off-flow from its proposed settling basin, both north and south of said premises, into the aforesaid drainage cut to be constructed by said party of the first part (the grantors), the right to use which as a drain is hereby conceded to the said party of the second part (the grantee) free of compensation." These clauses of the deed refer to the mining privilege as applying to tract "Third," and indicate the purpose of the government to use the property north and south thereof as a settling basin.

Provisions are made in the deed with reference to the deposit of material from mining operations which will hereafter be more fully discussed, requiring the redeposit of all material on the premises from which they are taken, with the exception of the right to deposit detritus upon tract "First," in quantities which, under certain conditions, may aggregate 14,000,000 cubic yards.

As further indicating the grantee's intention to use a portion of tract "First" as a settling basin, a right of way was granted across the land of the grantor to the east of tract "Third" "for a canal leading to said south basin from the upper works to be constructed by the said party of the second part along lands on the south side of the Yuba river." Another right of way is granted "to convey water from the southern extremity of said settling basin south of Linda levee, following the natural depression of the land," etc. The deed also provides:

> "That at any time such portions of said premises as shall have been already worked over shall be available for use by the United States as a settling basin on condition that such use shall not interfere with the mining of the remainder of said premises, and provided further that in any case all of said premises shall be available for use as a settling basin without restriction on and after January 1, 1952."

It is clear, from the deed as an entirety, that in the specific provisions with relation to the mining privilege the parties had in mind the mining operations immediately contemplated upon tract "Third" only. Whether there was an implied right to mine other tracts is a question which requires consideration, but that matter will be taken up later.

[1] On the face of the deed, then, it is clear that the conveyance is sufficient in form, both in the granting and habendum clauses, to convey the fee to the government. The reservation of mining rights is not inconsistent with the granting of the fee to the government, nor is the right to the use and possession of the premises, limited as it is by the proviso that such use and occupation must be subject at all times to the wishes of the grantee, inconsistent with the grant of the fee. It is clear from the deed itself that the government intended to use the premises for the construction of certain reclamation works, and certain of the premises, including a portion of tract "First," as a settling basin. There is, however, no express provision of the deed limiting the use of the government to that purpose, nor any right of reversion to the grantor in the event that the government used the premises for some other purpose, or failed to use it for the purposes mentioned. On the contrary, as already stated, it is expressly provided that the premises may be used by the government for any and all purposes. The government no doubt intended to use a portion of the premises in controversy as and for a settling basin. The whole deed clearly shows this purpose, but the question here is whether, failing to use it for that purpose, the title reverts to the grantor. It is not so stated in the deed, and it is conceded, unless the right of the government was a mere easement, the abandonment of the scheme to use the premises as a settling basin would not destroy the title of the government. When the government ascertained that the south settling basin would not be needed, because the dredging operations carried on by the plaintiff had obviated the necessity for that use, it offered tract "First" for sale and sold the same to the defendant.

The plaintiff insisted upon its right to introduce evidence of circumstances, the surroundings, and the negotiations leading up to the execution of the deed, for the purpose of construing it. Such evidence was objected to by the defendant. Its objections were overruled, and in the light of this evidence the court rendered its decree. In considering the admissibility of this testimony, and its effect upon the construction of the deed, we will for a moment lay aside the conclusion already announced that the proper construction of the deed is plain upon its face, and consider somewhat in detail the evidence by which it is sought to establish the contention that the deed created a mere easement in favor of the government.

The Circumstances Connected with the Execution of the Deed.

We will first state some of the facts and surrounding circumstances at the time of the execution of the deed, and will then set forth some of the evidence concerning the negotiations. The report of the California Débris Commission stated that its purpose was to impound mining débris to prevent further injury to the navigable waters of the state; that the commission had selected Yuba river as the site for the first works to be constructed, since this river carried more detritus than all the other tributaries of the Sacramento river combined; that in the vicinity of the Narrows there was a natural site for impounding works. Other portions of the report confirmed the view of the commission that land was to be secured for the purpose of a settling basin to impound the mining detritus. It is clear from the report of the California Débris Commission that the purpose of the commission in securing conveyances from Mr. O'Brien was in furtherance of their declared object of constructing the necessary works to establish a settling basin upon tract "First." It is worthy of note that the report states that the project is novel; that nothing of the kind had theretofore been attempted, and the work was necessarily experimental; but that the various structures contemplated were believed to be safe, practical, and reasonably permanent. It was then stated:

"They can be repaired, if required, and, if abandoned, not maintained, or never completed, cannot leave the river in any worse shape than at present."

It was further reported:

"Before construction work can be commenced, it is necessary to have, first, formal approval of the project by federal and state authorities; second, acquisition of title to the land embraced within the area occupied by the impounding works." "The aggregate amount of land required within the area embraced within the existing project is 2,000 acres, for which about $20,000 is believed to be a fair and reasonable compensation."

It is to be observed that the report speaks of the acquisition of land, and not easements, and a similar reference is contained in another portion of the report.

Negotiations Preceding the Execution of the O'Brien Deed.

Evidence of the negotiations between O'Brien and the agents of the government for the acquisition of his land was introduced, over the objection of the defendant. Without at present passing upon the correctness of this ruling, we will state in general terms the character of that evidence. James K. O'Brien, the son of the grantor, testified that he met Hubert Vischer, assistant engineer of the California Débris Commission, two or three weeks prior to December 6, 1901. Mr. Vischer carried on all the negotiations, during which Mr. Vischer stated that the ground on section 5 and probably section 4 (parts of tract "First") would be used as a settling basin.

"They admitted this land was valuable for farming and might be valuable for dredging. We discussed that it was mineral land, and said that in our opinion the amount of money we were to receive for the land was a mere bagatelle as far as the value of the property was concerned. We said that the land could be dredged by operations such as were being carried on in Oroville."

The purpose of these operations was to extract the gold. The price was fixed at $20 an acre for tract "First" for farming purposes. The witness testified that—

"At the hearing of the California Débris Commission the contemplated use of these lands by the government for settling basin purposes was discussed between my father and Mr. Vischer. Reference was especially made to the land in sections 6, 4, 5, and 8 (including tract 'First') for the south settling basin. It was discussed that my father was to retain the mineral in the settling basin."

The witness was then asked the following question:

"State the substance of what was said by the commissioner, Mr. Vischer, yourself, and your father at these hearings, in addition to what you have already testified to in regard to the particular purpose for which that land was to be used, and to what extent your father would be entitled to the use and possession of the property. A. Simply and solely for settling basin purposes in connection with the project of 1899. My father was to have exclusive use of the properties involved in sections 4, 5, 6, and 8, except as far as the government might need it for settling basin purposes. He could put it to any use he desired. If the project was not carried out, he would have the right to dredge if there was any dredging ground there, and he would have the use of the land for farming or any other purposes it was suitable for."

The witness further testified: That it was stated that it might be four or five years before the government would begin to use the land, and that "after the land had been used as a settling basin, when it was filled up, my father would have an elevated farm there." That the grantor "was to have the use of it, so far as it did not interfere with its use by the government as a settling basin." That the use and possession of the premises by the grantor would have to be under the rules and regulations prescribed by the United States government. That nothing was ever said to the effect that the United States might sell or dispose of these lands at any time. That "we reserved the mineral in the property. If, for any reason, the project might be amended, or the intention to use it as a settling basin should not be carried out, my father had the right to dredge-mine the property, which was the only method then and now supposed by which it could be operated." That the word "easement" was used by members of the commission and Mr. Vischer during the negotiations. "The commission used the word. My father used it, and Mr. Vischer used it—granting of an easement." That Mr. Vischer dictated a letter to accompany the deed to the United States government, which was dated December 6, 1901, and signed by J. O'Brien, the grantor. This contained the following statement: "Gentlemen: I herewith submit to you a deed conveying easements to certain lands," etc. On April 22, 1902, the letter was acknowledged by the California Débris Commission, by letter, stating: "We hereby notify you that in accordance with your letters of submittal, dated December 4 and 6, 1901, the United States has accepted two certain deeds," etc.

[2] In considering these negotiations it is well to remember that according to the testimony of Mr. O'Brien the only thing said as to the result if the government abandoned its proposed "settling basin" was that the property could then be dredge-mined. Both parties to the transaction evidently fully believed that the government would carry out its plan. The mere characterization by Mr. O'Brien, in the letter dictated by Mr. Vischer, of the deed as one conveying an easement,

is unimportant. It is clear that these declarations during the negotiations concerning the purposes of the deeds and the rights of the parties with reference to the use of the property cannot properly be considered for the purpose of modifying or changing the terms of the document itself. It is true that the evidence was ostensibly offered, as such evidence always is, in view of the definite statutory rule upon the subject (section 1625, Civ. Code), to place the court in the situation of the parties, and thus to enable it to interpret the terms of the deed.

[3] While it is apparent from the negotiations and surrounding circumstances that the purpose of the government in securing the land was to construct the works in question and to use the particular tract as a settling basin, this would have no greater effect than a declaration to the same effect in the deed, and such an express declaration would not convert a deed, whose terms otherwise conveyed a fee, into one conveying a mere easement for such use. Fitzgerald v. County of Modoc, 164 Cal. 493, 129 Pac. 794, 44 L. R. A. (N. S.) 1229. It is not claimed that in these negotiations it was agreed that the land would revert to the grantor in the event that the property was not used as a settling basin. At most it was said that his reserved right to use the surface of the land would be valuable for agricultural purposes, and this statement must have been made in the light of the fact that both parties in the discussion assumed that the government would retain the property. The negotiations were not directed to the possibility that the government might sell tract "First," so that in determining the effect of the deed upon the subsequent abandonment of the scheme by the government, so far as this land was concerned, we are given no assistance by any of the negotiations between the parties, even if it were proper to consider them. Indeed all that was said points to the conclusion that the government was, in any event, to retain some interest in the premises and that the rights of the grantor were to be subject thereto. We conclude, therefore, that the deed conveyed the fee of tract "First" to the government, and that the deed from the government to the defendant vested the fee in it.

In view of the necessity of a new trial, we will pass to a consideration of the exceptions and reservations in O'Brien's deed to the government. The plaintiff has acquired from O'Brien the reserved and excepted right to the precious metals in said land, and the defendant, through mesne conveyances from O'Brien, has acquired the easement to deposit 14,000,000 (subsequently decreased to 9,000,000) cubic yards of mining debris thereon. Defendant contends that the right to the precious metals does not include the right to extract them, and thus reduce them to possession, where the process of extraction destroys or disturbs the surface, citing in support of this contention the following cases, among others: Williams v. Gibson, 84 Ala. 228, 231, 4 South. 350, 5 Am. St. Rep. 368; Harris v. Ryding, 5 M. & W. 60, 68-76; Hext v. Gill, L. R. 7 Ch. 699, 718; Noonan v. Pardee, 200 Pa. 474, 482, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722; Phillips v. Collinsville Granite Co., 123 Ga. 830, 839, 51 S. E. 666; Bibby v. Bunch, 176 Ala. 585, 589, 58 South. 916; and the following text-books: 1 Jones on Real Property, § 538, p. 449; 18 Am. & Eng. Enc. of Law (2d Ed.) pp. 566, 567. The plaintiff claims that such a right is involved in the exception and reservation of the grant, by necessary implication, and in support of this contention cite the following text-books and cases: Footnote, 48 L. R. A. (N. S.) 884; 27 Cyc. 687, 688; Williams v. Gibson, supra; 18 Am. & Eng. Enc. of Law, pp. 556, 557.

There is no express reservation of the right to extract the gold or precious metals in tract "First," although such right was specially reserved and excepted as to tract "Third." In order to understand the claims of the parties, it will be necessary to state further facts in relation to the method of carrying on mining operations in the vicinity. Mining is carried on wholly by dredging. All the material from surface to bedrock is moved. In tract "Third" bedrock is 60 feet below the surface. At the time the deed was executed by O'Brien to the government, dredgers of the type used for the recovery of gold were only capable of operating to a depth of 40 feet, although they now operate to a depth of from 60 to 80 feet. It was therefore then impossible to operate a dredge from the surface to the bedrock on tract "Third." The overload of 20 feet would have to be removed in order that dredgers might successfully operate.

[4] It is contended by the plaintiff, and the trial court decided, that the purpose of those provisions of the contract authorizing the deposit on tract "First" of 14,000,000 cubic yards of material from the mining operations of the grantor was to make provisions for this overload, which aggregated on tract "Third" 14,900,000 cubic yards, and that such right inured to the benefit of tract "Third," which became the dominant estate to which the easement appertained. In this respect we think that the trial court correctly interpreted the deed. We will next consider the right of the plaintiff to remove the precious metals in tract "First."

Dredge mining absolutely destroys the surface and leaves the land from 12 to 13 feet higher than before the dredging operations were commenced; the upper portions being composed of cobblestones a foot or less in diameter. It follows that, if dredging operations of this type were conducted on tract "First," its value for agricultural purposes will be entirely destroyed. If, on the other hand, the reservation and exception of the precious metals in tract "First" did not authorize the grantor to operate a mining dredge in the customary manner, and thus destroy the surface, the reservation was of no effect and of no value, for no other method of mining was practicable. In this connection it should be observed that the use of the land, so far as not inconsistent with the use by the government, was expressly reserved along with the right to the precious minerals therein. That dredge mining is not wholly inconsistent with the use of the land as a settling basin is also clear from the fact that it is expressly provided in another clause of the deed that "worked-over" portions of tract "Third" "shall be available for use as a settling basin."

[5, 6] The principle that the right to precious metals implies the right to mine the same, fortified by the statutory rule that reservations and exceptions are to be construed in favor of the grantor, and by the express reservation and exception of the right to use the premises, in any manner not inconsistent with the use by the grantee, and by the further fact that the premises could still be used by the grantee as a settling basin, if the minerals were extracted with due regard to that use, and that the only known method of extraction in contemplation by the parties was dredge mining, all lead to the conclusion that the plaintiff, as grantee of O'Brien's mining rights in tract "First," is entitled to extract the precious metals therefrom, even though the effect thereof is to wholly destroy the surface.

Having thus determined that the plaintiff has the right to mine the precious minerals contained in tract "First," and that the defendant has succeeded to the rights of O'Brien to deposit detritus upon tract "First" from the mining operations on tract "Third," it remains to consider the proper relation of these two easements.

It should be stated in this connection that on January 15, 1902, O'Brien conveyed to Evans tract "Third," together with the reserved right to deposit mining detritus on tract "First," and that the conveyance by O'Brien to the plaintiff of all the rights remaining in him was made until April 10, 1912, 10 years after the said conveyance to Evans, and that it did not convey to the plaintiff anything which O'Brien's deed to Evans had conveyed to them. The defendant has succeeded to the rights of Evans to deposit detritus from tract "Third" on tract "First." If, at the time of the conveyance to Evans, O'Brien had owned tract "First" in fee, undoubtedly Evans' easement appurtenant to tract "Third" and the corresponding servitude on tract "First" would have been superior to O'Brien's fee-simple estate, and would carve that much out of said estate. The same result follows with respect to any easement or other interest which O'Brien then had in tract "First." Consequently the servitude was a burden, and a paramount burden to O'Brien's reserved right to mine the precious metals in tract "First." The subsequent conveyance of that right by O'Brien to plaintiff gave it no greater right than O'Brien then possessed, and therefore its mining right in tract "First" is subject to the defendant's right to deposit detritus thereon taken from tract "Third."

[7] As the question as to the exercise of these two rights under the deeds, as we have construed their effect, is not discussed in the briefs, it is only necessary for us to say that the right of the defendant to deposit detritus upon tract "First" is limited to what is reasonably necessary to enable it to conduct its dredge-mining operations upon tract "Third"; that the right is further limited by the maximum of 9,000,000 cubic yards, and that the deposit of this quantity of detritus, or any portion thereof, must be done in a manner reasonably required by the mining operations on tract "Third," and in a manner reasonably consistent with the right of the plaintiff to extract the precious minerals from tract "First" by dredge-mining operations. Whether the right to deposit the difference between 1,500,000 cubic yards of detritus and the balance of the 9,000,000 cubic yards is dependent upon the conditions expressed in the deed that a levee to the west of the settling basin should be elevated one foot for each additional 2,500,000 cubic yards of detritus deposited upon the land, is a matter that is not discussed in the briefs, and which therefore we will not consider. It is also necessary to pass upon the right to the use and occupation of the premises involved in the cross-complaint. The entire court concurs in the views hereinbefore expressed, but as to the right to the rents and profits the court is of opinion on that subject, from which I dissent, as follows, to wit:

"The Right of Possession.

[8] "In O'Brien's deed to the United States he reserved to himself 'the use and possession of said premises in so far as the same may not interfere with the use and possession of said premises by [the United States] its authorized agents, employees, or contractors, for any and all purposes that it or they may see fit to use the same, said use and possession so reserved to be subject to all the rules and regulations and orders of [the United States] its agents and employees.' This gave to O'Brien no right upon the premises, except when his use or occupation thereof did not interfere with the use or occupation of the United States. The deed contains no statement limiting the purposes for which the United

States should use the same. The conveyance being of the fee, it had the right to use the same for all purposes, except so far as such use was limited by the reserved servitude in favor of tract 'Third,' above mentioned, now owned by the defendant, and by the other reserved right of 'all precious metals on or in said premises,' which, as we have seen, included the right to mine the same by dredging. For any other purpose O'Brien's right to the use had to yield to the demands of the United States.

"On the other hand, until the United States demanded the use and possession of the property, O'Brien had the right to them and to any profits that might ensue from them. In this condition of affairs, the United States conveyed to the defendant on October 30, 1911, and O'Brien conveyed to the plaintiff on April 10, 1912. O'Brien had remained in the actual possession of the property up to the time of his deed to the plaintiff and then surrendered possession to the latter, which has been in possession ever since. So far as appears, no demand for possession was ever made upon O'Brien by the United States or upon O'Brien or the plaintiff by the defendant. The defendant, nevertheless, seeks by cross-complaint to recover from the plaintiff the value of the use and occupation of the property ever since the plaintiff took possession. But this it cannot do, except for such period as the plaintiff may have wrongfully been in possession, and until demand for possession was made by the United States, or by the defendant as its grantee, either upon O'Brien while he was in possession, or upon the plaintiff after it acquired possession, the possession of O'Brien and the plaintiff was not wrongful, but was under and in accord with the reservation under discussion. The theory of the defendant seems to be that the conveyance by the United States to it ipso facto terminated O'Brien's reserved right to use and possession. But O'Brien was lawfully in possession, and had the right to remain in possession until demand was made upon him, and this right, it seems plain to us, existed as to the grantee of the United States as well as to the United States itself. The defendants can therefore recover for the value of the use and occupation of the property only in case it appear that demand was made upon O'Brien or the plaintiff for possession and then only for the period subsequent to such demand."

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

184 Cal. 426

HAIGHT v. COSTANICH. (Sac. 2880.)

(Supreme Court of California. Dec. 3, 1920.)

1. **Waters and water courses 🔑140—Rights to divert and use waters subject to vested rights.**

Defendant's rights to waters to which his land is riparian are subject to those rights to divert and use which had vested and accrued through diversion prior to the vesting of defendant's rights under his grant from the United States government and to such rights as have been subsequently acquired by prescription through adverse and uninterrupted use for five years.

2. **Waters and water courses 🔑18—Riparian rights under government patent obtain from date of entry.**

The grant of a patent to a settler on public lands relates back to the filing of entry in the United States land office and confers the rights of a riparian owner upon the grantee from the date of entry.

3. **Waters and water courses 🔑20—Federal laws recognize local customs as to possessory water rights at time of entry.**

Defendant's rights under his government patent are subject to water rights under the California law of possessory right which had vested prior to defendant's entry, since the federal statutes protect such former rights upon the public domain acquired by diversion where they are recognized and acknowledged by local customs, laws, and court decisions. Rev. St. U. S. §§ 2339, 2340 (U. S. Comp. St. §§ 4647, 4648).

4. **Waters and water courses 🔑14—Actual diversion and use sufficient for rights by appropriation.**

Compliance with Civ. Code, § 1410 et seq., by posting notice is not essential to the acquisition of water rights by appropriation; actual diversion and use being sufficient.

5. **Waters and water courses 🔑24—Amount diverted determined by actual use, and not capacity of ditch.**

The quantity of water to which a person becomes entitled by diversion is not determined by the capacity of the diverting ditch, but is limited to the amount applied to a beneficial use; that is, the amount actually used and reasonably necessary for the useful purpose to which water has been applied.

6. **Waters and water courses 🔑24—Right to divert more than originally used in accordance with original intent if diligent.**

The quantity of water to which a person may become entitled by diversion is not limited to that actually used at time of original diversion, but he may take additional water to meet increasing needs where within the scope of the original intent, if such be done within a reasonable time and by the use of reasonable diligence.

7. **Waters and water courses 🔑29—Right to additional water under license from federal government not limited by state statute to five years from original diversion.**

Rights acquired by diversion prior to defendant's entry upon government land which were acquired outright under license of the federal government, and not by mere occupancy, embraced the conditional right to take an additional amount of water for future needs within the scope of the original intent within a reasonable time, which is not limited by Civ. Code, § 1411, to a period of five years from the date of original diversion, since such time may or may not be reasonable under the circumstances.

8. Waters and water courses 🔑24—Measure of quantity to which plaintiff had right by diversion.

Plaintiff is entitled by right of diversion to the quantity of water actually used for beneficial purposes at the time of the original diversion which was reasonably necessary, plus any additional quantity intended at time of original diversion to be applied to future needs and actually put to use within a reasonable time, measured by circumstances and reasonably necessary therefor, as against defendant obtaining land from the government over which plaintiff's ditch passed and which was entitled to riparian rights in the same stream.

9. Waters and water courses 🔑29—Right to divert excess water does not relate back to inception as intervening appropriator complying with Code.

The rule that an appropriator's right at a later date to take water in excess of that which he had diverted and put to beneficial use may relate back to the inception of his work, although he has not complied with the Code requirements, does not hold as against an intervening appropriator who has complied therewith, in view of Civ. Code, § 1419.

10. Waters and water courses 🔑143—Title by prescription cannot be obtained to water in excess of needs.

Plaintiff might, after defendant's entry on government lands and diversion of water, increase by prescription the quantity to which he was entitled, but such right is limited to water reasonably necessary for the beneficial purpose for which it is diverted, and no prescriptive title can be acquired to that part of a diversion in excess of needs.

11. Waters and water courses 🔑24 — Judgment based on capacity of ditch as measure of right, irrespective of beneficial use, is erroneous.

A judgment rendered on the assumption that the capacity of plaintiff's ditch over government lands at the time of the original diversion and prior to defendant's entry on such land was the measure of his rights, irrespective of beneficial use, must be reversed for such error.

12. Waters and water courses 🔑33—Burden upon plaintiff alleging subsequent diversion according to intent on original diversion to prove such facts.

Where, at the time defendant became possessed of riparian rights, plaintiff was using only enough water for stock, domestic purposes, and irrigation of six acres, if plaintiff had at time of original diversion planned for additional water to irrigate newly cultivated land, and had not completed preparation thereof at time of defendant's entry on the government land, but continued thereafter with due diligence to use such additional water, the burden was upon the plaintiff to prove such facts.

13. Waters and water courses 🔑152(6)—Burden upon plaintiff to show adverse use for five years.

If plaintiff acquired a right to more water after defendant's entry by adverse use for a period of five years, the burden was upon plaintiff to show such fact.

14. Waters and water courses 🔑152(7) — Where evidence showed no right by prescription or by relation back to original diversion to water for additional land, evidence of water needed therefor was inadmissible.

Where the evidence showed that 15 acres of plaintiff's land, and not the whole 22 acres, were under irrigation continuously for five years before commencing action, and the right to take water for an additional 7 acres could not relate back to the original diversion, because there was no reasonable diligence in its preparation, evidence as to water needed for the 22 acres was incompetent and irrelevant.

15. Waters and water courses 🔑152(8)—Evidence held insufficient to support finding as to quantity of water.

Evidence *held* to show plaintiff's right only to water to irrigate 6 acres of land and insufficient to support a finding of the use of 48 miner's inches for 35 years, which was the capacity of the ditch and more than necessary to irrigate 6 acres.

16. Waters and water courses 🔑24—Amount put to beneficial use for particular time, and not flow of ditch, determines right as to quantity.

The mere fact that a ditch was full or carried a certain quantity of water throughout the season is of no consequence unless the whole amount of water was put to beneficial use; for, if it ran full all the time, but was used only half the time, there would be a right only to one-half of the water flowing or to all the water for half the time.

In Bank.

Appeal from Superior Court, Shasta County; James G. Estey, Judge.

Action by Herbert Haight against Marion C. Costanich. Judgment in favor of plaintiff, and defendant appeals. Reversed.

Carr & Kennedy and Chenoweth & Leininger, all of Redding, for appellant.

Braynard & Kimball, of Redding, for respondent.

LENNON, J. Plaintiff and defendant, who are the owners of adjoining tracts of land in Shasta county, seek in this action an adjudication of their respective rights in and to the waters of a creek, known as the North fork of Richardson creek, to which defendant's land is riparian. In 1885 plaintiff's predecessor in interest made entry of plaintiff's land, which was then part of the public lands of the United States, in the United States land office, obtaining a patent in 1895. Prior to making entry of his land, the predecessor of plaintiff constructed a ditch which had at that time, and still has, a carrying capacity of 48 miner's inches, by which he diverted water from the North fork of Richardson creek across the land of defendant, which at that time was part of the public domain, to plaintiff's land, where it was used for irrigation, stock, and domestic purposes. At the time defendant made entry of his land, which was in 1886, the ditch above mentioned had been constructed and plaintiff's predecessor had about 6 acres of his land cleared, cultivated, and under irrigation from said ditch. Just when additional acres of plaintiff's land were cultivated does not clearly appear from the testimony, but some time between the years 1886 and 1910 the acreage under irrigation was increased to at least 15. In 1892 defendant constructed a ditch with a capacity of 75 miner's inches, the intake of which was higher up the creek than that of plaintiff. The evidence does not show that either party objected, prior to 1916, to the amount of water diverted by the other; some witnesses testified that there was at all times sufficient water in the creek for the uses of both. From 1892 both plaintiff and defendant diverted water through their respective ditches and used it for irrigation and stock purposes until the year 1916, when defendant dammed up the creek so as to prevent all water from flowing into plaintiff's ditch.

Plaintiff in his complaint asked for an injunction restraining defendant from interfering with his use of the water and for a judgment for damages alleged to have resulted to his crops from defendant's interference with the flow of water in his ditch. The trial court decreed that plaintiff was entitled to 48 miner's inches of the first flow of the waters of the North fork of Richardson creek, and that, subject to said right of plaintiff, defendant was entitled to the remainder thereof, amounting to 52 miner's inches, and gave judgment for damages against defendant for the sum of $613.30. Upon his appeal from the judgment defendant does not question the right of plaintiff to divert water across defendant's land by means of his ditch; the amount of water which plaintiff is entitled to divert is the point of controversy.

[1] Defendant's claims are based upon his ownership of riparian lands. The rights of defendant to the waters to which his land is riparian are subject to those rights to divert and use the waters which had vested and accrued, as the result of diversion, prior to the vesting of defendant's rights as a riparian owner under his grant from the United States government. Osgood v. Water Co., 56 Cal. 571; Himes v. Johnson, 61 Cal. 259; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Duckworth v. Water Co., 170 Cal. 425, 432, 150 Pac. 58. His rights are also subject to such rights to the waters as have been acquired subsequent to his entry, by purchase and grant or by prescription; "that is, by adverse use for the period of five years without interruption by the real owner." Palmer v. R. R. Com., 167 Cal. 163, 172, 138 Pac. 997; Smith v. Hawkins, 110 Cal. 122, 125, 42 Pac. 453; Duckworth v. Water Co., 150 Cal. 520, 530, 89 Pac. 338. The first question to be determined is the extent of plaintiff's rights acquired by diversion prior to the vesting of defendant's rights as a riparian owner.

[2] The granting of a patent to a settler on public lands is held to relate back to the filing of the entry of the land in the United States land office and to confer the rights of a riparian owner upon the grantee of the patent from the date of his entry. Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384. Therefore, upon the granting to defendant of a patent to his land in 1893, his rights as a riparian owner vested as of the date of his entry, namely, 1886.

[3] Defendant's rights under his patent are subject to water rights which, under the California law of possessory rights, had vested prior to defendant's entry, for the federal statutes provide for the protection of those rights to waters upon the public domain, acquired by diversion, which are recognized and acknowledged by the local customs, laws, and decisions of the courts of the localities where such rights are claimed. U. S. Rev. Stats. §§ 2339, 2340 (U. S. Comp. St. §§ 4647, 4678); Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240; Telluride Power Co. v. Rio Grande, etc., Ry., 175 U. S. 639, 20 Sup. Ct. 245, 44 L. Ed. 308.

[4] Plaintiff's appropriation was not made by posting notice as required by the provisions of the Civil Code (Civ. Code, § 1410 et seq.), but compliance with these provisions is not essential to the acquisition of rights by appropriation; actual diversion and use of the water is recognized as a valid appropriation in this state. De Necochea v. Curtis, supra; Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 211, 110 Pac. 927.

[5] The quantity of water to which a person becomes entitled by such diversion is not determined by the capacity of the ditch diverting the water; the extent of the right gained by the diversion is limited to the amount of water applied to a beneficial use, which has been interpreted to mean the amount actually used and reasonably necessary for a useful purpose to which the water has been applied. McKinney v. Smith, 21 Cal. 374; Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213; Cal., etc., Co. v. Madera, etc., Irr. Co., 167 Cal. 78, 138 Pac. 718.

[6] However, the quantity of water to which a person may become entitled by di-

version is not necessarily limited to the amount of water actually used at the time of the original diversion. Inasmuch as plaintiff's diversion was not made under the modes prescribed by the California statutes, it is governed solely by the California law of possessory rights as it existed prior to the adoption of such statutory methods. The cases involving water rights acquired under this law—

> "lay down the rule that a right to the use of running water does not vest in possession at common law, until there has been an actual diversion and beneficial use of the water. But they all recognize, and some of them declare, that, before any actual diversion or use of the water, a claimant may acquire an incipient, incomplete, and conditional right to the future use of the water, by beginning the construction of the works necessary for such diversion and use, and in good faith diligently prosecuting the same toward completion. * * * There is no case arising prior to the enactment of the Code which holds that the party who thus in good faith began and diligently prosecuted the work on a dam and ditch for the diversion and use of water could not protect his incipient right to the water against the hostile diversions and claims of others by an appropriate suit for that purpose. It is obvious that this could not be so. Such visible act and avowed intent gave him a conditional right to the future use of the water, prior to its actual use; the condition being that he should thereafter diligently continue the work to completion and then divert the water and apply it to a useful purpose, failing which his right would cease. Upon the performance of these conditions, his title to such use would become complete and perfect. In the meantime, however, he had an existing conditional right, manifested by actual visible possession of the works." Inyo Cons. Water Co. v. Jess, 161 Cal. 516, 519, 119 Pac. 934, 936.

This right to take an additional amount of water reasonably necessary to meet increasing needs is not unrestricted; the new use must have been within the scope of the original intent, and additional water must be taken and put to a beneficial use in keeping with the original intent, "within a reasonable time by the use of reasonable diligence," or the right to the additional water is subject to intervening claims. Senior v. Anderson, 115 Cal. 496, 504, 47 Pac. 454, 456; Inyo Cons. Water Co. v. Jess, supra.

[7] Defendant contends that the period of time within which the right to use an increased amount of water to meet accruing needs must be exercised is limited to a period of five years from the date of the original diversion, basing the contention upon the fact that, by virtue of section 1411 of the Civil Code, as interpreted in the California cases, a right acquired by appropriation ceases upon a failure to make a beneficial use of the appropriation for a period of five years. Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453, affirmed 120 Cal. 86, 52 Pac. 139; Lindblom v. Water Co., 178 Cal. 450, 173 Pac. 994. This rule, however, is inapplicable to the facts of the present case. Whatever rights were acquired by plaintiff to take an increased amount of water to meet accruing needs were not within the rule prescribing a definite period for loss by nonuse of rights acquired by prescription or under the provisions of the Civil Code. The rights acquired by diversion prior to defendant's entry were acquired outright under license from the federal government, and not by mere occupancy. This license under which the diversion was made embraced the conditional right to take an additional amount of water to meet future needs, within the scope of the original intent, within a reasonable time. Five years may or may not have been a reasonable time. In this connection it should be noted, as previously indicated, that there was not any clear showing of when the preparation of additional acres of land and the diversion of water for use thereon was commenced and completed. If plaintiff had made his original diversion with the intent to take more water to irrigate additional land, and had planned his diversion works for that purpose, but had not completed the same, or had not completed the preparation of the additional land at the time of defendant's entry, plaintiff could not lose this right to additional water by nonuse for an arbitrary period after defendant's entry, but was entitled, as part of the right itself, to a reasonable time under all the circumstances of the case within which to exercise the right to divert an increased amount of water and use it for beneficial purposes as originally intended.

[8] It follows that the quantity of water to which plaintiff is entitled by right of diversion is the quantity actually used for beneficial purposes at the time of the original diversion, and which was reasonably necessary for such purposes, plus any additional quantity intended to be applied to future needs at the time of the original diversion, which has been actually put to use within a reasonable time, measured by all the circumstances of the case, after the original diversion, and which was reasonably necessary therefor.

[9] It perhaps should be said that this rule, whereby the right of an appropriator to take at a later date water in excess of that which he diverted and put to beneficial use in the first instance may relate back to the inception of his work, although he has not complied with the Code requirements, does not hold as against an intervening appropriator who does comply with the Code requirements. As against such an intervening appropriator, the first has, under section 1419 of the Civil Code, only such right as was perfected by diversion and beneficial use at the time the intervening appropriator com-

mences his appropriation by posting his notice. But the Code section by its terms destroys the right of relation back of an appropriator who does not comply with the Code only as to a subsequent appropriator who does. As to all others, his rights are not affected by the Code provisions and are to be determined by the law governing the subject of appropriations as it exists independently of the Code. Wells v. Mantes, 99 Cal. 586, 34 Pac. 324; Senior v. Anderson, supra.

[10] In addition to any rights thus acquired by diversion before defendant's entry, plaintiff, as previously stated, might, of course, after defendant's entry, increase the quantity of water to which he was entitled as against defendant, who was a riparian owner, by prescription; that is, by diverting and using a certain quantity of water "continuously, uninterruptedly, and adversely for a period of at least five years." Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453. A right acquired by prescription is likewise limited to the amount of water reasonably necessary for the beneficial purpose for which it is diverted, and no title by prescription can be acquired to that part of a diversion which is excessive of such needs. Cal., etc., Co. v. Madera, etc., Co., supra. Whether plaintiff rests his right to the water upon diversion under the federal statutes, or upon prescription, the quantity of water to which he is entitled is dependent upon the quantity of water reasonably necessary for the beneficial uses to which it was applied, as well as to the amount actually applied to such uses.

[11] Viewed in the light of these principles, the judgment of the trial court must be reversed because of the error, pervasive and perversive of both trial and judgment, in assuming that the capacity of plaintiff's ditch at the time of the original diversion, prior to defendant's entry, was the measure of his rights, irrespective of beneficial use.

That this was the theory of counsel for plaintiff at the trial is indicated by their opening statement:

> "But we shall claim that * * * no question arises in this case as to the beneficial use of water; for instance, That the government of the United States said to George Haight: 'You have constructed this ditch. You own that land. You took this ditch on government land and you have a right to all the water that that ditch will carry, whether you can put it to a beneficial use or not.'"

The following colloquy occurred at the trial:

> "The Court: Is the question of necessary use involved in this case?
>
> "Attorney for Plaintiff: Well, the other side contends that it is. We contend that it is not."

Doubtless, because of the erroneous assumption that the capacity of the ditch, since it diverted water on government land, determined plaintiff's rights, the testimony offered on behalf of plaintiff merely tended to prove that his ditch had been running full for about 20 or 30 years last past, and that plaintiff's predecessor in interest and plaintiff had irrigated his land with water from the ditch during all of that time.

[12, 13] Defendant's rights as a riparian owner were proved when he showed his entry upon land riparian to the stream. At the time when defendant became possessed of riparian rights, when he made entry in 1886, plaintiff was, as the record shows, using only enough water for stock and domestic purposes and for the irrigation of 6 acres of land, and defendant's riparian rights were subject to plaintiff's right to take such an amount of water. If plaintiff had, at the time of his original diversion, planned to take additional water to irrigate newly cultivated land, had planned his diversion works for that purpose, had not completed the works or the preparation of his land at the time of defendant's entry, and continued thereafter with due diligence to prepare such land and use the additional water, the burden was upon him to prove these facts. Gardner v. Wright, 49 Or. 609, 91 Pac. 286; 3 Kinney on Irrigation (2d Ed.) p. 2802. Likewise, if plaintiff acquired a right to more water after defendant's entry by adverse use for a period of five years, the burden was upon plaintiff to show that fact. Gurnsey v. Water Co., 6 Cal. App. 387, 392, 92 Pac. 326.

[14] There is no evidence of due diligence, or any diligence, in perfecting a previously initiated diversion for a larger amount than he was using at the time of defendant's entry; nor was there any evidence showing an acquisition of an additional right by adverse user. When asked how much of the water from the ditch was needed for the irrigation of his 22 acres of land since January, 1910, plaintiff replied: "All that was in it." This evidence was introduced at the close of the trial upon permission to reopen the case obtained after oral argument. It is to be noted that plaintiff himself testified that in the irrigating season his ditch ran about two-thirds full. Taken as a whole, therefore, plaintiff's testimony can only mean that, since January, 1910, 32 miner's inches of water were needed (not actually used) for the irrigation of 22 acres. Furthermore, the evidence shows that in 1915 only 15 acres were under irrigation, so the whole 22 acres could not have been under irrigation continuously for 5 years before the commencement of this action, in 1916, nor could the right to take water for the irrigation of the additional 7 acres relate back to the original diversion, for there was clearly no reasonable diligence in the preparation of this additional land. Therefore, under the circumstances disclosed by the record, the evidence as to the amount of water needed for the irrigation of 22 acres was incompetent and irrelevant.

[15] It is obvious that plaintiff did not show a right to more than enough water to irrigate 6 acres. The finding that for more than 35 years plaintiff has diverted and used 48 miner's inches, which is the capacity of the ditch and far more than is necessary for the irrigation of 6 acres, is wholly unsupported by the evidence, and the judgment awarding plaintiff 48 miner's inches cannot be sustained.

[16] It is important, in the event of a new trial, that the parties be advised that the mere fact that the ditch was full or carried a certain quantity of water throughout the season is of no consequence unless all of the water so carried was put to a beneficial use all of the time; that is to say, the amount of water beneficially used during the entire season is determinative of the quantity to which plaintiff is entitled. If, for example, the plaintiff kept the ditch running full for 4 months continuously, but used the water only 2 months in the aggregate, he would gain a right to receive only one-half of the water flowing in the ditch, or to all of it for one-half of the time.

The judgment of the court was also erroneous in proceeding upon the theory that the flow of the North Fork is 100 miner's inches during the irrigating season, whereas, according to the undisputed testimony, the flow is only 80 miner's inches.

The amount of damages to be awarded plaintiff will have to be ascertained after the number of acres which plaintiff is entitled to have irrigated with the water from his ditch is definitely determined in accordance with the principles above set forth.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LAWLOR, J.; WILBUR, J.; SLOANE, J.

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184 Cal. 484

NORTHWESTERN REDWOOD CO. et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 9393.)

(Supreme Court of California. Dec. 8, 1920. Rehearing Denied Jan. 6, 1921.)

1. Master and servant 🔑347 — Workmen's Compensation Act, allowing wife of injured employé to prosecute proceedings, held valid.

Workmen's Compensation Insurance and Safety Act of 1917, § 24(b) subd. 5, allowing living expenses to the wife or minor children of an injured employé who has deserted or is neglecting his family, is not unconstitutional in permitting a wife to proceed in behalf of the community to secure the compensation, which is community property, particularly where the husband has deserted the wife.

2. Master and servant 🔑398—Change in title of wife's petition for compensation held not a new proceeding barred by limitation.

Where an injured employee deserted his wife, and she instituted proceedings under Workmen's Compensation Insurance and Safety Act of 1917, §§ 17(a), 24(b), 55(a), for compensation, entitling them in her husband's name, signing the application herself, but later amended the application so as to bring the proceedings in her own name, the fact that such amendment was made after the expiration of the six months fixed by law for the bringing of the proceedings had expired *held* not to bar her claim; the mere change in the title being merely a correction of an informality within section 60(a), and not the commencement of a new proceeding.

3. Master and servant 🔑398—Constructive notice held binding on injured employee deserting wife petitioning for compensation.

Where an injured employee deserted his wife, who later instituted proceedings for compensation under the Workmen's Compensation Insurance and Safety Act to enforce her rights in the community property, constructive notice to the husband by publication *held* sufficient as to him, as the proceeding may be characterized as one quasi in rem.

4. Master and servant 🔑405(1) — Evidence held to show injured employee had deserted wife applying for compensation.

In a proceeding by a wife under Workmen's Compensation Insurance and Safety Act to recover for injuries to her husband, evidence *held* to show that he had deserted her and was living.

In Bank.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by Mary A. Schaefer, opposed by the Northwestern Redwood Company, employer, and the Fidelity & Casualty Company of New York, insurance carrier, to recover compensation for injuries sustained by her huband, Jack Schaefer. An award of compensation was made by the Industrial Accident Commission, and employer and insurance carrier apply for certiorari. Award affirmed.

R. P. Wisecarver, of San Francisco (Redman & Alexander, of San Francisco, of counsel), for petitioners.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

WILBUR, J. Petitioners seek to review and annul an award of the respondent commission which was made because of an accident suffered by Jack Schaefer, husband of respondent Mary Schaefer, February 14, 1918, while he was employed by the Northwestern Redwood Company, resulting in the amputation of one finger and the crippling of the other fingers of the hand. No question is raised as to the amount or as to the obligation to make compensation for said injuries under the Workmen's Compensation Law. The contention of the petitioners is that the award could not properly be made upon the petition of the wife. The injured employee had married the respondent Mary A. Schaefer about a week before the accident. Two months after the marriage he left his wife, taking with him $500 of her money, came to San Francisco, wrote her that he would return on the next Sunday, and has not been heard of since.

The respondent, Mary Schaefer, based her right to the award upon the provision of section 24, subd. 5, of the Workmen's Compensation Insurance and Safety Act of 1917 (Stats. 1917, pp. 831, 852), which is as follows:

> "(b) The commission may fix and determine and allow as a lien against any amount to be paid as compensation: * * * (5) The reasonable living expenses of the wife or minor children of the injured employee, or both, subsequent to the date of the injury, where such employee has deserted or is neglecting his family, to be allowed in such proportion as the commission shall deem proper, upon application of the wife or guardian of the minor children."

Petitioner claims, however, that the application for compensation must be made by the injured employee, and that the application by the wife as a lien claimant is not authorized by the law. The statute expressly authorizes the application by any party in interest. The provision is in sections 17 and 55, as follows:

> "Sec. 17. (a) Upon the filing with the commission by any party in interest, * * * concerning any right or liability arising out of, or incidental thereto, jurisdiction over which is vested by this act in the commission, a time and place shall be fixed for the hearing thereof. * * *"
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> "Sec. 55. (a) All proceedings for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto, or for the enforcement against the employer or an insurance carrier of any liability for compensation imposed upon him by this act in favor of the injured employee, his dependents or any third person, or for the determination of any question as to the distribution of compensation among dependents or other persons * * * or for obtaining any order which by this act the commission is authorized to make, or for the determination of any other matter, jurisdiction over which is vested by this act in the commission, shall be instituted before the commission, and not elsewhere, except as otherwise in this act provided, and the commission is hereby vested with full power, authority and jurisdiction to try and finally determine all such matters, subject only to the review by the courts in this act specified and in the manner and within the time in this act provided."

[1] In dealing with the right of the wife to maintain a proceeding, it is well to remember that the compensation inuring to the husband by reason of his disability is community property. Although the interest of the wife in such property is inchoate, there is no constitutional objection to a law which permits her to proceed in behalf of the community to secure the property belonging to the community, particularly where the husband has deserted the wife and defaulted in his obligations to the marital partnership. Moreover, it is quite as consistent with the whole theory of the Workmen's Compensation Act to allow the wife or children of an injured employee, who is neglecting his obligation to his family by desertion or otherwise, to prosecute the proceedings for the recovery of compensation as it is to allow the dependents of a deceased husband to prosecute a similar proceeding. The latter course has been sustained as a constitutional exercise of authority (Western Metal Supply Co. v. Industrial Accident Commission, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390), and for the same reasons the provisions of the act relied upon by the respondent Mary Schaefer must be sustained as constitutional.

With these preliminary observations we return to a consideration of the points raised by the petitioner with reference to the procedure adopted in this case for the enforcement of the claim or lien of the wife against the compensation due to her husband because of the injuries received by him in the course of his employment.

On May 22, 1918, the wife filed an informal request with the commission asking that she be granted a lien upon the compensation alleged to be due her husband on account of this injury. On June 5, 1918, the commission filed and served an order upon the petitioners to show cause why such a lien should not be granted. A return was made denying that any compensation was due the husband. On June 17, 1918, Mary A. Schaefer signed and filed a formal application with the Industrial Accident Commission requesting an adjustment of the claim of her husband and the enforcement of her lien thereon. This application, although made by the wife in her own name, was entitled, "Jack Schaefer, applicant, v. Northwestern Redwood Company, a Corporation, defendant." Notice of the hearing of the application was given for July 17, 1918. The petitioners appeared and resisted the application. At the hearing the petitioner testified that she had no authority from her husband to file the application on his behalf, that she did not know where he was, and that he had disappeared, and related the circumstances of his disappearance. On September 20, 1918, the commission denied the application of petitioner herein to dismiss the application, and on September 26, 1918, more than six months after the injury, an order was made amending the title of the application by substituting Mary A. Schaefer as the applicant instead of Jack Schaefer, and that Jack Schaefer, the injured employee, be made a defendant with the petitioner herein, and that the proceedings be continued under the new title. It was further ordered that notice of the time and place of hearing of the application should be published. On October 17, 1918, a notice of hearing was served upon the petitioners herein, and the hearing was set for January 17, 1919. It appeared on that date that the notice had not been properly published, and on February 11, 1919, the commission again set the hearing in the case and ordered publication of notice to the defendant husband. The hearing was fixed for April 30, 1919. At that time, it appearing to the commission that proper notice had been published, a hearing was had and an award made that the employee had received an injury in the course of his employment, and that by reason thereof he was entitled to $2,314.35, payable at $16.67 per week for 139 weeks; that the amount of compensation accrued and payable to December 29, 1919, equaled the sum of $1,598.40. The commission further found that Mary A. Schaefer was the deserted wife of Jack Schaefer; that she was entitled to $60 a month as a lien on his compensation from and after the 16th day of April, 1918; and that the amount accrued to the 16th day of December, 1919, a period of 20 months, was $1,200. This amount was ordered payable forthwith to Mary A. Schaefer, with an award to her of $60 a month beginning December 16, 1919, and continuing until the exhaustion of the disability indemnity of $2,314.35 due Jack Schaefer. It is claimed by the petitioners that substitution of the respondent wife as a petitioner before the commission was in legal effect the beginning of a new proceeding on her behalf after the period of 6 months fixed by law for the bringing of such proceedings had expired, and that therefore her claim is barred. This claim is based upon the assumption that the first petition was a wholly unauthorized application by the wife as agent for the husband, and, hence, ineffective to toll the statute of limitations.

[2] However, it is clear from the entire procedure that the wife from the first was seeking to enforce the obligation which the statute authorized her to enforce, namely, a claim or lien upon the compensation due her husband. The fact that the first petition was entitled as if brought by the husband is immaterial. The face of the petition showed the nature of the claim asserted and that the petitioner signed the petition in her own right. The Workmen's Compensation Act and the Constitution both expressly require the commission to proceed without formality, and the act (section 60a) directs that the awards of the commission shall not be set aside because of any informalities in the procedure. The commission is directed by the provisions of section 60(a) to "make inquiry in such manner, through oral testimony and written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this act. No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the commission." In view of the nature and character of the proceeding, we hold that the mere change in the title of the petition and of the proceedings had no effect upon the substantial matters submitted to the commission for adjudication, and that they had jurisdiction under the petition as filed, with or without amendment, to determine the rights of the deserted wife to the compensation allowed to her husband and herself by law.

[3] Petitioners also claim that the award is improper because of the fact that no notice other than by publication was served upon the husband, for the reason that he is thus deprived of his property without due process of law. Respondent maintains that this constitutional question cannot properly be raised by the employer, who, in any event, is bound to make compensation. Without passing upon respondent's contention, it is sufficient to say that the purpose of this proceeding is to enforce the rights of the wife in community property located in this state, and that constructive notice to the husband is, therefore, sufficient to give jurisdiction to pass upon the questions so involved.

The proceeding may be characterized as one quasi in rem. In such proceeding notice by publication is a sufficient compliance with the federal Constitution. The distinction between this type of action and an action in personam is pointed out in L. R. A. 1918F, 609, 610. It is unnecessary to discuss this matter at length, as the right to subject this claim within the state of California to the lien of the wife is sufficiently clear from the authority just cited. The rule in such matters is stated in the leading case of Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565:

> "The state, having within it certain property of a nonresident, may hold and appropriate it to satisfy the claims of her citizens against him, and her tribunals may inquire into his obligation to the extent necessary to control the disposition of that property. If he has no property within the state, there is nothing upon which her tribunal can adjudicate."

[4] The petitioners next contend that there is a presumption that the husband is dead, and that, therefore, the award is improper. It is argued that the presumption that the

husband is innocent of crime overcomes the presumption of the continuance of life, and that, therefore, the presumption of innocence required the commission to find that the husband was dead. This contention is based upon the fact that under section 270a of the Penal Code it is a felony for a husband to willfully abandon his wife in a destitute condition, or to refuse or neglect to provide such wife with necessary food, clothing, etc. It appears, however, that the commission were amply justified in finding that the injured employee was still living. The wife has never heard from him since his arrival in San Francisco. Either he left home intending to desert his wife or afterward formed that intention, or suddenly died without sufficient warning to notify his wife of his condition. He was in good health when he left home. There was no reason, other than his sudden death or an intention to desert, why he should not have written his bride of two months, if, for any reason he had changed his plan to come home the next Sunday. If he had died suddenly, no doubt the wife would have been notified. She received no such notice. There were other facts and circumstances, which need not be stated, which also supported the conclusion of the commission that Jack Schaefer was living.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; LENNON, J.

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184 Cal. 451

HORTON et al. v. GOODENOUGH et al.
(L. A. 6045.)

(Supreme Court of California. Dec. 6, 1920.)

1. Waters and water courses 🔑115, 118 — "Surface waters" means waters falling by precipitation or arising in springs; obstruction of flow of surface waters not within right of owner.

One has no right to obstruct the flow onto his land of what are technically known as "surface waters," but the term does not include all waters which may be on or moving across the surface of the land without being collected into a natural water course, being confined to waters falling on the land by precipitation or arising thereon in springs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Surface Water.]

2. Waters and water courses 🔑54 — Owner may protect against "flood waters" though obstruction causes water to flow on another's land.

One has the right to protect himself and his land against "flood waters," that is, waters escaping from a natural water course in time of flood or overflow, and for such purpose may obstruct the flow onto his land, even though such obstruction causes them to flow onto land of another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Flood Water.]

3. Waters and water courses 🔑38, 51, 78 — "Water course" is stream with definite channel; flow of natural water course may not be obstructed or diverted.

One may not obstruct or divert the flow of a natural water course, "water course" not meaning the gathering of errant waters while passing through a low depression, swale, or gulley, but a real stream, with a definite channel, with bed and banks, within which they flow at the times when the streams of the region habitually flow.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Water Course.]

4. Waters and water courses 🔑54—Waters breaking from channel are "flood waters" against which threatened property owner can protect himself; "surface waters."

Where a stream coming out of the mouth of a canyon has left a cone of detritus and flows down one side thereof, but in a time of high water it breaks out of its channel to flow down the other slope of the cone, such waters are flood waters running wild, and any property owner threatened thereby has the right to protect himself against them as best he can, the waters not being "surface waters" in the technical sense, it being immaterial that the escaping waters have made for themselves a channel or follow some natural channel, gulley, or depression to come to defendant property owner, who has protected himself against them, as a stream, instead of spreading out over the ground.

5. Pleading 🔑280—Leave to file supplemental answer pleading former judgment properly refused in absence of allegation that particular issue in present case was determined.

In an action for damages to plaintiffs from the acts of defendants in interfering with the course of flood waters, diverting them from their own lands upon plaintiff's, the trial court properly refused to a defendant leave to file supplemental answer pleading judgment against a plaintiff in another action brought by him against such defendant; such supplemental answer not alleging that the issue in the present case was in fact determined by the former judgment adversely to plaintiff, and not making any equivalent allegation to show any estoppel on plaintiff.

6. Judgment 🔑713(1)—Determination works estoppel when issue is one necessarily determined by jury in order to reach verdict.

If the issue as to which estoppel by former judgment is claimed was one which had to be determined by the jury to reach their verdict, the verdict and consequent judgment are a final determination of the issue binding on the parties in all subsequent litigation; but, if the issue was not one which the jury had to decide to reach verdict, the determination does not work an estoppel.

Department 1.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by J. M. Horton and another against Edgar D. Goodenough and others. From judgment for plaintiffs, defendants appeal. Reversed.

Robert M. Clarke, of Los Angeles, for appellants.

Charles F. Blackstock, of Oxnard, for respondents.

OLNEY, J. [1-3] This as an action wherein the plaintiffs seek to enjoin the continued maintenance by the defendants of certain small structures which the latter have built for the purpose of preventing water from flowing onto their lands. There is no question but that the defendants built the structures complained of or that the structures, or one of them, had the effect of diverting the water from the course it otherwise would have followed into a course which finally led some of it to the plaintiffs' land. The only question is as to the right of the defendants to maintain the structures. The primary rules of law governing such a case are simple enough and well settled, and are three in number. First, one has no right to obstruct the flow onto his land of what are technically known as surface waters. Heier v. Krull, 160 Cal. 441, and authorities therein cited at page 444, 117 Pac. 530. But by "surface waters" are not meant any waters which may be on or moving across the surface of the land without being collected into a natural water course. They are confined to waters falling on the land by precipitation or rising thereon in springs. Putting it conversely, they do not include waters flowing out of a natural water course, but which yet were once a part of a stream and have escaped from it, "flood waters" in other words. McDaniels v. Cummings, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575; Farnham on Waters, § 278. Second, one has the right to protect himself against "flood waters," that is, waters of the character last described, and for that purpose to obstruct their flow onto his land, and this even though such obstruction causes the water to flow onto the land of another. Barnes v. Marshall, 68 Cal. 569, 10 Pac. 115; Lamb v. Reclamation District, 73 Cal. 126, 14 Pac. 625, 2 Am. St. Rep. 775; De Baker v. Railway Co., 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237; Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169. Third, one may not obstruct or divert the flow of a natural water course. But by a "water course" is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow. Los Angeles, etc., Ass'n v. Los Angeles, 103 Cal. 466, 37 Pac. 375; Sanguinetti v. Pock, supra; San Gabriel Country Club v. Los Angeles, 188 Pac. 554; Simmons v. Winters, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727.

Such being the law, the complaint and findings are quite uncertain as to the character of the waters whose diversion by the defendants' obstructions is complained of. They are alleged and found to be "surface or flood waters." But if these words are used in their technical senses, surface waters and flood waters are not the same, and the defendants have not the right to obstruct them in the one case and have the right in the other. Nor is the uncertainty removed by assuming that the words were not used in a strictly technical sense, but that what was meant was that the waters were errant waters flowing over the surface of the ground without being gathered into the channel of a water course. If that be the meaning, then the character of the waters as surface or flood waters in the technical sense is not stated, and yet according as they are one or the other the plaintiffs are or are not entitled to recover. Nor is this uncertainty cured by the further statement in the complaint and findings that the obstructions were of waters "in natural channels." It is quite evident from the context that the channels so spoken of were channels only for flood and surface waters, and were not the channels for water courses or streams in the real sense. Apparently the cause was tried and decided upon the theory that the defendants had no right in any case to obstruct the flow of water onto their lands. Such is not the law. If the water was flood water, the defendants had the right to divert it from their lands even though such diversion injured the plaintiffs. It may perhaps be that even in such a case the defendants could not divert the water in a manner which would unnecessarily injure the plaintiffs, but that question is not presented and does not require consideration.

But we need not decide the case upon any insufficiency of the complaint and findings. The evidence, while perhaps somewhat obscure on certain points, is without substantial conflict, and we believe the material facts appear with reasonable certainty. The water whose diversion is complained of came from a cañon known as Jepson Cañon, which opens off the west side of the Sespe valley in Ventura county. This valley extends north and south, draining to the south, and the lands of all the parties are within it. Through approximately the middle of the valley runs the county road, which is its main highway. The lands of the defendants Hiller and Birss lie side by side on the west side of this road, and fronting upon it; that of Hiller being the more northerly of the two tracts. At their rear or westerly ends these tracts are almost immediately against the mouth of the Jepson Cañon. Directly to the east and across the main road from them lies the land of the defendant Goodenough. It fronts on the road at its westerly end, and extends easterly to the Arroyo Sespe, or Sespe creek, which flows to the south approximately parallel with the county road and drains the valley. The land of the plaintiffs is some distance to the south from Goodenough's land, and, like it, lies on the east of the county road, fronting upon it and extending from it to the Arroyo Sespe. The plaintiff Turner holds the legal title to the land, while the plaintiff Horton is the equitable owner. For the purposes of discussion we may treat them as a single plaintiff.

In January of 1914, at a time of extreme high water, some of the water of Jepson Cañon on emerging from it took a course which it had not previously followed, at least not since the region was settled up, and came in a stream against the west fence of Hiller's land near its southwest corner. There it turned southerly along the fence to the northerly end of Birss' west fence, and continued southerly along the latter. When it approached the southwest corner of Birss' land, it cut across it to the east and followed easterly along his south line to the main county road. It then flowed across this road and against the land of Goodenough at its southwest corner. It there went through or over his fence and followed along his southerly line until it lost itself in the Arroyo Sespe. In the years following the first invasion of the lands of the defendants in this manner, some of the water from the cañon continued to escape in similar fashion in times of high water and to follow the same course, and each of the defendants endeavored to protect his land against it. The obstructions erected for that purpose are those which the plaintiff seeks to have abated in this action. Those of Hiller and Birss were to keep the water outside their west fence instead of permitting it to come through and flow along the fence on the inside, and did not otherwise change the course of the stream. After reaching the south end of Birss' fence, it turned east as before, along his south line and came to the main county road, which it crossed to Goodenough's land. Goodenough's obstruction was to prevent the water coming through his fence at this point, and it had the effect of changing the course of the stream and turning the water south along the county road, where it distributed itself upon Goodenough's neighbors, including the plaintiff.

Upon the foregoing facts we are unable to see upon what possible theory it can be said that the plaintiff is injured by the obstructions of Hiller and Birss; and, unless he is injured, he has no cause of action against them, regardless of whether they had the legal right to maintain the obstructions or not. Their obstructions, as we have in effect said, did not in the slightest change the point at which the water reached the county road, crossed it, and ran against the fence of Goodenough. It was the latter's obstruction alone that turned the water south along the county road so that is finally came to the plaintiff. This is sufficient for a disposition of the case as to Hiller and Birss. This conclusion is possibly not true as to Hiller. There is a hint in the evidence—it is hardly more than that—that before Hiller put in her obstruction, the water when it came through her fence, instead of following along it to the south, as the plaintiff himself testifies, went northeasterly across her land to the channel of the main stream from the cañon. If this were the fact, then her obstruction did have the effect of turning the water south so that it finally reached the plaintiff's land when otherwise it would not have done so, and her position is the same as that of Goodenough. As to Birss, however, we have been unable to find even a hint in the evidence that his obstruction had any such effect.

The situation as to Goodenough is, of course, different. His obstruction undoubtedly had the direct effect of turning the course of the water so as to make it come to and upon the plaintiff's land. Before discussing the situation so presented, we cannot, however, avoid the observation that if the neighboring landowners about the mouth of Jepson Cañon, all of whom are threatened by flood waters from it, had done the only rational thing of uniting upon some plan to take care of those waters, instead of litigating about their respective rights when the waters are upon them, the cost in all probability would have been less than the final expense of this litigation to either side; and in the meantime presumably the waters are still not taken care of. But the parties have not seen fit to do this and it is necessary to determine just what their legal rights are.

The physical situation at the mouth of Jepson Cañon is a not uncommon one in this state. At the mouth of the cañon there is a cone of detritus washed down the cañon during the centuries, with its apex in the cañon and extending out fan-like over the valley lands. In all probability, the stream on coming to the cone has in times past shifted from one side to the other of it as the channel has from time to time filled up or been obstructed. It is probably apt again to shift its channel in the same manner unless prevented by artificial means. But at the present time, and for many years now, the channel of the stream has been on the northeasterly slope of the cone, coming down to the northerly portion of Hiller's land and thence across it and the northerly portion of Goodenough's land to the Arroyo Sespe. For years prior to 1914 no water, even in times of high water, broke out of this channel to flow down the southeast slope of the cone. In the extreme high water of January of that year, however, some of the water of the stream did break out and flow to the southeast, and it is this water which came to Hiller's land at its southwest corner and ultimately caused this litigation. In breaking out it evidently made something of a channel so that since that time some water has taken the same course in times of high water, even though the water was not as high as in 1914 when the break was first made. The legal question presented is: Has a landowner below such a break the right to protect his land against the water coming through it even though his doing so has the effect of causing the water to seek an outlet over the land of a neighbor?

[4] To this question we can see but one answer, and that is that he has such right. The waters are plainly flood waters breaking out of their channel and running wild, and as such each property owner threatened has the right to protect himself against them as best he can, under the authority of the decisions we have already cited, the most notable of which is Lamb v. Reclamation District, supra. The waters are not surface waters in the technical sense, for they have already been gathered into a stream whence they have escaped.

The plaintiff relies upon the authority of Ventura, etc., Co. v. Meiners, 136 Cal. 284, 68 Pac. 818, 89 Am. St. Rep. 128, but we are unable to see its applicability. The final question there involved was as to whether one of the parties was or was not a riparian owner, and this in turn depended on whether the banks of the stream were those of its channel in times of usual flow or were the high banks further back which included between them river bottom land over which the stream habitually flowed in high water but not at other times. It was held that the latter were the true banks. Now it may well be that the floor of Jepson Cañon is of the same character, that is, bottom land over which the stream flows in high water with a smaller channel or channels in it to which the stream is confined at other times. But the question here is not as to what were the banks of the stream in Jepson Cañon, but did the water whose course the defendant diverted escape from that stream on its emerging from the cañon, no matter what its banks were. That the water was from the stream seems to be assumed without question and is plainly shown by the plat introduced in evidence on behalf of the plaintiff. That it escaped from the stream would seem to be perfectly plain from the fact that it left the main body of the stream and took a course which it had not previously followed.

Nor is the fact material that the waters have made for themselves a channel or follow some natural channel, gully or depression, and now come to the defendants' lands as a stream instead of spreading out over the ground. The waters do not come as the stream of a natural water course following its accustomed channel, but as a stream which has escaped from such a channel and is following a new and unaccustomed course. The fact that in their course they make a channel or perhaps follow some natural runway made by surface waters does not change their character or give to the course which they follow the character of a natural water course. A natural water course is, as we have said, only the course of a permanent stream, that is, permanent in the sense that it habitually flows when the streams of the region are accustomed to flow and not merely in times of storm when surface water is running off.

The case, it seems to us, is plainly controlled by the authorities we have mentioned. But even if it were one of first impression, we do not see how any other rule could reasonably be adopted in such a situation as that presented at the mouth of Jepson Cañon. There is, and has been for years, a definite channel for the stream emerging from the cañon and crossing the valley to the arroyo. The lands about the mouth of the cañon have been settled and improved upon the assumption that the stream would continue to follow this channel. The channel being there, it is to the interest of every one that it should remain there, with the possible exception of the landowners through whose lands it runs. They, perhaps, might be benefited by the shifting of the stream, but their lands are subject to the legal burden of the channel as it is, and there is no reason why this burden should be shifted to lands of others. The other landowners have the legal right to have the stream continue in this channel, and could object to its diversion to another course by artificial means. It is, however, possible that it may be diverted by natural means. The danger of this happening is one common to all the lands immediately below, and, if the threat becomes a reality and the stream or a part of it does shift, it would be both unjust and unpractical not to permit the particular landowner whose property is invaded to protect himself as best he may. There is no reason why he should bear the entire burden of what is a common danger. Every reason which induced the adoption of the rule as to flood waters in the first instance applies here. Any other rule would be a hindrance and not a help to settlement and improvement. In particular, there would be little inducement for any united effort to keep the stream where it both properly and legally belongs, and yet such effort is the only practical means of ending or minimizing the common danger. Our conclusion, therefore, is that both upon authority and reason the defendants had the right to protect themselves against the water in question, and that the judgment against them is without support.

[5] Since a new trial is necessary, there is a further point which should be determined. At the trial, the defendant Goodenough asked leave to file a supplemental answer pleading a judgment against the plaintiff in another action brought by him against Goodenough. The court refused leave to file the answer, and this ruling is complained of. The ruling was correct. The answer was wholly insufficient to show any estoppel of the plaintiff. It alleges merely that the complaint in the first action alleged that the defendant therein had obstructed natural water channels and had thereby caused water to flow upon and across the plaintiff's land, that the defendant had answered denying this allegation, that the action had been tried and evidence presented upon the issue so made, and that judgment had been given that the plaintiff take nothing by his action. But it does not follow that, merely because the issue was made and judgment then had (and this, in effect, is all that is alleged), the issue was determined by the judgment. The judgment may have been based upon other issues entirely, for example, upon issues raised by some plea in abatement. It is not even alleged what the action was for. It may have been that the diversion alleged and as to which issue was made was not the gravamen of the plaintiff's supposed cause of action, and that the issue was really not material, and that the action was determined without regard to it. In the absence of an allegation that the issue was in fact determined by the judgment adversely to the plaintiff, or some equivalent allegation, the answer did not show any estoppel upon the plaintiff.

[6] We learn from the briefs that the action was in fact one for damages alleged to have been sustained by the plaintiff by reason of the defendant's diversion, that a jury trial was had and a general verdict returned in favor of the defendant, and that upon this verdict judgment was entered. Inasmuch as the defendant may offer a more complete pleading before a new trial is had, and the question is discussed as if these further facts were before us, it may be well to discuss them now. The case, then, is one of a judgment given upon a general verdict. The rule in regard to it is a simple one. If the issue, as to which estoppel is claimed, is one which had to be determined by the jury in order to arrive at the verdict they reached, the verdict and consequent judgment are a final determination of the issue binding upon the parties in all subsequent litigation. On the other hand, if the issue were not one which the jury had to decide to arrive at their verdict, as, for example, if in the other action there were other issues presented by the defendant's answer which made out a good defense even though this particular issue were determined favorably to the plaintiff's contention, then it is not possible to say that this issue has in fact been determined one way or the other, and there is no estoppel with regard to it. The pleadings are not before us, and we do not know just what the issues were, but presumably the defendant denied any injury to the plaintiff by the diversion, and, if he did, the jury, as plaintiff's counsel well say, may have reached their verdict upon that issue alone. The following statement from Russell v. Place, 94 U. S. 606, 608 (24 L. Ed. 214), covers the case exactly:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

See, also, 1 Freeman on Judgments, §§ 276 and 276a; 23 Cyc. 1536, 15 R. C. L. 980.

We should, perhaps, in this connection call attention to the distinction between a judgment operating by way of estoppel in a later action upon a different cause of action and one operating by way of bar against a second action upon the same cause of action. If in this case the other action had been upon the same cause of action as the present, that is, had been an action to abate the defendant's obstructions, a judgment for the defendant upon the merits would have been a bar to a second action for the same purpose, regardless of what different or various issues may or may not have been presented. But, as we are given to understand, the other action was not the same as the present. The judgment in it can therefore not operate as a bar to the present action, but at most only as a judicial determination binding upon the parties of issues again involved between them. In order that it may so operate, it must of necessity appear that it did in fact determine those issues. This, of course, we cannot determine, as the judgment roll is not before us.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

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184 Cal. 401

ROBINSON et al. v. WESTERN STATES GAS & ELECTRIC CO.

(Sac. 2832.)

(Supreme Court of California. Nov. 23, 1920.)

1. Electricity 🔑19(5)—Evidence sufficient to show that deceased was killed by shock.

Evidence *held* sufficient to show that death was the result of electric shock, notwithstanding the statement of the coroner in the record of the certificate of death issued pursuant to St. 1907, p. 296, declaring that the cause was acute dilatation of the heart, and although such certificate is by section 15 made prima facie evidence; it appearing that the statement was based on hearsay, and there was no medical attendance at the time of the death.

2. Appeal and error 🔑1002—Verdict on conflicting evidence conclusive.

The decision of the jury on conflicting evidence is conclusive.

3. Electricity 🔑16(4) — Act of electric company in so maintaining line that current passed into windmill negligence.

Where an electric company prepared a branch line for the purpose of operating a motor at a windmill, it was negligence for the company to allow poles which had sagged so as to come near the windmill to remain in a position where current might be transmitted into the structure, wires and chains leading from the top, for it is the duty of an electric company to use all reasonable care necessary under the circumstances.

4. Evidence 🔑318(1)—Trial 🔑110—Claim by physician for services at inquest inadmissible as hearsay, and it was misconduct to read it.

Where an electric company contended that death was due to heart dilatation, and not shock, and offered a death certificate so stating, a claim presented to the county by a physician who was at the inquest was inadmissible, being hearsay, and it was improper for counsel, in offering the same, to read the contents.

5. Appeal and error 🔑1170(6)—Error in attempting to get certain matters before jury harmless.

Where an electric company contended that death was the result of heart dilatation, and not shock, and plaintiff's counsel, in attempting to contradict the recital of the death certificate that heart dilatation was the cause, read part of the contents of a claim by a physician at the inquest against the county, which was for only $5, and the court, after excluding such claim, charged that plaintiff's failure to produce the physician warranted a presumption he would testify in accordance with the recitals of the certificate, any error was harmless, and should, under Code Civ. Proc. § 657, subd. 1, be disregarded.

6. Electricity 🔑19(4)—Evidence that another received a shock under similar circumstances admissible.

In an action for death, asserted to be the result of shock, evidence that some three months after, and under similar circumstances, another person received a shock, was admissible.

7. Evidence 🔑493—As to physical effects of electric shock admissible.

Where an electric company contended that death was the result of heart dilatation, and not shock, testimony by a lay witness, who had observed people receiving fatal shocks of high voltage, that skin discolorations similar to those on deceased were found, etc., was admissible.

8. Witnesses 🔑380(5)—Evidence of record at coroner's inquest inadmissible on ground of surprise.

Where defendant offered a witness, who testified to deceased's complaints of pains in his heart, defendant cannot, on the theory that it was surprised, read in evidence the witness' testimony at the coroner's inquest, where it was similar to that given at the trial.

9. Trial 🔑296(3)—Instruction on duty of electric company not erroneous, when considered with others.

In an action for death resulting from electric shock, an instruction that it was not only the duty of defendant electric company to construct its power line in a safe and substantial manner, but to keep it in such condition, when considered with other instructions that the duty had been discharged when due care had been used to make the line safe from injury, was not objectionable as declaring defendant liable unless the line was absolutely safe.

10. Death 🔑105—Separate awards to heirs unauthorized.

Under Code Civ. Proc. § 377, heirs of a decedent cannot maintain separate actions for his death, and separate awards of damages in favor of each heir are improper.

11. Appeal and error 🔑1070(1) — Separate damages for two heirs harmless, where the appeal of one heir was dismissed.

A verdict in a death action, which awarded damages separately to each with heirs, though erroneous, was harmless, where the appeal of one of the heirs was dismissed.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Lyda Robinson and another against the Western States Gas & Electric Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

The plaintiffs sue as heirs of William S. Robinson, deceased, to recover damages accrued to them from his death, which it is alleged was caused by the negligence of the defendant. Lyda Robinson is the widow, and Eliza J. Robinson the mother, of the decedent. Both of them were at the time of his death dependent upon him for support and maintenance.

Chickering & Gregory, of San Francisco, Devlin & Devlin, of Sacramento, and Evan Williams and Donald Y. Lamont, both of San Francisco, for appellant.

Elliott & Atkinson and White, Miller, Needham & Harber, all of Sacramento, for respondents.

SHAW, J. The defendant was operating power wires by means of which it was in the business of transmitting electricity from its power plant to consumers. Robinson owned a farm on which he maintained a windmill. The upper part of the windmill was made of metal, and was so arranged that the fans could be turned in any direction by means of a chain and a small wire attached to the metal parts at the top of the mill and hanging down to within 3 feet of the ground. A branch of the power line maintained by the defendants, consisting of three transmission wires, ran to said windmill. It is alleged that the defendant negligently constructed said power line, so that by the natural operation of the wind, water, and gravity, its wires carrying electricity would be likely to come in contact with the metal parts of said windmill, and that as a consequence said wires did come in contact with the same; that the soil about the mill was damp, and the electric current would readily turn from said wires and flow down said small wire and chain to the ground, when ever any one standing on the ground should take hold of or touch said chain to turn said windmill; that it was necessary in the course of his farming operations for said Robinson to turn said windmill into or out of the wind by grasping and pulling said chain and wire; that all this was known to the defendant; that while said Robinson was manipulating said windmill in the course of his farming operations he grasped said chain for that purpose, while the metal part of said mill was in contact with one of said wires, he being unaware of any danger therefrom; and that by reason of the carelessness aforesaid the electricity then being carried over said wires of the defendant was transmitted to and through the body of said Robinson into the ground, greatly injuring him and causing his death.

The main power line of the defendant ran along the road in front of the Robinson farm. In May, 1913, a branch line running to his house for lighting purposes was extended about 600 feet to the windmill to carry power to run the pump. Robinson proposed to substitute an electric motor for the windmill. He had not procured the motor at the time of his death, but an electric current of 11,000 volts had been turned on the wires of the branch line. The windmill was constructed in the usual manner upon a wooden frame of four uprights, forming a square about 8 feet in size at the bottom and converging toward the top. When first built, one of the wires of the branch line was about 12 inches from the vane of the mill when it was turned toward the wire. In the fall of 1913 transformers weighing 600 pounds were placed near the top of the two poles nearest the mill. From the weight of these, the force of the wind, and the softness of the ground in which the poles were set, they began to lean toward the mill. Ten days before his death there was a heavy windstorm, which blew down several poles of the main line and threw the other poles out of plumb.

There was no eyewitness to the death of Robinson. He left his house a little before 10 o'clock in the forenoon of February 19, 1915, and some time after 10 o'clock his body was found under the windmill, lying within the square formed by the uprights of the frame, close to the chain used for turning the mill.

[1, 2] The claim that the evidence is insufficient to prove that the deceased was killed by a shock of electricity from the defendant's wires cannot be upheld. The evidence is wholly circumstantial, but it is sufficient to raise a reasonable inference that such electricity was the cause of his death. As above stated, the top of the windmill and the nearest wire were only 12 inches apart when the line was constructed. Afterwards the poles were seen to be leaning towards the mill. It was extremely probable that the vibration of the two under the influence of a strong wind would bring them into contact. The power wire was carrying 11,000 volts. If it came into contact with the vane of the mill, the current would be likely to pass therefrom down the wire and chain, and to the hand of the person grasping the chain. If the ground was wet, as the evidence showed, this would close the circuit from the power line to the ground through the body of such person. When Robinson's body was found his lips were swollen, the lower lip was split open, there was a clot of blood at his nose and the right side of his face and chin, his right ear, and the right side of the neck was discolored, and his neck swollen and enlarged. There is evidence that these symptoms would not be caused by heart disease, which the defendant claimed was the cause of his death. No such appearances were on his body when he left the house for the mill. Evidence was given by a person, not a physician, but who had had the experience of seeing a number of persons injured by electric charges, to the effect that a swell-

ing of the neck and discoloration of the skin or flesh appeared upon such persons immediately after the shock. It was shown that some three months afterwards, with conditions substantially as they were at the time of his death, a young man who was manipulating the windmill by the chain received a severe shock of electricity, which caused his lip to swell and crack and become discolored.

The only evidence of any other cause of death was testimony to the effect that he had shortly before his death complained of pain about his heart, and a certified copy of the record of the death of Robinson, issued by the state registrar under the act of March 18, 1905, as amended in 1907 (Stats. 1905, p. 115; Stats. 1907, p. 296), showing the record of facts required to be kept by that act relating to the death of persons, and among other things that the cause of his death was "acute dilatation of heart." It also contains this statement: "I hereby certify post mortem Feb. 20, 1915." This statement appears to have been made by A. D. Fenton, the coroner of Sacramento county, and by him reported to the state registrar. It also appears to have been signed by J. Milton Ward, M. D. Section 15 of the act (Stats. 1907, p. 300) provides that a copy of the record of the death made under the act, when certified by the state registrar or the local registrar to be a true copy thereof, shall be prima facie evidence in all courts of the facts therein stated. Section 6 of the act requires that the certificate of death shall state, among other things, the cause of the death. In this case the death occurred "without medical attendance." In such cases section 7 provides that the coroner shall within three days after the inquest furnish the local registrar a certificate as required by the act, containing as many of the facts required as can be ascertained, and that the local registrar shall then transmit such certificate to the state registrar. It is obvious, therefore, that the statements in the certificate must have been founded upon hearsay, and that, although made prima facie evidence by the act, it is not entitled to a very high degree of credence, in the face of other evidence on the subject tending to show another cause of death. But, however this may be, this evidence relating to heart disease as the cause of death had no effect further than to produce a conflict in the evidence, upon which the decision of the jury is final.

[3] It is not seriously contended that the evidence is insufficient to show that the defendant was guilty of negligence proximately causing the death, if we assume electricity as the cause. It was the duty of the defendant, in placing wires for the transmission of electricity, to use all reasonable care necessary under the circumstances to prevent the electricity from escaping from the line in such a manner as to be dangerous to persons or property. It was negligence to allow the poles to remain so placed that the vibration of the poles and the windmill from the wind, coupled with the settling and leaning of the poles, might bring the wires and the vane in contact. A violent windstorm occurred a few days before the accident, which blew down a number of the poles of its main line. A day or two after, and before the accident, the defendant repaired this line; but there is no claim that it even inspected the branch line, while at the same time maintaining therein a current of 11,000 volts. There being evidence that the death was caused by electricity, it is only reasonable to conclude that the wires and the vane did come in contact at that moment, thus establishing the negligence in placing the two so near together as the cause of death.

Appellant further contends that there was prejudicial misconduct, both by the court and by the attorneys for the plaintiff; also that the court erred in its rulings on evidence and in giving an instruction to the jury.

[4, 5] The principal assignment of misconduct is that the plaintiff's attorney, during the trial, when offering papers in evidence, attempted to read the contents of the incompetent documents in the presence of the jury, and that the court failed to use sufficient promptness in preventing him from doing so. In order to controvert the effect of the death certificate as evidence that acute dilatation of the heart was the cause of the death, the plaintiffs offered in evidence a claim presented to Sacramento county by Dr. Ward for his services at the inquest upon the body, showing a charge of only $5, and solely for examining the body. The evidence was hearsay and incompetent. It was not necessary for the plaintiff, in making the offer, to read the document or state any portion of the contents thereof, and the court, under the circumstances of the case, should have prevented him from doing so. He proceeded, however, to read enough to show that the claim was only $5, and that it had been allowed and paid. An objection to its admission was sustained, and the document rejected as evidence. After the close of the evidence the jury was instructed that, by reason of the failure of the plaintiff to produce Dr. Ward as a witness to contradict the recitals of the death certificate concerning the cause of death, a presumption was raised that, if produced, he would testify in accord with said recitals. We think the ruling rejecting the evidence and this instruction, taken together, so far lessened the injurious effect of the misconduct aforesaid that it cannot be deemed sufficient to justify a reversal of the case. Misconduct is not cause for reversal or a new trial, unless it has the effect of preventing the complaining party from having a fair trial. Code Civ.

Proc. § 657, subd. 1. The other assignments of misconduct are too trivial to be worthy of discussion.

[6] The defendant insists that the court erred in admitting evidence that the witness Brugler received a shock of electricity some 3 months after the death of Robinson when he was grasping the chain at the windmill. We think the evidence was properly admitted. There was evidence to show that the circumstances at the time he received the injury were substantially the same as those existing when Robinson came to his death. Under these circumstances, it is proper to prove the effects of the conditions so existing, upon the principle that, if an electric shock was produced upon Brugler, it would be probable that it might have been produced upon Robinson under the same circumstances. Proof of other manifestations of electric contact between the wires and the windmill about the same time was admissible for the same reason.

[7] The evidence that the shock received by Brugler caused his lip to swell and crack and his chin to become discolored was properly admitted. It showed that the effect of the shock was to create those appearances and that they were almost identical with those found on the body of Robinson. Evidence to prove the effects of such shocks may be given in other ways than by the testimony of experts. Actual occurrences under the same conditions, showing the effects, is competent proof thereof. It tended to prove that Robinson also received an electric shock.

The same rule applies to the admission of testimony of the witness Cannon. He testified that he was engaged in electrical work, and had been for about 14 years; that he had received electric shocks himself, and that he had seen other people receive electric shocks of fairly high voltage about a dozen times. He described the effects of electric shocks upon the body of a man at the moment of receiving it, and also testified that one of the results was a swelling of the neck and of the tongue, and that afterwards a discoloration of the skin appeared. The testimony was revelant, and although the witness was not a physician, and had received no special academic education concerning the results of electric shocks, he had had many years of experience and observation, and was competent to testify as to the results of his experience and observation on that subject.

[8] The defendant called Mrs. Stevens, a sister of the deceased, to testify concerning the heart trouble. She testified to several complaints by deceased at different times of pain in his heart. Claiming to be surprised at the testimony of the witness, the defendant's attorney offered to ask her about her testimony at the coroner's inquest on the same subject. Objection was made that the answer was not impeaching and did not tend to explain the surprise. The objection was sustained. There was no error in this ruling. Her testimony at the coroner's inquest was a more condensed statement than her testimony on the trial, but was not essentially different therefrom.

[9] The court gave the following instruction:

> "It was not only the duty of the defendant to construct its power line leading to the mill on the Robinson premises in a safe, substantial manner, but also to keep it in such condition by constant oversight and repair."

The defendant urges that under this instruction the jury would be required to find the defendant guilty of negligence, unless the power line was built and maintained so that it would be absolutely safe against injury from the escape of electricity. If the instruction had been standing alone, it possibly might have been so understood. But the court instructed the jury very elaborately to the effect that the defendant's duty was discharged when it had used due care to make the line safe from injury to others, and that due care required that the wires be so placed with reference to other conducting agencies that dangerous contact would not be probable. These charges were repeated several times, and the jury could not have failed to understand that the care required of the defendant was the reasonable care required by the circumstances and the character of the agency under its control.

The defendant complains of many rulings of the court in addition to those above noticed. We do not think any of them are of sufficient importance to justify us in mentioning them.

[10, 11] At the direction of the court the jury returned a verdict for separate damages to each plaintiff, giving $2,000 to each of them. The defendant excepted to the instruction which directed the verdict in that form, but the record does not show that any objection was made when the verdict was returned, or at any time afterward in the court below, except by the specification that the verdict was against law, in the notice of intention to move for a new trial. The specifications in the bill of exceptions, stating the particular reasons for the claim that the verdict was against law, do not mention this cause as one of them. There is no specification, and no claim, that the evidence is insufficient to justify a verdict for $4,000 or $2,000 to each or either of the plaintiffs, nor any claim that the damages are excessive. The law does not authorize a verdict in this form. The action by the heirs of a person to recover damages for his death

is authorized only by section 377 of the code. That section does not authorize separate actions by the several heirs.

> "So far as the heirs are concerned, a single joint cause of action is given. The language of our statute permits no other construction." Salmon v. Rathjens, 152 Cal. 294, 92 Pac. 733.

So it is held that in computing the damages—

> "the loss of each and all must be considered. The statute does not provide for a distribution among the members of the family who take as the beneficiaries of the statute. * * * It is not intended that the amount recovered shall be divided into integral or proportional parts. The persons entitled do not take as heirs or by succession, but as beneficiaries of the statute; 'the statute being framed upon the theory that the heirs will always constitute the family of the deceased.'" Simoneau v. Pac., etc., Co., 159 Cal. 494, 508, 115 Pac. 320, 327.

See, also, Daubert v. Western Meat Co., 139 Cal. 480, 69 Pac. 297, 73 Pac. 244, 96 Am. St. Rep. 154.

The verdict should have been given for a lump sum to all the plaintiffs, including, of course, the damages to each of them. But we are unable to perceive that any injury has been suffered by the defendant on account of the verdict having been rendered in this form. It is said that the plaintiff, Lyda Robinson, took an appeal from the judgment. It is also said that this appeal was dismissed by her without any decision on appeal. Neither of these statements is denied by the other party. It is possible that complications arising from an appeal by one of the plaintiffs in such a case would require a reversal of the case because of the separation of the damages by the verdict and judgment; but, as it is conceded that the appeal has been dismissed, no injury could arise therefrom. The defendant has no interest in the division which the plaintiffs may make among themselves, or which may be made for them, of the damages recovered. The statute contemplates a single recovery for the benefit of the family of the deceased, or those of his heirs who are dependent upon him for support. Whether it is divided among them after recovery or not, or how it is divided, are matters of no concern to the defendant. If the damages are not excessive, as is in effect admitted by the failure to object on that account, the defendant has no reason to complain, or at least his reason is not sufficient to warrant a reversal of the judgment, because of this defect in the form of the judgment.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; WILBUR, J.; SLOANE, J.

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49 Cal. App. 640

PEOPLE v. HASKINS. (Cr. 938.)

(District Court of Appeal, First District, Division 1, California. Oct. 22, 1920. Hearing Denied by Supreme Court Dec. 20, 1920.)

1. False pretenses ⚷30 — Information held sufficient.

In prosecution for obtaining money under false pretenses, information alleging that defendants fraudulently represented to complaining witness that they had positions of employment for a number of men at specified wages, that such a position would be given to complaining witness on his payment of specified amount to defendants, that complaining witness, being induced by the false and fraudulent representations and relying thereon, delivered to defendants the specified sum "for one of said reported and pretended positions and immediate employment," which the defendants did not, and which they knew they did not have the power to give, *held* sufficient without specific allegation that defendants did not give complaining witness immediate employment.

2. False pretenses ⚷5—Intention with which complaining witness parted with money immaterial.

Defendants, who falsely pretended to be in a position to give complaining witness employment, and by reason of such pretense fraudulently obtained his money, were guilty of obtaining money by false pretenses; the intention with which complaining witness parted with his money being immaterial.

3. False pretenses ⚷9—Reliance on false representations an element of the crime.

In a prosecution for obtaining money under false pretenses, the state was required to prove, as an element of the crime, that the false representations made by defendants did in fact induce the complaining witness to part with his money.

4. False pretenses ⚷49(1)—Evidence of corroborating circumstances held sufficient to prove defendants' connection with crime.

In a prosecution for obtaining money under false pretenses by inducing complaining witness to part with a specified amount in reliance on defendants' false representations that they could furnish him employment, evidence of circumstances in corroboration of testimony of witness that one of the defendants was connected with the transaction *held* sufficient to sustain such defendant's conviction, under Pen. Code, § 1110, requiring testimony of one witness and corroborating circumstances in such cases.

5. Criminal law ⚷423(3)—Advertisement and correspondence admissible against a defendant not named therein, but who participated in crime.

In a prosecution for obtaining money under false pretenses, newspaper advertisements and correspondence between complaining witness and defendants *held* admissible as against a defendant not mentioned therein, where it clearly appeared that such defendant, with another defendant, was associated in a joint enterprise and equally interested in its fraudulent schemes, and together they participated in furthering its plans.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Amon J. Haskins was convicted of obtaining money under false pretenses, and from judgment of conviction and from order denying motions for a new trial and in arrest of judgment, he appeals. Affirmed.

James H. Boyer and Frank J. Golden, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant and Grant Todd were charged with obtaining money under false pretenses. The defendant Haskins' demurrer to the information was overruled. He was convicted and sentenced to imprisonment in the state prison. Motions for a new trial and in arrest of judgment were denied, and this appeal is from the judgment and from the order denying said motions.

It is first urged that the facts stated in the information do not constitute a public offense. It is alleged that the defendants devised and intended by unlawful ways and means and by false and fraudulent pretenses and representations to obtain money of the complaining witness, M. E. Hart. To that end they pretended and represented to Hart that they "had positions of employment and immediate employment for a number of men at a salary of $6.40 per day, and that for the sum of $100 paid to them by the said M. E. Hart they the said Grant Todd and Amon J. Haskins would then and there give to said M. E. Hart one of said positions, whereas, in truth and in fact, the said Grant Todd and Amon J. Haskins did not then and there have positions and immediate employment for a number of men or any positions or any immediate employment for a number of men or for any man or at all for a salary of $6.40 per day or at any salary per day or at all, as they the said Grant Todd and Amon J. Haskins then and there well knew." Believing and relying upon these representations, Hart paid Todd and Haskins the sum of $100 for one of the purported positions, The pretenses and representations were in all respects false and untrue.

[1] Because the information nowhere alleges that the defendants did not give the complaining witness, Hart, a position, or immediate employment, appellant contends that it fails to state a cause of action. He relies upon the rule that it is essential that more than the conclusion that the representations were false and fraudulent be alleged; it being necessary to set out the facts upon which it may be determined whether or not the conclusion that there was a fraudulent and false representation is correct. He cites a number of instances in which the rule has been invoked. People v. Carpenter, 6 Cal. App. 231, 233, 91 Pac. 809; People v. Mahony, 145 Cal. 106, 78 Pac. 354; Ex parte Gillett, 190 Pac. 210, 211; People v. Haas, 28 Cal. App. 184, 151 Pac. 672; People v. McKenna, 81 Cal. 158, 22 Pac. 488; People v. Bliss, 190 Pac. 1046, 32 Cal. App. 249. The facts there passed upon differentiate those decisions from the case at bar. For instance, in People v. Bliss, the court held that the representations alleged to have been false were representations totally disconnected with the purpose for which Lansdale parted with his money. To the like effect is People v. Kahler, 26 Cal. App. 449, 147 Pac. 228, in which the information did not disclose the purpose for which the money was paid to the makers of the alleged false and fraudulent representations. But in the case at bar the allegation is that the complaining witness, being induced by the false and fraudulent representations, and relying thereon, delivered to Todd and Haskins the sum of $100, "for one of said purported and pretended positions and immediate employment," which the defendants did not, and which they knew they did not, have the power to give.

[2] By falsely pretending to be in a position to give Hart employment, and by reason of such pretense fraudulently obtaining his money, they were guilty of obtaining that property by false pretenses. People v. Bryant, 119 Cal. 595, 597, 51 Pac. 960. The intention with which Hart parted with his money was immaterial. People v. Martin, 102 Cal. 558, 563, 36 Pac. 952; People v. Cummings, 123 Cal. 269, 272, 55 Pac. 898.

Appellant urges the insufficiency of the evidence to support the conviction. It appears that the complaining witness saw an advertisement in the San Francisco Examiner reading as follows: "Wanted, handy man for machine shop; good wages. $100 req. Box S7158, Examiner." He answered in writing, addressed as directed, and received a reply signed by Todd directing him to call at his earliest convenience. He did so, and was taken by Todd directly to defendant Haskins. He was told by Todd and by Haskins that they had immediate employment for men at $6.40 per day, and would employ him, but that in order to obtain this work he would have to give $100 for the purpose of investing in a boatbuilding corporation the defendants intended to incorporate. Hart paid $100 to the defendants and received a certain document in writing indicating an investment of $100 in the stock of the corporation, the International Aero-Marine Locomotion Company, which had not, and which has never been organized. The writing was signed by the defendant Haskins. Hart was told to report at a designated place, which he did, but, not finding any one to direct him to any work, remained there for some time, when the brother of the defendant Haskins appeared and told him to go to another place, where he found a number of men engaged in tearing down some buildings. He was assigned to this work, and after working some hours was told by the defendant Haskins that "that is all that is necessary; when we want you again we will send for you." Hart ceased work, was not sent for again, and received nothing for the work he did. There is other testimony indicating that the purported engagement of Hart was part of a scheme to fraudulently obtain possession of his $100.

[3] Whether the representations made by Haskins and Todd did in fact induce Hart to part with his money was an element of the charge to be established by the people. When the jury was convinced that he was so induced, and the representation was shown to have been false and fraudulent, and made by Haskins and Todd knowingly and designedly, the jury had the right to find that Hart was defrauded of his money by the defendant by means of such representation. People v. Bryant, supra.

[4] Appellant argues that there was no corroboration of the evidence tending to connect him with the fraudulent scheme. In this he is mistaken. The testimony of "one witness and corroborating circumstances" is sufficient in cases of this nature. Pen. Code, § 1110. The testimony of the complaining witness directly connected the defendant with the transaction. The entire conduct of the defendant as testified to by H. D. Haskins, a witness for the defense, the receipt for the $100 signed by the defendant, the advertisement in the newspaper—all these matters were corroborating circumstances when related together, sufficient in our opinion to meet the requirement of the statute. People v. Martin, 102 Cal. 558, 564, 36 Pac. 952.

[5] It was not error to admit in evidence the advertisement in the newspaper, and the correspondence passing between Hart and the defendants. Although the defendant Haskins is not mentioned in either, his connection with the entire matter was sufficiently established by other evidence to warrant their introduction. It clearly appears that Todd and he were associates in a joint enterprise, were equally interested in its fraudulent schemes, and together participated in furthering its plans.

One of the instructions given the jury reads:

"The court further instructs you that the employment referred to in the information is employment at $6.40 a day. The information is silent upon the subject of whether such employment should be temporary or permanent. But if you find from the evidence in this case that such representation was made, that is, that upon the payment of $100 M. E. Hart would be entitled to a position at $6.40 a day, and that the defendant knew at the time he made such statement, if he did make such statement, that he could not give to the said M. E. Hart a position at $6.40 a day, and if you find all of these facts and the other essential facts to constitute the crime as you have been heretofore instructed to a moral certainty and beyond a reasonable doubt and in addition thereto that the defendant did not give a position of $6.40 a day to the said M. E. Hart, it will be your duty to return a verdict of guilty as charged in the information."

Appellant argues:

That "this instruction was a declaration of a negative pregnant; that if the defendant did not give a position of employment to Hart at $6.40 per day, but did give him employment at $7 per day, or any other sum greater or less than $6.40 per day, it was the duty of the jury, under such instruction, to have returned a verdict of guilty."

The appellant is hypercritical. The instruction is only a part of a charge, which, as a whole, fairly presented the case to the jury.

The court was justified in refusing to give defendant's requested instructions 17 and 18. Their effect, if given, would have been to virtually instruct the jury to acquit, in the first instance, and in the next to eliminate from the consideration of the jury all questions of fraudulent intent.

The orders denying a new trial and in arrest of judgment and the judgment are affirmed.

We concur: WOOD, Justice pro tem.; RICHARDS, J.

49 Cal. App. 700

BYRON JACKSON IRON WORKS v. HOGE et al. (Civ. 2180.)

(District Court of Appeal, Third District, California. Oct. 29, 1920. Hearing Denied by Supreme Court Dec. 27, 1920.)

1. Fixtures 🔑14—Property sold under conditional sale to lessee remains personal property in hands of lessor.

Where owners of mining premises leased them with the right given, and under the expectation that the lessee would install machinery thereon and operate the same, and the lessee purchased machinery under a conditional sales contract, title to remain in the seller until paid for, and failed to pay for the same and vacated the premises, the machinery, although affixed to the property, remained personalty in the hands of the owners of the mining property the same as while in the possession of the lessee.

2. Sales 🔑464—Conditional sales valid.

Conditional sales under which title remains in the seller until the property is paid for are valid.

3. **New trial 🔑16—Irregularities in issuance of execution not ground.**

Irregularities in relation to an issuance of execution after the entry of judgment are not grounds for new trial under Code Civ. Proc. § 657.

4. **Appeal and error 🔑1170(3)—Failure to sufficiently allege corporate character held not reversible error.**

Error of the court in holding that complaint sufficiently alleged corporate character of plaintiff was not reversible error, in view of Const. art. 6, § 4½, where the complaint showed the existence of plaintiff as a corporation at the time of beginning of action, and evidence showed plaintiff was doing business as a corporation at time of the matters involved, and the answer did not deny the existence of the corporation, and the case was tried upon the theory of the plaintiff being a corporation during all times involved.

5. **Appeal and error 🔑1071(6)—Omission of finding, which would necessarily be against appellant if made, not reversible error.**

Where a finding is omitted upon an issue, which necessarily would be against the appellant if any finding was made thereon, the appellant is not injured thereby, and cannot complain thereof.

6. **Limitation of actions 🔑45—Title of lessor in personalty left on land begins at date of taking possession of land.**

Where lessee affixed to land machinery purchased under a conditional contract, and failed to pay for it, and vacated the land title to the property in lessor, as founded upon Code Civ. Proc. § 338, would begin at the date of his taking possession of the land; the conditional vendor having three years after such date within which to remove the property.

Appeal from Superior Court, Nevada County; J. E. Prewett, Judge.

Action by the Byron Jackson Iron Works against A. W. Hoge and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. E. Wright, of Nevada City, for appellants.

Wm. B. White and L. P. Larue, both of Grass Valley, for respondent.

PLUMMER, Presiding Justice pro tem. The defendants and appellants are, and were during all the times mentioned in this opinion, owners of a certain mining claim situate in Nevada county. During the year 1915 the defendants leased said mining premises to the Willow Valley Mining Company, and thereafter the said Willow Valley Mining Company entered into a contract for the purchase from the plaintiff of a certain pump and electric motor to be used upon the mining premises herein referred to. The pump and motor were delivered by the plaintiff to the Willow Valley Mining Company on or about the 15th of September, 1915. The agreement of sale entered into between the Willow Valley Mining Company and the plaintiff provided that the title to the pump and motor should not pass from the plaintiff to the Willow Valley Mining Company until the full purchase price thereof had been fully paid. The Willow Valley Mining Company continued operations upon the mining premises under its lease from the defendants until on or about the 6th day of March, 1916, but, according to the testimony of some of the witnesses, did not abandon its work entirely upon the leased premises until some time during the year 1917. The Willow Valley Mining Company never completed its purchase of the pump and motor herein referred to, and left said property upon the mining premises belonging to the defendants at the time it finally gave up its lease thereto. Some time after the discontinuance of operations by the Willow Valley Mining Company, and its surrender of the mining premises to the defendants, the plaintiff in this action demanded of the defendants the return of the pump and motor, which return not being made, suit was begun for the recovery of the same in the month of October, 1918. Judgment went for the plaintiff for the return of the property or the value thereof.

The appellants contend that by virtue of the provisions of section 661 of the Civil Code, the pump and motor became real estate immediately upon being brought upon the mining premises.

The testimony in this case does not clearly show whether the pump and motor were, at the time of the beginning of this action, either in place for operation or affixed to any portion of the premises, but it does show that at the time of their use they were affixed, and as the case appears to have been tried upon the theory of their having been affixed, we will so consider the same.

Section 661 was enacted in 1872, and was therefore in force at the time of the rendition of the decision in the case of Hendy v. Dinkerhoff et al., 57 Cal. 3, 40 Am. Rep. 107, where a similar question as presented in this case appears to have first been considered by the Supreme Court of this state. In that case, Hendy had leased a steam engine and boiler to one Lampson, with the right of purchase, Lampson to become the owner upon the full payment of the purchase price, title to remain in Hendy until the purchase price was so paid. The engine and boiler were permanently affixed to a quartz mill on the mining claim, which mining claim and mill belonged to the defendant Dinkerhoff. An agreement of sale existed between Dinkerhoff and Lampson. Lampson failed to make purchase, and Dinkerhoff took possession of the mining premises and the quartz mill, including the engine and boiler purchased by Lampson from Hendy under the agreement as stated above, Lampson failing to make payment. After the premises had been restored to the possession of Dinkerhoff, Hendy began action against Dinkerhoff for the recovery of the engine and boiler, or the value thereof.

The court held in that case that, as between Hendy and Lampson, the engine and boiler remained personal property, notwithstanding the fact of their having been attached to the mill, and then asked the following question:

> "Can they be so regarded in the hands of the defendants?"

—and then used the following language:

> "How this would be if the latter occupied the position of bona fide purchasers, without notice, of the real estate to which the chattels were attached, need not be determined, for they are not in that position. They were all the time the owners of the property to which the engine and boiler were attached; and as such owners, placed Lampson in possession of the mill and mine, with authority to work them, and under an agreement on his part to purchase, and with a stipulation that, in the event he failed to do so, 'any and all machinery and tools put upon or used in said mill or mine' should become the property of the defendants. Under these circumstances, the latter must be held to stand in the shoes of Lampson, and the property in question treated as personalty in their hands as in his."

While in a proper case it would be held, under section 661, Civil Code, that the kind of property therein described would be treated as real estate, the holding of this case is clearly to the effect that it does not operate independently as a transfer of title.

In the case at bar, the defendants placed the Willow Valley Mining Company in possession of the mining premises owned by them under a lease, providing that the Willow Mining Company should operate the same, and also might exercise an option of purchase. Under these circumstances, the defendants were acting just as the defendant in the Dinkerhoff Case. They knew, or they must have known, that in order to operate the mining premises their lessee would have to purchase mining machinery and the necessary equipment.

In the case of Jordan v. Myres et al., 126 Cal. 565, 58 Pac. 1061, it appears that the Joshua Hendy Machine Works leased an engine and other machinery to one Berry, who was operating a mine belonging to the defendant, Berry obtaining the machinery from the Joshua Hendy Machine Works under a conditional sale, title not to pass until the purchase price had been paid. The machinery was attached to the mine. Payment of the purchase price was not made. Thereafter, in an action to foreclose a mechanic's lien, it was held that the character of the property had not changed from personalty to realty so as to render the rights of the Joshua Hendy Machine Works to recover the same subject to the rights of the lienholders.

In the case of Oakland Bank of Savings v. California Pressed Brick Co. (Sup.) 191 Pac. 524, the Supreme Court reviews the various questions involved in this action, and holds substantially as follows: Notwithstanding personalty is converted into realty and is afterwards affixed to the land, it will, as between the buyer and seller, be treated as personalty. That so long as the personalty retains its character as such, the title of the conditional vendor will be good as against a subsequent mortgagee or purchaser, but that when it changes its character by reason of being affixed to real estate, a subsequent purchaser or mortgagee, without notice, will be held to have acquired the title to the personal property so affixed as against the conditional vendor.

[1, 2] The overwhelming weight of authority unquestionably is, as contended by appellant, that where personal property is sold under a contract reserving the title, to be affixed to real estate, the title of such seller becomes subject to the rights of mortgagees and purchasers in good faith and without notice of the reserved title. But that is not this case. The defendants are neither mortgagees nor purchasers. They are simply the owners of certain mining premises, which they have leased to the Willow Mining Company with the right given and under the expectation that the Willow Mining Company would install machinery thereon and operate the same.

Under such a state of facts, and under the long-established rule of decision in this state that conditional sales are valid, it must be held in this case, as in the Dinkerhoff Case, that the pump and motor were personal property in the hands of the defendants the same as while in the possession of their lessees.

[3] Other points for reversal are made by appellant, which we will now consider: First, that a new trial should have been granted for irregularities in relation to the issuance of an execution after the entry of judgment in the court below. A reference to section 657, Code of Civil Procedure, shows clearly that such contention is untenable, as no such grounds for a new trial are therein provided for.

It is also contended that the trial court erred in holding that the complaint sufficiently alleged the corporate character of the plaintiff. The complaint alleges:

> "That plaintiff is a corporation duly organized, existing and doing business under and by virtue of the laws of California."

Reliance for reversal upon this point is placed upon the decision in the case of Consolidated Concessions Co. v. McConnell, 180 Pac. 842. In that case the plaintiff alleges that it was incorporated on or about July 15, 1913. There was no averment that it continued to be a corporation, or that it was a corporation at the date of the institution of the action.

[4] In the instant case, the complaint shows the existence of the plaintiff as a corporation at the time of beginning the action. The evidence introduced shows that the plaintiff was doing business as an incorporation at the time of the conditional sale of the property involved herein. The answer does not deny the existence of the corporation alleged in the plaintiff's complaint. The whole case was tried upon the theory of the plaintiff being a corporation during all the times involved in the various transactions, and under such circumstances it would seem that section 4½ of article 6 of the Constitution applies, and that the error of the court in not sustaining the defendants' demurrer upon this point, if error it be, has not resulted in a miscarriage of justice, but that, on the other hand, it would be a miscarriage of justice to send the case back for another trial upon a point involving no substantial rights.

It is further insisted that the court below should have found upon the defendants' allegation that the plaintiff's cause of action, if any, was barred by the provisions of section 338 of the Code of Civil Procedure.

[5] The authorities are, without substantial conflict, that where a finding is omitted upon an issue which necessarily would be against the appellant, if any finding were made thereon, that the appellant has not been injured by such failure.

[6] The basis for the claim that the statute has run in this case is that the defendants became the owners of the property on the 15th day of September, 1915, when it was delivered to their lessee. There being nothing in this claim, as we have heretofore shown, their title to the property as founded upon the statute of limitations would begin at the date of their taking possession of the same, which did not occur until well within the period of three years preceding the institution of this action. Hence, when the court below found that the property had not become realty, and that the title thereto did not pass by reason of its being attached to the mining premises, it disposed of all rights that were asserted to have been acquired by reason of the statute of limitations, and the finding would necessarily have been against the defendants, if any finding were made, which we must hold, under the circumstances, not to be necessary to support the judgment.

It follows from what has been said that the judgment and order of the trial court must be, and the same are, hereby affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 597

PEOPLE v. MALLEY. (Cr. 891.)

(District Court of Appeal, First District, Division 1, California. Oct. 18, 1920. Rehearing Denied Nov. 16, 1920.)

1. Indictment and information ⚷117—Indictment in language of statute construed in same sense as statute.

Where the language of a statute and of an indictment are the same, the indictment must be understood in the same sense as the statute.

2. Criminal law ⚷5—Legislature may repress anything deemed hurtful subject to constitutional limitations.

The Legislature has power to repress whatever it deems hurtful to the general good, the only limitations being those prescribed in the Constitution.

3. Insurrection ⚷2—Criminal Syndicalism Law not unconstitutional.

The Criminal Syndicalism Act *held* constitutional so far as its provisions were material in a prosecution for circulating and displaying books and other printed and written matter prohibited by that act.

4. Indictment and information ⚷71—Defendant entitled to be apprised of nature of crime.

A defendant is entitled to be apprised with reasonable, but not with absolute, certainty of the nature and particulars of the crime charged, that he may prepare his defense and plead his jeopardy against further prosecution.

5. Indictment and information ⚷110(3)—Indictment for syndicalism held sufficient in language of statute.

Under Criminal Syndicalism Act, § 1, defining criminal syndicalism, and section 2, subd. 3, prescribing the punishment for circulating or displaying any book or written or printed matter advocating, teaching, aiding, abetting, or advising criminal syndicalism, an indictment following substantially the language of the statute was sufficient under Pen. Code, §§ 948, 950, 952, 957–959.

6. Indictment and information ⚷70, 71, 93—Indictment must be direct and certain and set forth facts.

No more is required than that an indictment be direct and certain and allege all the acts and facts which the Legislature has said shall constitute the offense.

7. Indictment and information ⚷110(3)—Indictment for syndicalism held sufficient though printed matter not identified.

An indictment for circulating and displaying books and printed matter prohibited by

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the Criminal Syndicalism Act *held* sufficient, though it did not identify the particular books and printed matter circulated and displayed and no copies thereof were attached, as no further statement of facts was required beyond the language employed in the statute.

8. Criminal law ⚷1186(4)—Defect in indictment not resulting in miscarriage of justice not ground for reversal.

Though an indictment for circulating and displaying books and printed matter prohibited by the Criminal Syndicalism Act was defective in not identifying the matter circulated and displayed, it was but an error in pleading not ground for reversal under Const. art. 6, § 4½, unless it resulted in a miscarriage of justice, especially in view of Pen. Code, § 960, relative to defects not tending to prejudice a substantial right on the merits.

9. Criminal law ⚷295—Person prosecuted a second time may establish identity of offenses by evidence.

Where an indictment for circulating and displaying books and printed matter in violation of the Criminal Syndicalism Act did not identify the books, etc., defendant if again prosecuted for the same offense may establish the identity of the cases by evidence; the burden being on him.

10. Insurrection ⚷2—Pamphlets and printed matter held within Criminal Syndicalism Act.

Pamphlets and printed matter displayed and exposed for sale at the headquarters of a branch of the I. W. W. of which defendant was secretary *held* to support a conviction for circulating and displaying matter advocating, teaching, and advising the commission of crime, sabotage, etc., in violation of the Criminal Syndicalism Act.

11. Insurrection ⚷2—"Sabotage" defined.

"Sabotage" in its ordinary sense means the malicious waste or destruction of an employer's property by workmen during labor troubles, but, as used in the Criminal Syndicalism Act, is defined by the act itself as meaning willful and malicious physical damage or injury to physical property.

12. Insurrection ⚷2—Distribution of prohibited literature held to support finding of wrongful intent.

Where defendant, the secretary of a branch of the I. W. W., distributed literature under his control and in his possession which violated the Criminal Syndicalism Act with full understanding of its nature, a finding that he intended and was attempting to bring about such consequences as might be reasonably anticipated from its distribution is warranted.

13. Insurrection ⚷5—Probable effect of literature and defendant's motives held questions for jury.

In a prosecution for circulating and displaying literature prohibited by the Criminal Syndicalism Act, the interpretation to be placed on the matters circulated and displayed, the probable effect of the circulation in the mode adopted and defendant's motives in distributing them were questions for the jury.

14. Criminal law ⚷1163(3)—Absence of prejudice presumed when not affirmatively shown.

Where there is no affirmative showing of prejudice from the court's action in admitting exhibits which were subsequently withdrawn, it will be presumed that no prejudice resulted.

15. Criminal law ⚷772(3)—Instructions held to sufficiently limit statute read to jury to allegations of indictment.

Though the court read all of sections 1 and 2 of the Criminal Syndicalism Act to the jury on a trial for violating subdivision 3 of section 2, where he read the indictment in full and told the jury to find defendant guilty of the crime set forth therein or not at all, there was a sufficient express limitation of the act to the allegations of the indictment.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

J. P. Malley was convicted of violation of the Criminal Syndicalism Act, and, from the judgment and orders denying motions for a new trial and in arrest of judgment, he appeals. Affirmed.

Austin Lewis, of San Francisco (R. M. Royce, of Oakland, of counsel), for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WASTE, P. J. The defendant was indicted for violating chapter 188 of the Statutes of 1919, commonly known as the Criminal Syndicalism Act. He was found guilty and sentenced to imprisonment in the state prison. This appeal is from the order denying the motion for a new trial, and in arrest of judgment, and from the judgment of conviction and sentence. The appellant contends that the indictment does not charge a public offense with the degree of certainty required, and that the evidence is insufficient to sustain the conviction. He alleges that error was committed in the introduction of certain exhibits which were subsequently withdrawn, and complains of the action of the trial court in reading the entire statute in its charge to the jury.

The indictment charges that the defendant circulated and publicly displayed certain books, papers, pamphlets, documents, and other printed and written matter, in his possession and custody, and under his control, containing and carrying written advocacy, teaching, and advising of criminal syndicalism. The defendant interposed a demurrer to the indictment which was overruled. It is contended, on this appeal, that the ruling of the lower court was erroneous, appellant claiming that the indictment does not state facts sufficient to constitute a public offense, and that it does not contain a statement of the acts constituting the offense charged, in ordinary and concise language, in such manner as to enable a person of common understanding to know what is intended; and further that it is faulty in neither setting out, nor identifying the books, papers, pamphlets, documents, and other printed and written matter, the defendant is charged with circulating and publicly displaying.

Section 1 of the act defining criminal syndicalism, and sabotage, and prescribing what acts and methods in connection therewith amount to a violation of its provisions (Stats. 1919, p. 281), defines the term "criminal syndicalism" to be "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." It is declared in section 2, subd. 3, that any person who "(3) prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid in abetment of, or advising, criminal syndicalism, * * * is guilty of a felony and punishable by imprisonment in the state prison." Other acts constituting separate offenses under the statute are set forth in section 2, under appropriate groupings. Subdivision 1 relates to any person who by spoken or written words, or personal conduct, advocates criminal syndicalism. Subdivision 2 deals with those who in like manner justify, or attempt to justify, such doctrines. Subdivision 4 refers to those who organize or become members of societies formed for the purpose of teaching criminal syndicalism. Subdivision 5 relates to those persons who advocate criminal syndicalism for the purpose of accomplishing a change in industrial ownership, or control, or for effecting political changes.

Omitting the necessary formal parts, the indictment charges that the defendant did "willfully, unlawfully, and feloniously circulate and publicly display, certain books, papers, pamphlets, documents, and other printed and written matter, then and there in the possession, custody, and under the control of him, the said James P. Malley, containing and carrying written advocacy, teaching, and advising of criminal syndicalism, to wit, advocating, teaching, and advising the commission of crime, sabotage, and other willful and malicious damage and injury to property, and unlawful acts of force and violence, and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control, and effecting political changes." This averment, it will be noted, substantially follows the languages of section 1 and section 2, subdivision 3, of the statute, by the terms of which the commission of the acts, alleged in the indictment, is made a criminal offense. In support of the sufficiency of the indictment the Attorney General cites In re McDermott, 183 Pac. 437, wherein, on an application for a writ of habeas corpus, the Supreme Court said that the complaint, or deposition, in almost the exact language of the pleading in this case, stated an offense under the provisions of the "act defining criminal syndicalism." But, in the later case of Whitney v. Superior Court (Sup.) 187 Pac. 12, the court said that the objections to the sufficiency of the information to state a public offense fell within the rule announced in Re Ruef, 150 Cal. 665, 89 Pac. 605, in which it was held that where an indictment purports, or attempts, to state an offense, the question whether the facts charged are sufficient will not be examined into on habeas corpus. Therefore the McDermott decision may not be relied upon to support the indictment in this case.

[1, 2] To hold that the indictment does not state a public offense would be to say that the statute defines none, for, as we shall presently show, the former follows and employs almost the precise language of certain sections of the act. The language of the statute and of the indictment being the same, the latter must be understood in the same sense as the former. People v. White, 34 Cal. 183, 186. In enacting the Criminal Syndicalism Act the Legislature declared in one of its provisions that it concerns, and is necessary to the immediate preservation of, the public peace and safety. It has power to repress whatever it deems hurtful to the general good, the only limitations being those prescribed in the Constitution. Ex parte Andrews, 18 Cal. 679, 682. This precise question was very recently considered by the Supreme Court of the state of Minnesota. Every objection, we think, urged against this indictment, was made there in an attack upon the constitutionality of a statute, so similar as to be almost identical in many respects with ours. It was there squarely held that no right granted, or secured to the citizen, by either the federal or state Constitution, was taken away or in any way impaired by the act. The opinion aptly disposes of much of appellant's argument here as is shown by the following quotation:

> "The design and purpose of the Legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the state, arising from the practice of sabotage and other unlawful methods of terrorism employed * * * in furtherance of industrial ends and in adjustment of alleged grievances against employers. The facts surrounding the practice of sabotage, and like in terrorem methods of self-adjudication of alleged wrongs, are matters of common knowledge and general

public notoriety of which the courts will take notice. That they are unlawful and within the restrictive power of the Legislature is clear. Sabotage as practiced by those advocating it as an appropriate and proper method of adjusting labor troubles embraces, among other lesser offensive acts, the willful and intentional injury to or destruction of the property of the employer in retaliation for his failure or refusal to comply with wage or other kindred labor demands. It amounts to malicious mischief and is a crime at common law as well as by statute. The methods of terrorism referred to in the statute have close relation to sabotage, and are practiced for the purpose of intimidation, and to coerce employers into a compliance with labor demands. Methods of that sort are equally unlawful and open to legislative condemnation.

"It is the exclusive province of the Legislature to declare what acts, deemed by the lawmakers inimical to the public welfare shall constitute a crime, to prohibit the same and impose appropriate penalties for a violation thereof. With the wisdom and propriety thereof the courts are not concerned. State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N. W. 935, 9 Ann. Cas. 634; Clark & Marshall, Crimes, § 41. Judicial consideration of enactments of the kind is limited to the inquiry whether the constitutional rights of the citizen have been invaded or violated. If such rights be in no wise infringed or abridged, the statute must stand however harsh it may seem to those who run counter to its commands. It requires no argument to demonstrate that the subject-matter of this statute was and is within legislative cognizance, vesting in that body the clear right to prohibit the advocacy or teaching of the iniquitous and unlawful doctrines which it condemns." State v. Moilen (Minn.) 167 N. W. 345, 346.

[3] The Supreme Court of California has said that no reason for holding the act beyond legislative power is obvious to it. In re McDermott, 183 Pac. 437. None is made to appear to us, in so far as its provisions are material in this case.

The rules by which the sufficiency of the pleadings in criminal actions is to be determined are those prescribed by the Penal Code of this state.

Under its provisions an indictment or information is only required to contain a statement of the acts constituting the offense, with which a defendant is charged, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. If the particular circumstances of the offense charged are necessary to constitute a complete statement of the crime, the pleading must be direct, and certain in that regard. The words used are to be construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are to be construed according to their legal meaning. Words used in a statute to define a public offense need not be strictly followed, but other words conveying the same meaning may be used. The degree of certainty must be such as to enable the court to pronounce judgment, upon a conviction, according to the right of the case. When these simple requirements have been complied with, the indictment, or information, is sufficient as to the statement of the act, or omission, charged as the offense. Penal Code, §§ 948, 950, 952, 957, 958, 959. These sections were taken almost verbatim from the first "act to regulate proceedings in criminal cases," passed by the Legislature in 1850 (Stats. 1850, pp. 275, 293, 294), under which it was almost immediately held that the "subtle distinctions and nice technicalities usually observed in an indictment at common law" had been abolished, and that only the substantial facts necessary to constitute the crime charged must appear. People v. Thompson, 4 Cal. 238, 239. Not long afterwards it was held that while the substantial facts, necessary to constitute the crime charged, must appear in the indictment with sufficient certainty to enable the court to pronounce a proper judgment, and the party to defend the charge, it was not necessary that they be stated with the particularity which was required at common law; it being sufficient if a man of ordinary intelligence could understand that under such circumstances an offense had been committed. People v. Dolan, 9 Cal. 576, 582. The modern disposition to relax much of the ancient strictness in criminal proceedings, followed by the Legislature in substituting "in the place of the old, a new system of practice and pleading, which retains all the elements of the former so far as they are made necessary by a due regard for the substantial rights of a defendant, but discards all such elements as serve to no good purpose, but tend to embarrass and defeat the administration of justice," was approvingly referred to in People v. King, 27 Cal. 507, 510–511 (87 Am. Dec. 95), where the court said:

> "If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense."

In keeping with the broad construction placed by it upon the action of the Legislature, in establishing the more liberal method of pleading in criminal cases, the Supreme Court, from the start uniformly held, in respect to indictments generally, that they were sufficient, in matter of averments, if they contained allegations of all the acts, or facts used by the Legislature in defining the particular offense charged. People v. Cronin, 34 Cal. 191, 208; People v. Murray, 67 Cal. 103, 7 Pac. 178; People v. Rozelle, 78

Cal. 84, 90, 20 Pac. 36. Shortly after the Penal Code was adopted, the court held that none of its sections changed the rules of pleading so as to require a more specific allegation of the means employed in the commission of an offense, than was necessary under the former statute. People v. Weaver, 47 Cal. 106, 108.

[4] As corollary to these rules of construction, and ever mindful of the lack of care on the part of prosecuting officers, in the preparation of pleadings in criminal matters, to which Chief Justice Murray called attention in the early case of People v. Thompson, supra, the court has as consistently held that, while it is a fact that the rules of the common law with respect to criminal pleading have been greatly relaxed in this state by legislation and judicial decision, and many of the formalities and particulars formerly deemed necessary are not now required, there are certain fundamental principles which have neither been abrogated nor modified. A defendant is still entitled to be apprised with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense, and, upon acquittal or conviction, plead his jeopardy against further prosecution. A defendant is entitled, under any statute, to a clear statement of the offense with which he is charged. People v. Lee, 107 Cal. 477, 480, 40 Pac. 754; People v. Webber, 138 Cal. 145, 149, 70 Pac. 1089; People v. Bergotini, 172 Cal. 717, 720, 158 Pac. 198.

[5, 6] Several separate, different, and distinct acts are enumerated in the Criminal Syndicalism Act, the commission of each, or any of which, constitutes a specific offense, though the same crime, and the defendant in order to make his defense was entitled to know what wrong he was charged with. The indictment, as already pointed out, follows substantially the language of section 1, and section 2, subd. 3, of the act, by the terms of which the commission of the acts, there enumerated, is made a criminal offense. As the statute defines, and describes, the acts constituting the particular offense, it was sufficient to describe those acts in the indictment in the language employed in the statute, applying them, of course, concretely to the defendant. People v. Ward, 110 Cal. 369, 372, 42 Pac. 894. No more was required than that the indictment be direct and certain, and allege all the acts and facts which the Legislature has said shall constitute the offense. People v. Fowler, 88 Cal. 136, 138, 25 Pac. 1110. The defendant was only entitled to be apprised with reasonable certainty of the nature and particulars of the crime charged against him. People v. Lee, supra. Absolute certainty is not guaranteed to him by either legislative or judicial decision.

Had this defendant been charged with merely committing an act of criminal syndicalism in general terms, his objections would be well taken; but he was charged with the commission of a public offense by an indictment, the words of which he, and all others, were bound to construe in their usual acceptance in common language, except the word "sabotage" which carried with it the definition and legal meaning given to it by the statute. Pen. Code, § 957. He was informed in ordinary and concise language of the acts constituting the alleged crime. No other circumstances were necessary to constitute a complete offense. Bound, as we are, by the unbroken line of authorities in this state to the effect that only in exceptional cases, of which this is not one, is it necessary to do more than set out the offense in the language of the statute, we must hold this indictment sufficient. It contains, in a clear and concise statement, allegations of all the acts, and facts, used by the Legislature in defining the particular offense with which the defendant is charged. According to the established rules of pleading, the defendant was informed of the nature and cause of the accusation against him. Burton v. United States, 202 U. S. 344, 372, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362.

[7] The indictment did not specify, or identify the books, papers, pamphlets, documents, and other printed matter which it is alleged the defendant circulated and publicly displayed, and no copies are attached. Appellant therefore urges the contention that the allegations that the defendant circulated and publicly displayed books and other matter "containing and carrying written advocacy, teaching and advising of criminal syndicalism," states but a conclusion of law, and also that unless the books and other matter so circulated and displayed be identified, or particularly described, the defendant is without means of knowledge sufficient to enable him to prepare a defense. We are not wholly satisfied with the indictment in this respect. We have examined a number of the decisions dealing with prosecutions similar to the one at bar. In nearly every instance, so far as we have gone, some means of identification of the documents in question was adopted. In some cases copies of publications, circulars, and pamphlets were attached to the indictment. Abrams v. United States, 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173. In another photographic copies of posters were attached. State v. Moilen, supra. In others the book, or publication, is described by name or other designation. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. 205, 64 L. Ed. 542. While this procedure was followed in the other jurisdictions, and we highly commend its adoption in a spirit of fairness towards defendants charged with the particular offenses described by the criminal syndicalism stat-

ute, we are not prepared to hold that the omission to do so will prove fatal to a conviction under the circumstances of this and similar cases. We have already announced our conclusion that the defendant was apprised of the nature of the offense, with which he was charged, with that reasonable certainty to which he was entitled. This is not one of those cases in which any further statement of acts, or facts, is required to allege a complete offense, beyond the language employed in the statute. It was not necessary, therefore, to aver the means by which the defendant devoted himself to the dissemination of the propaganda of criminal syndicalism, which is the evil the statute strikes at. He was sufficiently charged with doing certain acts which the law forbids, the doing of which is made a criminal offense. Ex parte Foley, 62 Cal. 508; People v. Hunt, 120 Cal. 281, 52 Pac. 658.

[8] Even though the indictment was defective, in not identifying the matter circulated and displayed by the defendant, which we do not in the least admit, it was but an error in pleading, and following the mandatory direction of the Constitution (section 4½ of article 6), the judgment should not be reversed unless the error of pleading has, in the opinion of this court, formed after an examination of the entire case, resulted in a miscarriage of justice. People v. Griesheimer, 176 Cal. 44, 49, 167 Pac. 521; People v. Bonfanti, 181 Pac. 80. No indictment is insufficient, in this state, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect which does not tend to the prejudice of a substantial right of the defendant upon its merits. Pen. Code, § 960; People v. Rozelle, 78 Cal. 84, 90, 20 Pac. 36; People v. Ah Sing, 95 Cal. 654, 656, 30 Pac. 796. That phase of the case we shall presently consider.

[9] It was not necessary to specify the books, papers, pamphlets, or documents alleged to have been circulated and displayed by the defendant, in order to protect him from a second prosecution for the offense. If he should be again prosecuted for the offense, he may plead his conviction in the manner provided by the Code, and establish the identity of the cases by evidence; the burden being upon him. People v. Faust, 113 Cal. 172, 176, 45 Pac. 261; People v. Burke, 18 Cal. App. 72, 80, 122 Pac. 435.

[10] The appellant contends that the evidence in this case is insufficient to warrant his conviction. He was shown to be a member and the secretary of the San Francisco branch of the Industrial Workers of the World, an international organization, or movement, commonly known and designated as the "I. W. W." As such secretary he was in charge of its headquarters and the place of assemblage of the members of the organization. On tables, and in bookcases in the rooms were openly displayed, and exposed for sale, large quantities of pamphlets, and other printed matter, in order to purchase any of which it was necessary to consult the defendant, who stated to a number of persons previous to his arrest that it was "for sale." There were introduced in evidence as being part of the printed matter thus offered for sale by the defendant: A copy of "The One Big Union Monthly," a magazine published by the General Executive Board of the Industrial Workers of the World, and devoted to the dissemination of the preamble and doctrines of the organization, and manifestly devoted to advancing the "triumph of the one big union"; "The Liberator—a Journal of Revolutionary Progress," a considerable portion of which publication appears to be devoted to extolling Eugene V. Debs and "the invincible I. W. W."; a pamphlet entitled "The Revolutionary I. W. W.," by Grover H. Perry, from which it appears, according to its author, that "the I. W. W. is fast approaching the stage where it can accomplish its mission"; "The Red Dawn—The Bolsheviki and the I. W. W.," in which "the lesson of the Bolsheviki and the road to power of the I. W. W." are offered as a means of advancement to industrial freedom; a leaflet entitled "Poison Gas and Violence"; two books of songs, one entitled "I. W. W. Songs—To Fan the Flames of Discontent," and the other bearing a frontispiece depicting a female figure bearing a shield on which are the words "Solidarity, Class Consciousness," holding aloft a blazing torch, and standing on a platform upon which are the words "I Will Win"; a pamphlet entitled "I. W. W., One Big Union of all the Workers, The Greatest Thing on Earth"; a Russian revolutionary pamphlet, entitled "Lessons of the Revolution, by Vladimir Oulianow (N. Lenin), translated from the Russian original and published by the Bureau of International Revolutionary Propaganda attached to the commissariat for foreign affairs of the Provisional Workmen's and Peasants' Government of the Russian Republic." This pamphlet, which bears a rubber stamp indorsement "I. W. W. Hall, 1135 Mission St.," accords "all power to the Soviets," which "means a complete surrender of the administration of the country and of control over its economic resources to the workmen and peasants, whom no one would dare to resist, and who would soon learn by experience, from their own practice, justly to distribute the bread, the land, and the necessities."

We do not think it is necessary to make long quotations from these various publications, which were introduced in evidence, in order to illustrate the nature of their contents. One excerpt from the pamphlet "The Revolutionary I. W. W.," by Grover H. Perry, will suffice. The pamphlet defines the I.

W. W. organization as a "labor union that aspires to be the future society," sets forth the "interests in common" of all workers and the power that the I. W. W. would have if, when a strike is called, a whole industry could be paralyzed, and thus an employer "would be forced to accede to the demands of the workers. That is the way the I. W. W. proposes to organize." Further along we find this language:

> "The Industrial Workers of the World is an international movement; not merely an American movement. We are 'patriotic' for our class, the working class. We realize that as workers we have no country. The flags and symbols that once meant great things to us have been seized by our employers. To-day they mean naught to us but oppression and tyranny. As long as we quarrel among ourselves over differences of nationality, we weaken our cause; we defeat our own purpose. The practice of some craft unions is to bar men because of nationality or race. * * *
>
> "*Organizing a New Social System.*—The I. W W. is fast approaching the stage where it can accomplish its mission. This mission is revolutionary in character. The preamble of the I. W. W. constitution says in part: 'By organizing industrially we are forming the structure of the new society within the shell of the old.' That is the crux of the I. W. W. position. We are not satisfied with a fair day's wages for a fair day's work. Such a thing is impossible. Labor produces all wealth. Labor is therefore entitled to all wealth. We are going to do away with capitalism, by taking possession of the land and the machinery of production. We don't intend to buy them, either."

As was well said by the writer of the opinion in Kumpula v. United States, 261 Fed. 49, 52, 171 C. C. A. 645, 648, in commenting upon this identical language:

> "If the preamble and constitution of the organization are correctly expounded by the Perry pamphlet, the flag of the nation means only 'oppression' and 'tyranny,' and the 'mission' and purposes of the I. W. W. organization are to be accomplished by force, violence, and other unlawful means."

[11] We have already alluded to the design and purpose of the Legislature in the enactment of the statute. "Sabotage," in the ordinary sense of the word, means the "malicious waste or destruction of an employer's property by workmen during labor troubles." Webster's New International Dictionary. Its legal meaning, as applied by the Legislature, is found in the statute which defines criminal syndicalism as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." The circulation or display of printed matter, in any form, containing "advocacy, teaching, or aid in abetment of, or advising criminal syndicalism," is prohibited by the act, the incentive for the adoption of which, as stated in one of its sections, was the fact that large numbers of persons were then going from place to place in this state, advocating, teaching, and practicing the doctrine of sabotage, and other unlawful acts of force, violence and unlawful means of terrorism, employed in furtherance of industrial demands, and in settlement of alleged grievances against their employers. So insistent was the danger that the Legislature departed from its usual course, and provided that the act, destined to put a stop to the practices therein made unlawful, should have immediate effect. It was the "unlawful" acts of force and "unlawful" methods of terrorism that the Legislature struck at, not acts which are permissible and within the law. In re Hartman (Sup.) 188 Pac. 548.

[12] Appellant's arrest, and subsequent conviction, followed not long after the enactment of the law. When arrested, the defendant declared that he was not a citizen of the United States, and that he had no desire to be one. A copy of the Criminal Syndicalism Act, under which this prosecution is lodged, was posted conspicuously upon the wall in the headquarters. We are satisfied from the record that the defendant distributed the literature under his control, and in his possession, with full understanding of its nature; and this, of itself, furnished a ground of attributing to him an intent to bring about, and for finding that he was thereby attempting to bring about, any and all such consequences as might reasonably be anticipated from its distribution. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. 205, 209, 64 L. Ed. 542.

[13] The question presented in this case is whether the printed matter was circulated under such circumstances, and is of such nature as to create a clear and present danger, or to bring about an evil, that the Legislature had a right to prevent; or, stated in another way: Does this case so made show an advocacy and teaching of the form of sabotage, or the other methods of terrorism designed to effect industrial and political ends which the statute condemns? It was held in State v. Moilen, supra, 167 N. W. 348, that the question was one for the jury. What interpretation ought to be placed upon the printed matter circulated and displayed by the defendant, what would be the probable effect of its circulation in the mode adopted, and what were defendant's motives in so doing, were questions for the jury to decide, in view of all the circumstances of the time and manner of its distribution. Pierce v. United States, supra; Schenck v. United States, 249 U. S.

47, 52, 39 Sup. Ct. 247, 63 L. Ed. 470. Its decision, on evidence which we deem sufficient, is against the defendant. We do not think it necessary to dwell longer upon this phase of the question, important as it is, for the reason that the eminent authorities already cited seem to conclusively set the matter at rest, both as to the nature of the evidence, and the power of the jury to make the ultimate decision in the matter.

[14] During the trial the court admitted in evidence on behalf of the prosecution certain translations from Russian writings, and a copy of "I. W. W., Its History, Structure and Methods, by Vincent St. John," which were found in the desk of the defendant. Later, upon the suggestion of the district attorney, they were withdrawn. The court thereupon ordered the exhibits stricken out, and instructed the jury to disregard them. Defendant contends that prejudicial error resulted from the admission of these exhibits, which was not cured by their subsequent withdrawal, and the instructions of the court. He fails to point out, however, where any error resulted, relying merely upon People v. Derbert, 138 Cal. 470, 71 Pac. 564, which deals with alleged misconduct on the part of the district attorney, in persisting, against the ruling of the court, in asking improper questions. The decision has no bearing on the facts of the case at bar. In the absence of any affirmative showing, it will be presumed that no prejudice resulted from the act of the court in this regard. People v. Lapara, 183 Pac. 545.

[15] Appellant's last contention is that the court erred in reading all of sections 1 and 2 of the Criminal Syndicalism Act in its charge, instead of instructing the jury that the defendant was only charged with violating subdivision 3 of said section 2, which specifically relates to the printing, publishing, and displaying, of certain printed matter. The court, however, read the indictment in full, and charged the jury that it must find the defendant guilty "of the crime as set forth in the indictment beyond all reasonable doubt," or not at all. This was a sufficient express limitation of the terms of the act to the allegations contained in the indictment. Hargrave v. State (Tex. Cr. App.) 30 S. W. 444; Simons v. State (Tex. Cr. App.) 34 S. W. 619, 620; People v. Young, 186 Pac. 383.

The defendant was charged with a public offense in an indictment which was sufficient for that purpose. His guilt was established to the satisfaction of the jury upon evidence of sufficient probative force to warrant the conviction. No miscarriage of justice resulted from any matter occurring in connection with the overruling of the demurrer, or rulings of the court during the trial.

The orders denying defendant's motions for a new trial and in arrest of judgment, and the judgment, are, and each is, affirmed.

We concur: RICHARDS, J.; BEASLY, Justice pro tem.

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49 Cal. App. 646

JONES v. KEHRLEIN et al. (Civ. 3286.)

(District Court of Appeal, First District, Division 1, California. Oct. 23, 1920.)

1. Master and servant 🔑302(1)—Theater usher held acting within authority in excluding negro from particular section.

A theater usher who had general orders to seat all members of the so-called dark races in a particular section of the theater was acting within his authority in refusing plaintiff, a negro, a seat in a different section.

2. Civil rights 🔑2—Statute held valid.

Civ. Code, § 51, requiring all persons to be awarded equal accommodations and privileges in theaters, etc., and section 52, making persons denying any such rights except for reasons applicable alike to every race and color liable in damages, are valid.

3. Civil rights 🔑6—Refusal of theater seat except in section set apart for members of plaintiff's race held violation of statute.

It was a violation of Civ. Code, §§ 51, 52, for the management of a moving picture theater to refuse plaintiff, a negro, a seat except in a section set apart for the so-called dark races, solely on account of plaintiff's color and race.

4. Civil rights 🔑6—Provision of theater ticket invalid so far as authorizing seating in particular section solely because of race.

While a theater ticket by which the holder was to be admitted to such seat as might be assigned by the management gave the management a right to adjust the seating of the audience and to select, within legal bounds and for legal reasons, the seats of its various patrons, it was invalid so far as it authorized the management to require a negro to sit in a particular section solely because of his race and color.

5. Civil rights 🔑6—Purchase of theater ticket held not contract to submit to discrimination so as to prevent recovery.

A negro, by purchasing a theater ticket authorizing the management to assign him a seat, did not contract to submit to a violation of his legal rights so as to prevent recovery for refusing him a seat in a particular part of the theater because of his race and color.

6. Civil rights 🔑6—Minor held entitled to recover for discrimination.

Civ. Code, § 53, making it unlawful to refuse admittance to any theater, etc., to any person over 21 presenting a ticket of admission, does not prevent a minor from recovering under sections 51 and 52 for refusal to allow

him to sit anywhere except in a particular section, where he was not discriminated against because of his minority, but because he was a negro.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Errol Jones, a minor, etc., against Oliver Kehrlein, Jr., and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Everts & Ewing, of Fresno, and J. R. Fitch, of Oakland, for appellants.

E. Burton Ceruti, of Los Angeles, for respondent.

BEASLY, Justice pro tem. This is an appeal from a judgment obtained by plaintiff against the defendants.

The plaintiff is a minor, a citizen of the United States and a negro. The defendants conduct a moving picture show at Fresno, and on June 20, 1918, sold to plaintiff two tickets to the show, upon presentation of which plaintiff and his young woman friend were admitted to the showroom. He was thereupon directed by an usher, acting under general orders from the management to seats on the right side of the house, which were set apart by the management for the use of what the defendants termed "the dark races." The boy declined to follow the direction of the usher, and requested a seat in a part of the house not so set aside, namely, in the rear of the center section, where, incidently there were plenty of vacant and unsold chairs. The ticket was of the kind which in the hands of one not of the "dark races" admitted the holder to seats in this latter section of the house. This request on his part was refused, and he and his companion thereupon left the theater. He subsequently brought this action to recover $5,000 as damages because of the incident, and was awarded judgment for $100. The defendants appeal from this judgment.

In response to allegations of the complaint the trial court found that the plaintiff was refused a seat in the center section of the lower floor of the theater solely because he was a negro, and that he was thereby denied the full accommodation and privileges of the theater because of his race and color and without any other cause applicable to all citizens of every race and color, to his humiliation and damage in the sum of $100.

These findings are supported by the following facts in evidence: Each of the tickets purchased by plaintiff provided for admission of one person to such seat as might be assigned its holder by the management. It was of the class of tickets which were honored by giving to those presenting them seats in the rear of the center section of the theater. When the young man was told that he could not sit in the center section of the house, he asked the reason for this distinction, and the significant answer was, "You know the reason why," and further, "Because you people can't sit there," and again, "Because it is the orders of the management." The defendant Kehrlein subsequently stated in conversation with the father of the plaintiff that the management put all of the dark races (with whom he included colored persons, Japanese, Chinese, and Mexicans) on the left side, not, as he claimed, because of any prejudice of his own against them, but for the reason that doing otherwise would hurt his business. There is, then, no question that young Jones was refused a seat among those for which his ticket called, and ordered into the section set apart for colored people, Japanese, Chinese, and Mexicans, solely because he was a negro.

[1] The first point made for reversal is that the usher who endeavored to seat Jones in the "dark" section of the theater acted without authority of the management. It was admitted by defendants' counsel at the trial that the usher was acting under the authority of the management. It is now claimed, however, that this stipulation was general in its nature, and did not include acting under authority of the management in doing the specific and tortious act complained of by the plaintiff. The testimony of the plaintiff's father as to Kehrlein's declarations above referred to, accepted as it was by the court, shows that the ushers acted under sweeping general orders of the management to seat all so-called "dark" races in the section to which young Jones was directed. This was authority to discriminate against the plaintiff sufficient to bind the defendant Kehrlein.

The statutory law governing this case is embodied in part 2 of the Civil Code, embracing, among others, the four sections numbered 51 to 54, inclusive. Section 51, as it existed at the time of the incident out of which this case grows and before it was amended in 1919, provided that all persons within this state are entitled to the full and equal accommodations, advantages, facilities, and privileges of theaters and all other places of public amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens; and at the same time and before its amendment in 1919 section 52 provided that whoever should violate the provisions of section 51 by denying to any citizen, except for reasons applicable alike to every race and color, the rights enumerated in that section, or whoever should make any discrimination on account of color or race, or except for good cause applicable alike to all citizens of every color or race whatever, in respect to the admission to or treatment in any theater or other place of public amusement, or should aid or incite thereto, should be liable in damages in a sum not less that $50, which might be recovered in an action at law brought for that purpose.

It is contended that the facts in the record, while showing segregation of the plaintiff, do not establish a discrimination against him. This is another way of saying that the plaintiff's personal rights under part 2 of the Civil Code were not violated by the act complained of. In support of this contention the appellants cite Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 16 L. R. A. 558, 33 Am. St. Rep. 527, a Missouri case. In that case the Court of Appeals of the state of Missouri held that segregating the negro patrons of a theater in the gallery, and refusing them seats in the orchestra, did not violate the rights of colored citizens under the Fourteenth Amendment to the Constitution of the United States; but it is distinctly said even there that "a discrimination against colored persons by permitting them to sit only in the balcony of a theater is not unlawful, in the absence of any statute to the contrary." The fact that there was no civil rights act in Missouri at the time that case arose distinguishes it from the case now before us, and the distinction is clearly pointed out in the Missouri case, where it is said:

> "This state has enacted no law having any application to the present case. It does not undertake to say how theaters and other places of amusement shall be managed. As the state does not by itself or through the city of Kansas undertake to regulate theaters, and as the clauses of the Fourteenth Amendment before noted are prohibitory of state action only, they have nothing to do with the question at hand. There is nothing upon which the prohibitions can operate. Many of the states have enacted laws known as 'civil rights statutes,' and we are cited to cases upholding and giving effect to such laws. Under them it has been held that the proprietor of a theater will be liable in damages for a refusal to admit a colored person (Joseph v. Bidwell, 28 La. Ann. 382; Donnell v. State, 48 Miss. 661), and for a refusal to admit a colored person to the several circles or grades of seats in a theater (Baylies v. Curry, 128 Ill. 287)."

So that even this case recognizes the force of such statutes as ours.

The appellants also, in support of this contention, cite Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256. This case arose out of a statute of Louisiana which provided that railroads operating in that state should furnish different coaches for white and negro passengers, and that neither race should be permitted to occupy the coaches designed for the other. It was there held that such a statute was not in conflict with the Fourteenth Amendment; but here the question is not the constitutionality of such a statute segregating the races and providing equal accommodation for each. There is no such statute in California nor any similar statute here applicable to theaters.

[2, 3] On the contrary, in a case entitled People of the State of New York v. King, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293, 6 Am. Rep. 389, both the policy and constitutionality of a statute of the state of New York almost identical with the provisions of our Code were strongly upheld; and in Ferguson v. Gies, 82 Mich. 358, 46 N. W. 718, 9 L. R. A. 589, 21 Am. St. Rep. 576, the Supreme Court of Michigan upheld a statute similar to our own Code provisions. There is no doubt as to where the weight of authority lies on this point. It upholds such statutes, and also holds that conduct such as that of the defendants toward plaintiff constitutes a discrimination against the negro on account of his color and race in violation of his rights under such civil rights bills. The construction placed upon the acts of defendant Kehrlein by the trial court is that the refusal to seat Jones in any other portion of the house than that set apart for the so-called colored races constituted an illegal discrimination against him under sections 51 and 52 of the Civil Code.

[4] A further point is made to the effect that the provisions of the ticket by which the holder was to be admitted to such seat as might be assigned by the management gave the management the absolute right to assign to the holder any seat which they might designate, including a seat in what might be called the segregated section. It is true that the management had the right to adjust the seating of its audience, as the manager claimed on the witness stand, and to select within legal bounds and for legal reasons the seats of its various patrons holding this form of ticket; but, if this provision of the ticket is to be interpreted as giving them the right to seat young Jones and his girl friend in the segregated section because of his race or color, the provision of the ticket is to that extent illegal and void; for the right to full and equal treatment, as prescribed in section 51 of the Civil Code, is subject only to conditions and limitations established by law and applicable alike to all citizens. This provision in the ticket, if meant to give the management the right to discriminate against plaintiff in seating him on account of his race and color, is to that extent illegal and void.

[5] It is also contended that in purchasing the tickets with the provision permitting the management to assign him a seat Jones did so with his eyes open, and that if he did not like the conditions he need not buy. But it is clear that in purchasing the ticket Jones made no contract that bound him to submit to being seated in violation of his legal rights. The language of the ticket conferred and could confer no such right upon the management to discriminate against him in violation of the rights guaranteed him by part 2 of the Civil Code. The truth is, as found by the court, that the whole transaction with young Jones was tainted from the beginning with illegality arising

out of the intent of the management from the start to deprive him of his civil rights under the statute by discriminating against him in the matter of seating accommodation solely on account of his race. The intent was illegally conceived and illegally carried out by the management of the theater.

[6] The next contention is that the plaintiff does not come within the classes of citizens protected in their civil rights by sections 51 and 52 of the Civil Code because he was a minor. Say the appellants:

> "The words 'all citizens,' taken in connection with section 53 of the same Code, would mean all citizens over the age of 21. Plaintiff being a minor, the guaranty of the statute does not extend to him because it expressly excludes minors by particular reference to persons over the age of 21. The complaint therefore does not state a cause of action."

In support of this appellants cite Greenberg v. Western Turf Ass'n, 140 Cal. 362, 73 Pac. 1051, in which the right of admission to a place of public amusement is said to have been guaranteed to the plaintiff in that case by law "in common with all other inhabitants of the state over the age of twenty-one." The quoted sentence from the case is the only portion thereof stressed by the appellants in their argument. Other than the inference which can be drawn from these quoted words, there is nothing in the case bearing upon the question before us, but the provisions of section 53 of the Civil Code are intended to guarantee admission of all citizens to places of amusement, and the restriction therein as to minors, if the language imports such restrictions, is intended only to permit the exclusion of minors from certain classes of public amusements, and this is all that is intended thereby. There is neither pleading nor evidence that young Jones was segregated because he was a minor nor that minors generally were excluded from Kehrlein's show, but, on the contrary, the court finds from convincing evidence that the sole reason for discrimination against the plaintiff was his race and color. Further than this, it may be said that the defendants took the young man's money, and they cannot now be heard to say in court that because the plaintiff was a minor he shall not be permitted to recover for the wrong done him. The plaintiff was not refused the seat he desired because he was a minor, but because he was a negro, and section 53, Civil Code, was never intended to form a defense to an action by one whose rights under sections 51 and 52 have been violated.

This seems to dispose of all of the contentions of the appellants in the case.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

TURNER v. FIDELITY & DEPOSIT CO. OF MARYLAND. (Civ. 3215.)*

(District Court of Appeal, Second District, Division 2, California. Oct. 29, 1920.)

1. Attachment 🔑333—Surety liable on bond to release where condition on which recovery is made to depend happened.

Where the condition on which, by the express agreement of a surety on bond for the release of an attachment, plaintiff's right of recovery on the bond is made to depend, that is, the recovery by plaintiff of a judgment in the action, has come to pass, defendant surety is liable under the letter of its undertaking, unless it can successfully contend that the bond was merely a substitute for the property attached, and that, because the death of defendant in the former action dissolved the attachment, its liability on the undertaking has been discharged.

2. Attachment 🔑272, 337 — Surety on common-law bond to release attachment not released by death of defendant pending appeal, which did not dissolve attachment.

Where the bond given to release an attachment was not a statutory delivery or forthcoming bond, and was not of such a character that the release of the property from the attachment must follow by compulsion of law, being merely a common-law bond to pay plaintiff whatever judgment he might recover in the action, the surety unconditionally obligated itself thereon, and, plaintiff having recovered judgment, must satisfy the same, though defendant in the action wherein the attachment issued, its principal, died pending appeal, which did not dissolve the attachment.

3. Attachment 🔑277 — Statutory bond alone takes place of property attached to be dissolved by whatever would have dissolved attachment lien.

If in any case an undertaking to release an attachment may be deemed to take the place of the property attached, so that whatever would have worked dissolution of the attachment lien shall have a like effect on the undertaking, it is only when the bond is a statutory bond, and is conditioned for the redelivery of the property.

4. Pleading 🔑248(4) — Amendment detailing character and extent of breaches and enlarging damages permissible.

In an action on a contract between plaintiff and defendant wherein defendant, among other things, agreed to subdivide certain property, amendment of the complaint to set forth more in detail the character and extent of breaches, and enlarging somewhat the amount claimed as damages therefor, was permissible, stating no new and different cause of action.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Frank C. Turner against the Fidelity & Deposit Company of Maryland. From judgment for plaintiff, defendant appeals. Affirmed.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion of Supreme Court. See 200 Pac. 959.

S. E. Vermilyea and S. L. Carpenter, both of Los Angeles, for appellant.

Stephens & Stephens, of Los Angeles, for respondent.

THOMAS, J. This is an action to recover on a bond alleged to have been given for the release of an attachment.

It appears from the complaint that during the year 1911 this same plaintiff brought an action in the superior court of Los Angeles county against one John Howze, and that at about the same time, and before June 1, 1911, writs of attachment were issued from said court to the sheriffs of the counties of Los Angeles and Riverside, respectively, and certain real and personal properties belonging to said Howze levied upon by such sheriffs in said counties. On June 1, 1911, this plaintiff, who was also, as we have seen, the plaintiff there, released all of the property so attached from said attachment liens, and the defendant here, in consideration of such releases, executed and delivered to plaintiff a certain paper, alleged to be a bond, a copy of which, omitting the formal parts, is as follows:

> "Whereas, the above-named plaintiff commenced an action in the superior court of the county of Los Angeles, state of California, against the above-named defendant [John Howze], claiming that there was due to said plaintiff from said defendant the sum of twenty-three thousand four hundred one and 76/100 ($23,401.76) dollars, or thereabouts, and thereupon an attachment issued against the property of said defendant as security for the satisfaction of any judgment that might be recovered therein; and certain property and effects of the said defendant have been attached and seized by the sheriff of the said Los Angeles county, under and by virtue of said writ; and whereas, the said defendant is desirous of having said property released from said attachment: Now, therefore, the undersigned, Fidelity & Deposit Company of Maryland, a corporation duly organized and doing business under and by virtue of the laws of the state of Maryland, and duly licensed for the purpose of making, guaranteeing or becoming a surety upon bonds or undertakings required or authorized by the law of the state of California, in consideration of the premises, and also in consideration of the release from said attachment of the property attached, as above mentioned, does hereby undertake in the sum of twenty-four thousand ($24,000.00) dollars, and promise that in case the plaintiff recover judgment in the action, defendant will, on demand, pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the interest and costs; the same to be paid in United States gold coin, if so required by the terms of the judgment."

The case was thereafter tried, and judgment went for plaintiff, who, not being satisfied therewith, appealed and secured a reversal thereof. While the appeal was pending, however, Howze died, a resident of Los Angeles county, leaving both real and personal property therein. In due time and by proper proceedings, according to the record, the Citizens' Trust & Savings Bank, a corporation, and A. C. Howze were appointed administrators of the estate of John Howze, deceased, and letters of administration duly issued to them accordingly. Thereupon such administrators were substituted as parties defendant in the action then pending, for and in the place of the said John Howze, deceased. Upon a retrial of the action the court again found for the plaintiff, but in a much larger sum than previously had been determined to be due him, the judgment reciting, among other things, that—

> "It is ordered, adjudged and decreed that the plaintiff have and recover of the defendants [said administrators] the sum of $30,813.51, * * * to be paid by the said defendants out of the assets of the said estate of John Howze, deceased, in the due course of administration."

There was a motion for a new trial, which was denied. Whereupon the said administrators filed their notice of appeal to the Supreme Court from the order denying said motion, and from the judgment so entered, which appeal, because of failure to file the transcript in time, was in due time dismissed. Written demand was thereafter made by the plaintiff upon the administrators for the payment of this judgment, with which demand the latter have not complied, and, accordingly, the present action is brought.

The principal defense set up in the action before us is that the bond sued on here was and is a common-law obligation, and that since it was given two amended complaints were filed, thus exonerating the defendant from liability thereunder. The action was tried on the second amended complaint, and the court found for the plaintiff as claimed by him. The appeal is from the judgment on the judgment roll alone.

Two points only are urged for a reversal of the judgment: (1) That the complaint does not state a cause of action; and (2) that the amendment of the complaint after the execution of the undertaking varied the contract and exonerated the appellant. It is urged in support of the first point that the complaint discloses no breach of appellant's obligation under the bond, and hence states no cause of action.

The complaint and findings here show that the defendant in the former action—John Howze—died after the attachment therein was released, and before the judgment obtained in that action became final.

[1] The most cursory perusal of the bond sued upon will disclose that it is not the statutory undertaking, but is a common-law bond. The condition upon which, by the express agreement of the surety, plaintiff's right of recovery on the bond is made to depend, namely, the recovery by the plaintiff of a

judgment in the action, has come to pass. Under the letter of the defendant's undertaking it is liable, unless it can successfully be contended that the bond was but a substitute for the property attached, and that, because the death of the defendant in the former action dissolved the attachment (Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49), its liability on the undertaking has been discharged.

[2, 3] Where the bond is a statutory bond, i. e., where it is in the form prescribed by the statute, there may be good reason for holding that such a bond is a substitute for the attachment lien, and that whatever occurrence would have effected a dissolution of the attachment lien, had the bond not been given, has a like effect upon the undertaking, regarded as a statutory substitute for the attached property or for the attachment lien thereon.

The statutory bond is one whereby the surety undertakes that—

> "In case the plaintiff recovers judgment in the action, defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released, not exceeding the amount of such judgment." Section 555, Code Civ. Proc.

Such a bond is known as a delivery or forthcoming bond; whereas the common-law bond which was given in this action is that which sometimes is described as a bail bond.

Where the statutory undertaking is entered into there is an element of legal compulsion, i. e., the plaintiff in the attachment action and the officer who has levied the attachment, by compulsion of law, and nolens volens, must acquiesce in a release of the property from the attachment lien. Such an undertaking is not an unconditional undertaking for the payment of the judgment, in the event that the plaintiff in the action recover a judgment, but is an undertaking for the redelivery of the attached property, i. e., for its redelivery if the plaintiff recovers a judgment in the action, or, in default of such redelivery, payment to the plaintiff of the full value of the property released.

Where a delivery bond is given, i. e., a bond to return to the officer, upon request, the goods attached, in case final judgment is rendered in favor of the plaintiff, it can readily be seen that there is then some basis for a claim that whatever operates to dissolve an attachment lien should be deemed to have the same effect upon the bond given for the redelivery of the property. For, manifestly, if the undertaking is for the redelivery of the property, and if, for any legal reason, such, for example, as the death of the defendant in the action, an attachment lien upon the property so to be redelivered would have been dissolved if the bond had not been given, then redelivery of the property to the attaching officer would be of no benefit to the plaintiff in the attachment action. It is obvious, therefore, that where a delivery or forthcoming bond has been given—a bond that, by compulsion of law, necessarily releases the property from the custody of the attaching officer—there is some reason why the bond may be deemed to be a substitute for the attached property, and to be discharged by any event that would have worked a dissolution of the attachment lien had the property not been released from attachment by giving the statutory undertaking. Such, however, is not the case where, as here, the bond was not a delivery or forthcoming bond, and was not of such a character that a release of the property from the attachment must follow by compulsion of law. Mr. Drake, in his work on Attachment, seems to recognize the fact that, with respect to the effect upon the liability of the surety of an event that would have worked a dissolution of the attachment had the property not been released, there is a distinction between a delivery bond and a bail bond, such as was given in this action. Mr. Drake says that—

> "A dissolution of the attachment discharges the obligation of the surety on a delivery bond." Drake on Attachment, § 341b.

For these reasons we are of the opinion that if, in any case, an undertaking may be deemed to take the place of the property attached, so that whatever would have worked a dissolution of the attachment lien shall have a like effect upon the undertaking, it is when and only when the bond is a statutory bond, and is conditioned for the redelivery of the property. Here the surety has unconditionally obligated itself that in case the paintiff recover judgment in the action the defendant, on demand, will pay the plaintiff the amount of such judgment. The judgment has been recovered, and, under the letter of its obligation, the surety is liable. In principle the case does not seem to be distinguishable from Rosenthal v. Perkins, 123 Cal. 241, 55 Pac. 804, San Francisco Sulphur Co. v. Ætna Indemnity Co., 11 Cal. App. 695, 106 Pac. 111, and McCombs v. Allen, 82 N. Y. 114.

[4] As to the second point urged, we think no extended discussion necessary. The amendment of the complaint in the Howze Case was made as a matter of right, and before the hearing of the demurrer to the original complaint in that action. There was a demurrer to the amended complaint, which was sustained. Thereupon a second amended complaint was filed. Upon the issues formed the case was tried and went to judgment.

The subject-matter of that action was two contracts between Turner and Howze, in which the latter, among other things, agreed to subdivide certain property. There was, in the amendment, no change whatever in the contracts themselves, but there was a change in the allegations of the complaint setting forth more in detail the character and extent of the breaches, and enlarging somewhat the amount claimed as damages therefor. There is no new and different cause of action stated. Such an amendment is permissible. Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53; Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 128 Pac. 330; Doolittle v. McConnell, 178 Cal. 697, 174 Pac. 305; Rauer's Law, etc., Co. v. Leffingwell, 11 Cal. App. 494, 105 Pac. 427; Born v. Castle, 22 Cal. App. 282, 134 Pac. 347; Third Street Imp. Co. v. McLelland, 23 Cal. App. 369, 137 Pac. 1089; Barr v. Southern California Edison Co., 24 Cal. App. 22, 140 Pac. 47; White v. Deering, 38 Cal. App. 516, 179 Pac. 401.

Under these conditions there was no release of the security or exoneration of the bond.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

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49 Cal. App. 664

COONEY v. GRAY et al. (Civ. 3608.)

(District Court of Appeal, First District, Division 1, California. Oct. 26, 1920.)

1. Appeal and error ⇐907(3)—Evidence presumed sufficient in absence of transcript or bill of exceptions.

In the absence of any transcript of the testimony or bill of exceptions, it is assumed on appeal that the evidence presented in support of the findings was competent and material to the issues, was as received without objection, and was sufficient to sustain the facts found.

2. Pleading ⇐409(1) — Objection to insufficiency of answer should be raised before trial.

Objection to insufficiency of answer should be interposed before going to trial by a demurrer or by a timely motion for a judgment on the pleadings.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action by M. Cooney against F. Gray and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Arthur Brand, of San Francisco, for appellant.

Leo H. Susman, of San Francisco, for respondents.

WASTE, P. J. The plaintiff brought this action, seeking to recover the sum of $2,000 which she alleges she was fraudulently induced to loan to the defendants in July, 1908, and to have the amount decreed to be a lien upon property of defendants. The trial court found specifically in favor of the defendants. Judgment was entered accordingly, and plaintiff has appealed on the judgment roll alone, claiming that, because of the failure of the defendants to deny certain allegations of the complaint, the answer became a negative pregnant, entitling plaintiff to judgment. No motion for judgment on the pleadings appears to have been made.

According to the allegations of the complaint, in July, 1904, respondents, one of whom is the daughter of the plaintiff, represented to her that they were married, in which belief the plaintiff remained until September, 1918. In June, 1908, so it is alleged, the respondents, learning that plaintiff had on deposit in a savings bank the sum of $2,000 conspired to obtain the money from her. Accordingly, by means of undue influence obtained over plaintiff by reason of her trust and confidence in them, due to the supposed family relationship which she believed the defendant F. Gray bore to her, the defendants induced the plaintiff to let them have the use of the money, upon the promise that they would repay the same at the end of nine years, together with interest at the savings bank rate. This money, it is alleged, the defendants invested in a dwelling house and lot of land in San Francisco, of which they are still the owners, and upon which it is alleged they have declared a homestead. This alleged loan has never been repaid.

In 1918 the plaintiff learned that in 1903, and for a long time theretofore, the defendant F. Gray had been married to a woman other than her daughter, and that in that year he had commenced an action against his said wife for a divorce. After due hearing the superior court awarded said Gray, and there was entered, an absolute decree of divorce in his favor, although sections 131 and 132 of the Civil Code, requiring the entry of interlocutory decrees of divorce in such actions, were in force and effect. The further allegation is that, by reason of the refusal and failure of Gray to obtain an interlocutory decree of divorce from his said wife, he never has been divorced, and that the defendants did not marry in July, 1904, but only pretended to be married, and thereby deceived the plaintiff, in order to obtain an undue influence over her for the purpose of defrauding her out of the $2,000.

The defendants denied specifically every allegation of the complaint, other than the averment as to the divorce action. As to that they denied that defendant Gray failed or refused to obtain an interlocutory decree of divorce, and alleged that defendants are husband and wife. As an affirmative defense, the defendants alleged that the money was a gift to them, which the plaintiff is now seeking to convert into a loan.

Because the defendants do not specifically deny that they were not married at the time when the alleged undue influence was practiced upon the plaintiff and the money obtained, appellant now argues that the answer is a negative pregnant, and admits all the essential facts alleged in the complaint. Her theory, as stated by her, is that the action is not to recover a loan, but to establish a trust, and it is immaterial whether the money paid to the respondents under the circumstances described in the complaint, which payment is not denied, was intended as a gift, or a loan, for it would be a trust in either case. A gift to a supposed son-in-law, and a daughter supposed to be lawfully married, to establish a home, she contends, would become a trust if the representation of marriage were false and fraudulent. Assuming appellant's contention to be a correct statement of law so far as it goes, the trial court found that the plaintiff gave the money to the defendants, and that by this action she is attempting to convert that gift into a loan. It further found that the defendants are now husband and wife, that the plaintiff did not place either confidence or trust in them, and that they did not, nor did either of them, use any deception to obtain an undue influence over plaintiff to secure her trust or confidence, for the purpose of defrauding her, and that they did not defraud her.

[1] In the absence of any transcript of the testimony or bill of exceptions, it will be assumed on this appeal that the evidence presented in support of the findings was competent and material to the issues, was received without objection, and was sufficient to sustain the facts found. Damon v. Quinn, 143 Cal. 75, 77, 76 Pac. 818; Cutting Packing Co. v. Canty, 141 Cal. 692, 695, 75 Pac. 564; California Canneries Co. v. Great Western Lumber Co., 185 Pac. 1008; Brett v. Vanomar Producers, 187 Pac. 758.

[2] If the appellant wished to rely upon the alleged insufficiency of the answer of the defendants, she should have interposed a demurrer, or made a timely motion for judgment on the pleadings. Tibbets v. Blade, 60 Cal. 428, 430. The parties went to trial without objection, upon the theory that the issues were well defined. The ultimate finding was against the appellant. The evidence given at the trial furnished the reason for the finding, and if the reason was not sufficient, the evidence should have been brought here, and the finding challenged. Brett v. Vanomar Producers, supra; Weidenmueller v. Stearns, 128 Cal. 623, 626, 61 Pac. 374.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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49 Cal. App. 712

SOUTHERN CALIFORNIA HARDWOOD & MFG. CO. v. LOS ANGELES COUNTY.

(Civ. 3412.)

(District Court of Appeal, First District, Division 1, California. Nov. 1, 1920.)

Taxation ⚷537—Taxpayer cannot acquiesce in assessment and recover taxes on ground that they were erroneously collected.

Where a taxpayer made a tentative statement of assets to the taxing officials, which they altered so as to show that it had considerable taxable assets it could not acquiesce in that assessment, and, then having paid it, recover from the county under Pol. Code, § 3804, declaring that any taxes erroneously or illegally collected may be recovered, because its property was of a value less than the amount assessed, but the taxpayer's sole remedy was, under section 3673, to apply to the board of equalization for a revaluation of its property; for, as the assessment was in accordance with laws, the taxes were not erroneously or illegally collected regardless of overvaluation.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by the Southern California Hardwood & Manufacturing Company against the County of Los Angeles to recover taxes alleged to have been erroneously and illegally collected. From a judgment for defendant, plaintiff appeals. Affirmed.

Arthur Wright, of Los Angeles, for appellant.

A. J. Hill and Gordon Boller, both of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant in an action brought by the plaintiff to recover the sum of $781.27, claimed to have been received by the defendant through the collection of taxes assessed against the plaintiff's properties and which taxes the plaintiff asserts to have been erroneously and illegally collected.

The facts are practically undisputed, and are embodied in the findings of the court, which may be briefly summarized as follows: The plaintiff in the year 1914 was a lumber manufacturing corporation with its principal place of business in the city of Los Angeles. In the spring of that year and during the period when assessments of property for purposes of public taxation are made the plaintiff prepared a statement of its properties subject to taxation and of the deductions to which it claimed to be entitled, and handed the same to a deputy county assessor, who called at its place of business for the purpose of receiving said statement. The statement thus prepared placed a valuation of $294,835 upon the unsecured credits and solvent debts due from others, including bank deposits, and also placed a valuation of $294,835 upon the plaintiff's unsecured debts due bona fide residents of the state, for which it was entitled under the law to a deduction. It thus appeared that there was no assessable balance upon which the defendant would be entitled to levy or collect taxes. With respect to this statement the trial court finds that its figures were incorrect, but that they were placed therein with the intention that they should be merely tentative and without any intent on the part of plaintiff to mislead or defraud the county assessor. At the time such statement was presented to the deputy assessor the latter, in the presence of the plaintiff's officials and with their knowledge, made certain alterations in the figures contained in said statement, the effect of which was to show that the total assessable assets of the plaintiff amounted to $220,240; that its unsecured debts, due to bona fide residents of this state, to which it was entitled to a deduction, amounted to $169,835, leaving a balance of assessable property in the sum of $50,405. These latter figures made by the deputy county assessor would also seem to have been tentative, and to have been subject to such subsequent changes as the assessor or his said deputy might make after some further investigation as to whether a particular indebtedness of the plaintiff was of such a character as to entitle it to have the same deducted in determining the net amount of its taxable assets. The figures thus made up by the deputy county assessor were not, however, changed as the result of any such subsequent investigation, and in consequence the balance of the plaintiff's assessable assets was fixed by the assessor at the sum of $50,405.

Under the provisions of chapter 3 of title 9 of the Political Code, county assessors are required to make and complete their assessments of property between the first Monday of March and the first Monday of July of each year, and to embody the same in the assessment roll, whereupon the board of supervisors of the county is required, under the provisions of chapter 4 of said title of the Political Code, to meet and sit between the first Monday and the third Monday in July of each year as a board of equalization, and as such board, and under the provisions of section 3673 of said Code, "to equalize the assessment of the property contained in said roll and make the assessment conform to the true value of such property in money." Having thus acted, it then becomes the duty of the board of supervisors, at a time not later than the first Tuesday after the first Monday of September in each year, to make the tax levy.

The above procedure was followed in the instant case. The plaintiff, however, did not appear before the board of supervisors sitting as a board of equalization to object to its assessment or to apply for a revaluation of its property, in consequence of which there was levied against its aforesaid assessable assets a tax amounting to the sum of $781.27, which in due course the plaintiff was required to pay, and which sum it has instituted the present action to recover.

The trial court further found that the changes which were made by the deputy county assessor in the plaintiff's statement as to the amount of its unsecured debts were made in the mistaken belief on the part of said official that plaintiff was not entitled to the deduction claimed by it on account of the particular item of indebtedness above referred to; and that in consequence of this mistake the plaintiff's assessable properties were overvalued to the full extent of such assessment, and that in fact there was no balance of assessable asset upon which a tax could be levied. Upon the foregoing fact the trial court directed a judgment in favor of the defendant, and from such judgment plaintiff prosecutes this appeal.

The sole contention which the appellant urges is that it is entitled to maintain this action under the provisions of section 3804 of the Political Code, which reads as follows:

> "Any taxes, penalties or costs thereon heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected, or any taxes heretofore or hereafter paid upon an assessment in excess of the actual cash value of the property so assessed by reason of a clerical error of the assessor as to the excess in such cases, or any taxes heretofore or hereafter paid upon an erroneous assessment of improvements on real estate not in fact in existence when said taxes became a lien, may, by order of the board of supervisors, be refunded by the county treasurer."

Appellant having made a demand under this section upon the board of supervisors for an order directing the county treasurer to refund the amount of its taxes collected as aforesaid, and said demand having been refused, it insists that it is entitled to maintain this action.

In order to sustain this contention on the part of the appellant it would be necessary to hold that the taxes for the return of which it sues herein were taxes which had been either "erroneously or illegally collected" or "paid upon an assessment in excess of the actual cash value of the property so assessed by reason of a clerical error of the assessor." It is conceded by the appellant that its assessment in excess of the actual cash value of its assessable properties was not caused by an "clerical error of the assessor," but that its alleged right to recover the same rests solely upon its contention that such taxes were "erroneously or illegally collected." We are unable to sustain the appellant's contention in this regard. We are directed to no action on the part of the officials of the county of Los Angeles which would render the assessment of the plaintiff's property or the collection of the taxes claimed to be due thereon illegal. The plaintiff's said properties were subject to assessment, and the procedure pursued by the county assessor and by the board of supervisors in making said assessment and in levying said tax were admittedly in accord with the provisions of the Political Code relating to taxation. Neither do we think that the assessment and levy and the taxes in question was "erroneous" within the meaning of the term as used in section 3804 of the Political Code. It is true, as found by the trial court, that the county assessor was mistaken in his conclusion as to the net amount of the plaintiff's properties subject to assessment and taxation: but it does not follow that merely by reason of said mistake the assessment and taxation of said property was erroneously made. The result of this mistake amounted merely to an overvaluation of the plaintiff's properties, or—which amounted to the same thing in effect—an undervaluation of the appellant's deductible debts; and we are cited to no case which goes to the extent of holding that an overvaluation of assessable properties on the part of the assessor is such an "error" as would entitle the owner of such properties to the remedy provided in section 3804 of the Political Code; but, on the contrary, our attention has been called to a consistent line of decisions by the Supreme Court and District Courts of Appeal of this state, holding that the remedy of the property owner in the event of an overvaluation of his property by the assessor is by application to the board of supervisors of the county sitting as a board of equalization for a revaluation of his property.

In the case of Los Angeles Gas & Electric Co. v. County of Los Angeles, 162 Cal. 164, 121 Pac. 384, the trial court declared it to be the settled rule—

> "That the conclusion of assessing officers as to the value of property for purposes of taxation, when honestly arrived at, and when not made in pursuance of some fixed rule or general system the result of which is necessarily discriminatory and inequitable, is conclusive on the courts, however erroneous the conclusion of those officers may be."

In the case of Clunie v. Siebe, 112 Cal. 593, 44 Pac. 1064, the same court held that—

> "The assessment of property for the purpose of taxation is a function of the executive department of the government, and the judiciary has no power * * * to inquire as to the actual value of property for the purpose of taxation, in order to determine whether there had been a misrepresentation of its value."

And in San Jose Gas Co. v. January, 57 Cal. 614, said court held that—

> "If an assessor errs in his judgment in determining the value of property, the remedy is by application to the board of equalization, and courts will not revise the judgments of assessors upon such questions."

In City of Los Angeles v. Glassell, 4 Cal. App. 43, 87 Pac. 241, wherein the question directly arose as to whether the remedy of the taxpayer, in the event of an overvaluation of his property (or, which amounted to the same thing, an undervaluation of his deductible debts) was by an appeal to the board of equalization for the reduction of the amount of his assessment, or whether he could raise the question by way of defense to an action to recover the tax, the court held that an appeal to the board of equalization was the proper remedy, and that, failing to make such appeal, the property owner was not entitled to urge such defense in an action to recover the tax.

The authorities cited by the appellant as sustaining its contention do not run counter to the foregoing line of cases, but, on the contrary, show that in every instance wherein the property owner was held entitled to relief under section 3804 of the Political Code the tax levied against his property was an illegal tax. In the case of Otis v. San Francisco, 170 Cal. 98, 148 Pac. 933, the tax sought to be recovered was illegal because in excess of the limit of taxation fixed by the San Francisco charter. In the case of Connelly v. San Francisco, 164 Cal. 101, 127 Pac. 834, the tax attempted to be assessed and collected was also one which was not authorized by the terms of said charter. In the case of Slade v. County of Butte, 14 Cal. App. 453, 112 Pac. 485, the tax in question was illegal because it was a tax upon land belonging to the United States which was not subject to local taxation. In the case of Stewart Law & Collection Co. v. County of Alameda, 142 Cal. 660, 76 Pac. 481, the tax in question was a county road tax levied upon property situated within the limits of a city, and hence clearly illegal and void; while in the case of Pacific Coast Co. v. Wells, 134 Cal. 471, 66 Pac. 657, upon which the appellant seems to chiefly rely, the mistake in the assessment arose "by reason of a clerical error of the assessor."

None of the foregoing cases touch the point involved in the present appeal; and we are clearly of the opinion that the trial court was correct in its conclusion that the plaintiff's sole remedy for the overvaluation of his assessable property, and the consequent imposition of a tax thereon which he ought not to have been required to pay, was by application to the board of equalization for a revaluation of his said property. Not having made such application, he was not entitled to apply to the courts for relief.

Judgment affirmed.

We concur: WASTE, P. J.; WELCH, Justice pro tem.

49 Cal. App. 676

FAMOUS PLAYERS–LASKY CORPORATION v. EWING. (Civ. 3463.)

(District Court of Appeal, First District, Division 2, California. Oct. 27, 1920. Hearing Denied by Supreme Court Dec. 23, 1920.)

Master and servant 🔑62—Employer held entitled to invention of employee.

Where defendant was employed by plaintiff motion picture corporation to improve the light in the studio in every way possible and to use his expert knowledge and ability in that direction, and the general idea of an invention designated a "light dissolve" was that of the manager of the plaintiff, plaintiff was entitled to the invention.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Famous Players-Lasky Corporation against Howard M. Ewing. From a judgment for plaintiff, defendant appeals. Affirmed.

G. E. Harpham, of Los Angeles, for appellant.

Joseph F. Westall, of Los Angeles, for respondent.

BRITTAIN, J. The defendant appeals from a judgment directing him to execute and deliver to the plaintiff an assignment of the title to an invention designated as a "light dissolve" and enjoining him from transferring or incumbering the invention.

The appellant attacks the judgment on various grounds, none of which has impressed this court as being substantial. An unwarranted attack is made upon the learned judge of the trial court. It is said that the complaint did not state facts sufficient to constitute a cause of action, and that the findings show the plaintiff had no cause of action, but neither argument nor authority is presented. Examination of the record fails to support the appellant's assertions in these particulars. Motion was made to vacate the judgment on the ground that the conclusions of law are not supported by the findings, but are inconsistent therewith, and a motion for a new trial was made. Both motions were denied. It is contended that the court erred in not granting the appellant's motion for nonsuit and in giving judgment for the plaintiff. There is really but one question presented by the appeal, which is whether or not the plaintiff corporation is the owner and should have conveyed to it the title to the invention. The appellant contends that he made the invention while he was employed by the plaintiff corporation and that there was no agreement in the terms of his employment by which his invention should belong to his employer. The respondent, on the other hand, maintains that the trial court correctly determined upon the facts that the appellant was employed to make the invention, and that, if there is substantial conflict in the evidence, the finding must be sustained.

The plaintiff is engaged in producing motion pictures. Its manager, Cecil B. De Mille, employed the defendant for the corporation as an expert electrician. He had been a theatrical electrician, but had no knowledge of making pictures at the time of his employment. His duties were to improve light in all manners possible. He was employed first at a salary of $30 a week, but because of his inventive ability his salary was raised from time to time until he was receiving $100 per week. The principal photographer of the corporation was Mr. Wyckoff. In taking motion pictures in the studio, open-faced arc lights were used. It was deemed necessary that some device be used to permit the gradual diminution and increase of the intensity of the light, the process of diminution being known as dissolving. Mr. De Mille, Mr. Wyckoff, and the defendant discussed the matter for several hours, and it was suggested that the arc lights might be reduced in power by some device, but the defendant, from his knowledge of electrical devices, considered that impractical. Mr. De Mille suggested using a piece of silk on a roller to be used in front of the lights, the silk being arranged so that it ran from red or orange through yellow, white, and blue to black, to effect a gradual dimming of the light. The defendant said he knew the machine and suggested that he work out something along that line for the purpose of dissolving the light from the arc light used. Mr. Wyckoff also made some suggestions on the subject. Subsequently Mr. Wyckoff made further suggestions, and finally a curtain was evolved of white material at one end and black at the other, with a V-shaped extension of the black running into the white portion at the middle of the curtain. This was mounted on two rollers operated by hand at the top and bottom of the lights before which it was used. When it was put into operation, at the request of De Mille, the attorney for the plaintiff was asked to examine it and suggested there might be patentable features about it, De Mille, Wyckoff, and Ewing being present. Upon the direction of De Mille, a patent attorney was called in and directed by the at-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

torney of the plaintiff corporation to prepare an application for patent. Since the application had to be signed by an individual, De Mille suggested that Ewing and he should sign it jointly, but, it being suggested by the attorney that De Mille was too busy to attend to the details, the application was signed by Ewing alone. The corporation paid all fees in connection with the patent application, although Ewing testified that he expected to pay the fees when the bill came in.

The appellant relies on the established rule that persons employed, as much as employers, are entitled to their own independent inventions (Agawam Co. v. Jordan, 74 U. S. [7 Wall.] 583, 19 L. Ed. 177), and that, in the absence of an express contract or agreement, the relation of employer and employee does not invest the employer with the entire property right in an invention of the employee (Johnson F. & E. Co. v. Western F. Co., 178 Fed. 823, 102 C. C. A. 267). In the Agawam Case, among other things, it was determined that, where a master workman employing other people has conceived the plan of invention and is engaged in experiments to perfect it, no suggestion by a person employed by him not amounting to a new method or arrangement, which in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement. "An employer who conceives the result embraced in an invention, or the general idea of a machine upon a particular principle, and in order to carry his conception into effect necessarily employs manual dexterity, or even inventive skill, in the mechanical details and arrangement, is nevertheless the inventor, and entitled to patent as against the servant who was the mere instrument through which he realized his idea." King v. Gedney, 14 Fed. Cas. page 526, No. 7795; Wellman v. Blood, Fed. Cas. No. 17,385; Huebel v. Bernard, 15 App. D. C. 510; Gallagher v. Hastings, 21 App. D. C. 88. The defendant was employed to improve the light in every way possible and to use his expert knowledge and ability in that direction. The general idea of the invention was that of De Mille, the manager of the plaintiff corporation. "As between an employer and a party employed for a special purpose, matters merely auxiliary or tributary to the main invention can give to the employee no claim as an inventor, and in regard to such features as amount to independent inventions a presumption exists in favor of the employer as the author of the same which can only be overcome by conclusive and unequivocal proof." Miller v. Kelley, 18 App. D. C. 163; United Shirt & Collar Co. v. Beattie, 149 Fed. 736, 79 C. C. A. 442. The findings of the trial court are in accordance with the facts; they are fully supported by the evidence, and the conclusions of law are in accordance both with the findings and with the evidence. The judgment follows the conclusions.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

49 Cal. App. 653

MILLER v. TURNER, Town Marshal, et al.
(Civ. 2176.)

(District Court of Appeal, Third District, California. Oct. 25, 1920. Hearing Denied by Supreme Court Dec. 23, 1920.)

1. Municipal corporations ⇨183(6) — Surety on officer's official bond may be joined as defendant.

In an action against a town marshal for false imprisonment, the surety on his official bond may be joined as defendant, under Pol. Code, § 961, allowing any person injured to sue in his own name, without an assignment of the bond.

2. False imprisonment ⇨20(1) — Complaint held to state cause of action.

A complaint alleging that the defendant town marshal, acting in his official capacity, arrested plaintiff, who had not committed any offense in the presence of the marshal, on a pretended charge of vagrancy without warrant or process, and imprisoned him in the town jail, of which the marshal was custodian, *held* to state a cause of action.

3. Pleading ⇨193(1)—That facts were stated with slightly varying phraseology in three different counts not ground for demurrer.

That facts were unnecessarily set forth in slightly varying phraseology in three different counts did not make complaint demurrable.

4. False imprisonment ⇨7(3)—Arrest without warrant on charge of vagrancy held illegal.

A marshal's arrest without a warrant of a person who had been in town a few minutes, and who had more than $400 in his pockets, on a charge of vagrancy, *held* without authority or excuse.

5. False imprisonment ⇨4 — Malice not an element.

Malice is not an element of false imprisonment, and need not be proved.

6. False imprisonment ⇨36 — $450 damages held not excessive.

$450 damages for false imprisonment *held* not excessive, where plaintiff, arrested without warrant and without excuse on a charge of vagrancy, was confined for about five hours in a repulsive and filthy jail.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by E. E. Miller against J. J. Turner, Town Marshal, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

James T. Matlock and N. A. Gernon, both of Red Bluff, for appellants.

James M. Lee and W. P. Johnson, both of Red Bluff, for respondent.

BURNETT, J. The action was for damages for false imprisonment, and was tried without a jury. The court awarded the plaintiff the sum of $450, and from the judgment the appeal has been taken.

The gist of the action is shown by the following allegations of the complaint:

> "On the 21st day of August, 1918, at and in the said town, the said J. J. Turner, with force, and without any public offense having been committed or attempted in his presence by the plaintiff, and without an order, warrant, or process of any court so to do, did seize and arrest the plaintiff on a pretended charge of vagrancy, and did then and there, against the will of the plaintiff, imprison him in the town jail of said town, and there restrain him of his liberty, for a space of five hours; that at the time of said arrest and imprisonment of the plaintiff as aforesaid the said J. J. Turner, by virtue of his official duties as marshal as aforesaid, was the custodian of said jail, and in charge of and using the same for the confinement of prisoners; that the plaintiff submitted to said seizure, arrest, and imprisonment by reason of the fact that the said J. J. Turner was then and there marshal as aforesaid; and that said J. J. Turner would not have made said arrest, but for the fact that he was such marshal, and claiming that a public offense, to wit, vagrancy, had been committed in his presence by the plaintiff at said time."

The action was brought against said Turner, as marshal of the town of Tehama, and the sureties on his official bond.

[1] The first point made by appellants is that a suit on such official bond will not lie in behalf of an individual. But a complete answer to this contention is found in section 961 of the Political Code, from which it is sufficient to quote the concluding clause:

> "And any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof."

[2, 3] The claim that the demurrer should have been sustained to the complaint is equally without merit. Therein is involved no uncertainty or ambiguity, and the facts are sufficient to constitute a cause of action. The facts were set forth with slightly varying phraseology in three different counts. This was unnecessary, but it constitutes no cause for complaint on the part of the appellants. Without setting forth the allegations of the complaint, it is sufficient to say that it contains all that is requisite under the doctrine announced in Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12.

[4] It cannot be successfully urged that the evidence is insufficient to justify the decision. The marshal had no warrant for the arrest of plaintiff, and the only attempted justification for his action is based on the claim that Miller committed the crime of vagrancy in the presence of the officer, because Miller said he did not want a job. This, indeed, would be very slight consideration upon which to base the arrest; but even that was denied by Miller, who said that he told the marshal that he was going to Corning to see if he could get a job there, and that thereupon the marshal said, "I will give you a job," and arrested him and put him in jail. Miller further testified that at the time he had in his pocket some $465, and that he had been in the town of Tehama only a few minutes before the arrest was made. In brief, there is ample support for the conclusion that the arrest was entirely without authority or excuse.

It is entirely immaterial whether the defendant Turner was the actual custodian of the jail. In that respect it is sufficient to say that he carried the keys to the jail, and locked the plaintiff in the cell.

[5] The court was not required to find specifically upon the allegation of the answer that the arrest was made without malice. If the action had been for malicious prosecution, such allegation and finding would be material; but, the complaint having been drawn upon the theory of false imprisonment, or an arrest without probable cause, the element of malice was not involved in plaintiff's cause of action, and hence no finding in regard thereto was necessary. Nelson v. Kellogg, 162 Cal. 621, 123 Pac. 1115, Ann. Cas. 1913D, 759; Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

Certain specifications of errors of law are contained in the brief of appellants; but, as no reason is urged or authorities cited in support thereof, we pass them by without specific consideration, further than to say that we perceive therein no prejudicial error.

[6] The only contention of appellants that seems to possess even the semblance of any merit is the claim that the damages are excessive. But in considering this point we must remember the well-established principle, as declared in Gomez v. Scanlan, supra, as follows:

> "The amount of money which will compensate one for an unwarranted restraint of his person is not the subject of exact computation. Especially is this true where the invasion of the right of personal liberty is accompanied by circumstances causing humiliation, shame, and public disgrace to the party injured. In cases of this kind the extent to which the allowance may go must, in large measure, be left to the sound discretion of the jury."

In 19 Cyc. p. 372, the rule is stated as follows:

> "In fixing the amount of damages, a jury is justified in exercising a liberal discretion with due reference to the place of plaintiff's detention, as well as duration of the detention, and the oppressive or humiliating treatment by defendant which may have characterized the detention for which plaintiff brings his action."

In viewing this feature of the case, we must, of course, accept the statements of plaintiff as embodying the true situation. So viewing the record, we find him confined for about five hours in a repulsive and filthy jail, and on account of said arrest and confinement being subjected to great humiliation, and also suffering the taunts and jeers of his neighbors. The mental disturbance caused thereby, while not capable of exact measurement, assuredly cannot be said to be more than compensated by the award which was made by the learned trial judge. In this particular it is not deemed advisable to notice in detail the various cases that have been cited on the subject, many of them being set forth in a note appended to the above quotation from Cyc.

From a review of the whole record, we cannot say that there is any legal justification for interfering with the conclusion of the trial court.

The judgment is, therefore, affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

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49 Cal. App. 657

Ex parte HEATH. (Cr. 546.)

(District Court of Appeal, Third District, California. Oct. 25, 1920.)

1. Criminal law ⚷1202(1) — Indeterminate sentence has no effect on procedure as to prior convictions.

The Indeterminate Sentence Law does not affect the procedure as to prior convictions, nor does it relieve defendant of the additional burden that may be imposed thereby.

2. Criminal law ⚷1208(9)—Limits of authority of state prison directors, as to term of imprisonment under Indeterminate Sentence Law, defined.

Under the Indeterminate Sentence Law, the authority of the state prison directors as to determination of the term of imprisonment is limited to cases wherein the Legislature has provided both a minimum and a maximum punishment, in view of subdivision (d) of the act.

3. Criminal law ⚷1211 — State prison directors have no authority to fix sentence for robbery with prior conviction for burglary at less than life, under Indeterminate Sentence Law.

Where petitioner was convicted of robbery together with a prior charge of burglary, and it appeared that in such case Pen. Code, §§ 213, 667, requires the punishment to be imprisonment for life, no minimum sentence being provided, the state prison directors *held* to have no authority under the Indeterminate Sentence Law to fix the term of imprisonment at less than life.

Application by Henry V. Heath for writ of habeas corpus, to be directed to the Warden of the State Prison at Folsom. Writ denied.

PER CURIAM. In the superior court of Alameda county, in the month of April, 1919, the petitioner was convicted of the crime of robbery together with a prior charge of burglary. In such cases it cannot be disputed that the statute requires the punishment to be imprisonment in the penitentiary for life. There is no minimum sentence for such case. Sections 213 and 667, Pen. Code.

[1, 2] But it is claimed that by virtue of the Indeterminate Sentence Law (St. 1917, p. 665), the board of prison directors should have disregarded the prior conviction and fixed the term of imprisonment as though the defendant had been convicted of robbery only. But this is a mistaken view of the law. Said statute does not affect the procedure as to prior convictions, nor does it relieve the defendant of the additional burden that may be imposed thereby. It does not, indeed, authorize or permit the state prison directors to fix the term of imprisonment, where no minimum is prescribed by the law. Their authority is limited to cases wherein the Legislature has provided both a minimum and a maximum punishment. This appears from subdivision (d) of said act, as follows:

> "The governing authority of the reformatory or prison in which such person may be confined, or any board or commission that may be hereafter given authority so to do, shall determine after the expiration of the minimum term of imprisonment has expired, what length of time, if any, such person shall be confined," etc.

[3] In the case at bar they had no discretion in the matter, since, at the time of petitioner's conviction, there was no minimum provided, and it is quite apparent that, if they had attempted to fix the term at less than life, they would have exceeded their authority. We may add that section 18a (Stats. 1919, p. 7) does not apply to this case. There is nothing in the situation before us to indicate in the slightest any illegality in the detention of petitioner.

The petition, therefore, for a writ of habeas corpus, is denied.

49 Cal. App. 659

FARRELL v. CITY OF ONTARIO.
(Civ. 3355.)

(District Court of Appeal, Second District, Division 1, California. Oct. 26, 1920. Hearing Denied by Supreme Court Dec. 23, 1920.)

1. New trial 🔑136—One defendant not required to give notice of intention to move for new trial to other defendants not affected by the judgment.

Where general verdict for plaintiff against one of the defendants made no reference to other defendants, and where plaintiff, on appeal from judgment for defendant, entered pursuant to order made on defendant's motion for new trial and for judgment on the special findings of fact, under Code Civ. Proc. § 663, subd. 2, conceded the finality of a judgment as to the other defendants, and where appellate court on such appeal ordered lower court to "enter judgment in accordance with the general verdict upon the issues as to damages," the defendant against whom such verdict was rendered on its motion for a new trial as to the judgment rendered against it on appellate court's order, was not required to notify such other defendants of its intention to move for a new trial under section 659; the judgment on appellate court's order not affecting the rights of such other defendants.

2. Appeal and error 🔑979(2)—New trial for insufficiency of evidence not reversed in absence of abuse of discretion.

An order granting a new trial on the ground of insufficiency of the evidence to justify the verdict will not be reversed unless it appears that there has been an abuse of discretion.

3. New trial 🔑68—Insufficiency of evidence addressed to discretion of court.

Motion for a new trial on the ground of insufficiency of the evidence to justify the verdict is addressed to the discretion of the court.

4. Municipal corporations 🔑846 — Findings held to justify denial of injunction restraining city from maintaining canal.

In action to enjoin city from maintaining a canal and from permitting water to be discharged therefrom so as to flow upon plaintiff's lands, findings that a canal and ditch had been constructed by the city more than five years prior to the commencement of the action and had been improved and maintained openly during such time with full knowledge upon the part of plaintiff and without objection by him, and that the construction and maintenance of canal had not changed the place where storm and surface waters would naturally flow upon plaintiff's land or increased the rush of waters thereon or the quantity of waters discharged thereon, *held* to justify denial of injunctive relief.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Patrick Farrell against the City of Ontario and others. Verdict for plaintiff against named defendant, and from order granting a new trial and from a judgment for defendant, plaintiff appeals. Order and judgment affirmed.

See, also, 39 Cal. App. 351, 178 Pac. 740.

Joseph Scott, of Los Angeles, A. S. Maloney, of San Bernardino, and A. G. Ritter, of Los Angeles, for appellant.

Benjamin F. Warmer, of Ontario, R. S. Parker, of Pasadena, and E. H. Jolliffe, of Ontario, for respondent.

CONREY, P. J. By the complaint in this action the city of Ontario was charged with having constructed and maintained a ditch or waterway through and by means of which it wrongfully and without right diverted storm waters upon plaintiff's land, to his damage in the sum of $10,000. In addition to the allegations upon which recovery of damages was sought, facts were alleged upon which plaintiff asked that the city of Ontario be perpetually enjoined from maintaining said canal, waterway, and connections in the manner then existing, and from permitting any water to be discharged from said canal upon any lands from whence such water will flow upon plaintiff's land.

Alleging that E. W. Churchill, Harvey Churchill, C. C. Groff, and F. W. Bauer cooperated with the city of Ontario in the doing of the wrongful acts complained of, they were made parties in the action for the recovery of damages only. The action was dismissed as to F. W. Bauer, and a judgment of nonsuit granted as to Harvey Churchill.

The case was tried before a jury, which on February 14, 1917, returned its general verdict in favor of the plaintiff as against the defendant city alone in the sum of $2,500, no reference therein being made to defendants E. W. Churchill and C. C. Groff; and at the same time the jury returned therewith its special verdict in answer to certain interrogatories submitted by the court. No objection was made by any of the parties on account of the irregularity in the verdict in omitting any reference to defendants Churchill and Groff. Thereupon the clerk, of his own motion, on the 15th day of February, 1917, entered judgment for the plaintiff and against the city of Ontario on the general verdict. Within ten days thereafter said defendant served and filed its notice of intention to move for a new trial, and notice of motion for a judgment for defendant on the special findings of fact, under section 663, Code of Civil Procedure, subd. 2. Said motions were argued and taken under submission by the court, which thereafter, on July 11, 1917, without ruling upon either of the motions, ordered findings and judgment for the defendant. Plaintiff appealed from the judgment entered, pursuant to that order, on April 6, 1918 (which judgment was that the plaintiff take nothing, and that the defendant city of Ontario have judgment against the plaintiff for costs), and upon a hearing thereof the judgment was by this court reversed, and the cause remanded to the superior court, with directions to enter judgment in accordance with the general verdict upon the issue as to damages, and to make such findings of fact as it might deem appropriate upon the evidence as to the equitable issues, and render judgment accordingly. Farrell v. City of Ontario, 39 Cal. App. 351, 178 Pac. 740. In its decision this court held that at the time when the clerk made his first entry of judgment he was without authority to enter judgment; that the judgment so entered was premature and of no effect; that therefore the motion for new trial was premature and of no effect. It was further noted in that decision that the plaintiff conceded the correctness of the judgment as to the defendants other than the city of Ontario. Upon going down of the remittitur, the court, on the 9th day of June, 1919, entered judgment against the defendant city of Ontario for the sum of $2,500 damages, and costs in the sum of $569.70, in accordance with the general verdict of the jury, and upon stipulation of the attorneys that, without further evidence taken, it should make findings as to the equitable issues, made findings upon which it denied to plaintiff the injunction prayed for.

Thereafter in due time the defendant city of Ontario, pursuant to its notice of intention so to do, moved the court for a new trial as to the judgment so rendered against it for damages, upon the ground, among others, that the evidence was insufficient to justify the verdict, which motion was by the court granted, and from which order so granting defendant's motion for a new trial plaintiff has appealed.

[1] Appellant contends that the court below was without jurisdiction to grant the motion for a new trial, because the defendant city did not serve upon its codefendants, E. W. Churchill, Harvey Churchill, and C. C. Groff, any notice of its intention to move for a new trial. The necessity for such service of notice is governed by the actual, and not by the merely nominal, relations of the parties. The notice of intention must be "served upon the adverse party." Code Civ. Proc. § 659. Were the Churchills and Groff parties adverse to defendant city at the time when the proceeding to obtain a new trial was instituted; that is, were they persons whose rights could be affected by any order made either granting or refusing the city's motion for a new trial? We think not. The plaintiff on its former appeal had conceded the finality of the judgment of April 6, 1918, so far as those defendants were concerned. This court's order of reversal of that judgment, construed in the light of that concession and its acceptance by this court, was a reversal of the judgment only as between the plaintiff and the defendant city. This is consistent with the further order which this court then made directing that the superior court "enter judgment in accordance with the general verdict upon the issues as to damages." That verdict being confined, in its terms and effect, to the plaintiff and the defendant city, the direction thus given was similarly limited. The action then remained pending only as an action between the plaintiff and the defendant city. Understood in the plain light of these facts, the judgment entered after remittitur sent down on the former appeal was a judgment affecting the rights of no defendant except the city. The only legally possible object of defendant city's motion for a new trial, and the only effect of the order granting the motion, was to set aside the judgment awarding damages and obtain a retrial of the issues pertaining to the claim for damages between the parties as to whom a new judgment had been entered pursuant to the order made by this court; that is to say, between the plaintiff and the city. We conclude that service of the notice on said former defendants was not necessary, and the court had jurisdiction to hear and determine the motion.

[2, 3] The form of the notice of intention to move for a new trial (we refer to the amended notice), while not written in the customary terms, is sufficient, and the grounds specified were, in part, those designated by the Code. Code Civ. Proc. § 657. One of these was insufficiency of the evidence to justify the verdict, and another that the damages awarded were excessive. The motion, as presented in accordance with the notice of intention, was limited to the law side of the case; it was that the court "set aside the verdicts and the judgment in the above-entitled cause and grant a new trial therein as to the issues at law and in said action for damages." There was conflicting evidence bearing upon the facts at issue, both as to the cause and the extent of the alleged injuries to the plaintiff's property. An order granting a new trial on the ground of insufficiency of the evidence to justify the verdict will not be reversed, unless it appears that there has been an abuse of that discretionary power of the court to which the motion was addressed. In this case it cannot be said that the lower court did not have some reasonable ground for its decision that the motion should be granted.

[4] There is also an appeal by the plaintiff from that part of the judgment whereby the plaintiff's prayer for an injunction was denied. In support of this appeal it is claimed that the pleadings and findings do not support the judgment. Attention is directed to the allegations contained in paragraph XII of the amended complaint, which appellant says were not denied. Referring to the same condition of the pleadings, this court said, in deciding the former appeal:

"Appellant contends that the allegations of the complaint upon which the prayer for equitable relief is directly predicated are admitted by the failure to deny them in the answer. This is true with respect to the allegations of the probability of future injuries. The other allegations so referred to by appellant, while not categorically denied, are sufficiently traversed by affirmative allegations in the answer inconsistent therewith."

Among the facts so alleged in the answer, it was set out therein that the said canal and ditch had been constructed by the city more than five years prior to the commencement of this action, and after their construction had been improved and maintained openly, with full knowledge on the part of the plaintiff and without objection by him. This the court found to be true. The court found further that the acts of the defendant had not changed the place where storm and surface waters would naturally flow upon plaintiff's land, or increased the rush of waters thereon, or the quantity of water discharged thereon. These were issues of fact, upon which there was evidence legally sufficient to sustain the court's determination thereof. The facts as thus determined fully justify the decision made thereon that the plaintiff was not entitled to the injunctive relief claimed by him.

The order granting a new trial of the issues at law is affirmed.

The judgment denying an injunction is affirmed.

We concur: SHAW, J.; JAMES, J.

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49 Cal. App. 718

COLE v. BUX. (Civ. 2055.)

(District Court of Appeal, Third District, California. Nov. 1, 1920.)

1. Appeal and error 🔑1011(1)—Finding on conflicting evidence conclusive.

The question presented by a conflict in the evidence was solely a question of fact, on which the conclusion of the trial court is binding on appeal.

2. Frauds, statute of 🔑23(4) — Contract of employment held not a promise to answer for debt of another, but a new and independent contract.

Where plaintiff and his assignor were working for W. at $11 a day, and after a few days quit W., and asked for their money, W. telling them to go to B., and B. stated that they should stay and work, and he would pay them for what they had done for W., and what they were to do for him, the new relation constituted a new and independent contract, involving no element of the statute of frauds, not being a promise by B., as contended by him when sued, to answer for the debt of another.

3. Depositions 🔑95—Court can exclude immaterial evidence contained in deposition.

The trial court, on objection of the adverse party, can exclude proposed evidence contained in a deposition on the ground that it is immaterial, or on other grounds touching its general competency, despite the rule that a party offering a deposition must read the whole of it.

4. Appeal and error 🔑1170(7)—Rejection of part of deposition held error, to be disregarded as harmless.

In an action to recover for labor performed, error of the trial court in refusing to receive in its entirety the deposition of the deputy labor commissioner *held* of such small proportions as to require disregard, in view of Const. art. 6, § 4½.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Jasper W. Cole against M. Bux. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Oscar Goldstein, of Chico, for appellant.
Harry Davids, of Chico, for respondent.

PREWETT, Presiding Justice pro tem. The plaintiff, in the first count of his complaint, claims the sum of $330 as due to himself for labor performed for the defendant. A second count or $385 is based upon a like claim of one Melvin J. Cole, assigned to the plaintiff. The appellant makes two points. The first involves a mere conflict in the evidence. The second is based upon certain rulings of the court concerning parts of a deposition of the deputy state labor commissioner.

[1, 2] 1. As to the first point, it is sufficient to state that the evidence is very sharply conflicting—the plaintiff having testified to one state of facts and the defendant to another, and in direct conflict with the plaintiff. The plaintiff and his assignor were working for one Walker at an agreed price for themselves and teams of $11 per day. Walker was a contractor under the defendant, and the labor was being performed upon property in the ownership or charge of the defendant. The plaintiff testified as follows:

"After we worked a few days, we quit Mr. Walker, and told him we wanted our money; and he said, 'If you are going to quit, go to M. Bux;' that 'we will go to see him and see if he can get your money,' and after we went to Mr. Bux he said 'You stay and work, and I will pay you,' and then he said that he would pay us for what we done and what we were to do we would stay and work, but that we were through with Mr. Walker, and wouldn't take any more chances with him;" and "he said, 'You boys are the only ones that are doing any work, and you stay and work, and I will pay you.'"

The testimony of the plaintiff was corroborated by other witnesses. The question was solely a question of fact, upon which the conclusions of the trial court are binding on appeal. No citation of authorities is needed to show that the new relation constituted a new and independent contract, involving no element of the statute of frauds. It was not a promise, as contended by the appellant, to answer for the debt of another. The court, out of an abundance of caution, rejected the claim for the first five days of labor performed for Walker, although under the third subdivision of section 2794 of the Civil Code. It might well have allowed this. The very recent case of Fuller v. Towne (October 11, 1920, decided by the court in bank) 193 Pac. 88, discusses a similar case, and our conclusions are in harmony with the doctrines of that case. On the theory that the primary contract (subsequent in point of time to the original contract for five days' work) was entered into with Walker, a theory not sustained by the findings of the trial court, the following observation by Mr. Justice Burnett, in Meyers v. McKillop, 37 Cal. App. 144, 173 Pac. 773, is in point:

> "It is a fair inference from the foregoing that the services were performed upon the reliance that the defendant would pay, and it is also a fair inference that the latter directly promised to make such payment. This constitutes an original contract, with a sufficient consideration for its support."

[3, 4] 2. Complaint is made by the appellant that the court refused to receive in its entirety the deposition of the deputy labor commissioner. The court, in a commissioner's decision, in Bank of Orland v. Finnell, 133 Cal. 475, 65 Pac. 976, held that the trial court must require the party offering a deposition to read the whole of it. In the later case of Metteer v. Smith, 156 Cal. 572, 105 Pac. 600, the court, in referring to the last case, passes it with the remark that counsel concede the admission of part of the deposition to be error; but the court ignores the error on the ground that the portions admitted were harmless. Conceding the soundness of the rule, it has no application to this case. Here the deposition was offered by the appellant, and the only portion denied admission was that part relating to an exhibit, as to which the court sustained an objection on the ground that it was not binding on the respondent. It has never been held that the court could not, upon the objection of the adverse party, exclude proposed evidence contained in a deposition upon the ground that it is immaterial or upon other grounds touching its general competency. Moreover, the alleged error is of such small proportions that it must be disregarded in view of section 4½ of article 6 of the Constitution.

The judgment finds abundant support in the evidence, it appears to be just, and we find no error prejudicial to the appellant.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

49 Cal. App. 707

WESTERN SOIL BACTERIA CO. v. O'BRIEN BROS., Inc. (Civ. 3484.)

(District Court of Appeal, First District, Division 1, California. Oct. 29, 1920. Hearing Denied by Supreme Court Dec. 27, 1920.)

1. Sales 🔑441(2)—Finding that seed was sold under guaranty that it would grow held sustained.

In an action for the purchase price of seed and a bacterial preparation to be mixed therewith, evidence *held* to sufficiently show that plaintiff expressly warranted that the seed would grow, and that it was such warranty which induced the purchase by the defendant of the seed and preparation.

2. Sales 🔑284(1)—Abnormal season defense to enforcement of guaranty that seed would germinate.

Since seasonal conditions are beyond the control of any person, if it can be shown that seasonable condition during time when seed was planted and was expected to grow was abnormal, and that failure in such seed to germinate was attributable to such abnormal condition, this would be a good defense to the enforcement of a guaranty that the seed would germinate.

3. Sales 🔑441(3)—Finding that failure of seed to germinate was not caused by abnormal weather conditions held sustained.

In an action for the purchase price of seed and a bacterial preparation to be mixed therewith, wherein defendant set up breach of a warranty that the seeds would germinate, evidence for the plaintiff, tending to show that the season was unusual as to the time and amount of rainfall, *held* insufficient to establish that the failure of the seed to germinate was due to the abnormal season.

4. Evidence 🔑150—No abuse of discretion to refuse to permit introduction of testimony of test made by witness.

In an action to recover purchase price of seed and a bacterial preparation, where defendant set up breach of warranty that the seed would germinate, *held* that the court did not abuse its discretion in refusing to permit plaintiff's witnesses to testify that they made a test of the seed by placing 100 grains between moistened blotters and subjecting them to a temperature of 98° for a specified time, and that some of them germinated.

5. Evidence 🔑150—Courts vested with discretion as to admission of evidence of tests.

Trial courts are invested with a large discretion in the matter of the admission of evidence of tests made by witnesses.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Western Soil Bacteria Company against O'Brien Bros., Incorporated, and others. From a judgment in its favor for only part of the relief prayed for, the plaintiff appeals. Affirmed.

Mervyn R. Dowd, of San Francisco, for appellant.

Oliver Dibble, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action brought to recover the sum of $525.40, a balance alleged to be due on the purchase price of certain vetch seed and of a certain bacterial preparation known as Westrobac, purchased by the defendants from the plaintiff.

The complaint was in two counts, each for goods sold and delivered, and each referring to the same transaction. The answer of the defendants, after denying that anything was due to plaintiff, or that any goods sold by it to the defendants had any value, set forth as an affirmative defense that—

> The seed and bacteria sold to the defendants by plaintiff was so sold upon the express understanding and agreement "that the same should be planted by defendants upon land belonging to the defendants in the state of California, and that when so planted the said bacteria and vetch seed so sold and delivered would grow upon said land, and would thereby promote the growth of trees in the orchard of defendants planted upon said land aforesaid; defendants allege that after said bacteria and vetch seed was delivered by plaintiff to defendants the same was planted by defendants upon said land, pursuant to the orders and direction of plaintiff and in furtherance of the scheme for which said bacteria and vetch seed were purchased by defendants as aforesaid; allege that said vetch seed failed to grow as warranted and agreed to by plaintiff, and was worthless."

Upon the trial and submission of the cause the trial court made its findings in favor of defendants, and in so doing found that said vetch seed and bacteria was sold by plaintiff to the defendants upon the express understanding and warranty made by plaintiff that the seed should be mixed with said Westrobac, and when so mixed should be planted by defendants upon certain land, * * * and that when so planted the said vetch seed * * * would grow upon said land and promote the growth of trees in the orchards of said defendants. The court further found that the said seed and bacteria was mixed and planted by defendants, pursuant to the orders and direction of plaintiff, and was planted and cultivated by defendants upon their said land in the manner directed and prescribed by plaintiff, and that said vetch seed so planted by defendants failed to grow as warranted by the plaintiff.

Upon these findings the court rendered judgment for the defendants as to the main amount of the plaintiff's claim, but for the plaintiff as to a small portion of said vetch seed, amounting to $67.50, which was neither planted by them nor returned to plaintiff. The plaintiff appeals from said judgment.

The chief contention of the appellant upon said appeal is that there was no evidence sufficient to support the finding of the court as to the existence of the express warranty, above referred to, and that, even if such warranty was made, it is not such a warranty as could be enforced in an action to recover the purchase price of the seed and bacteria involved in this transaction.

[1] In so far as said contention involves the existence of evidence to support the court's finding as to the making by plaintiff of the express warranty that the plaintiff's said seed when mixed with its special preparation, known as Westrobac, and planted upon the lands of the defendants, according to the paintiff's directions, would germinate and grow thereon, we are of the opinion that there is sufficient evidence to support such findings. The defendants were at the time of the transaction in question the owners of a large tract of land in Shasta county, which was planted out to orchard, and were desirous of planting among the trees in said orchard a cover crop, which would sprout and grow therein during the earlier months of the year, and would then be plowed under for the better fertilization of the soil in which said orchard trees were being grown. The plaintiff was advertising, by circulars and otherwise, the special merits of its bacterial preparation called Westrobac, which, being mixed with vetch seed, would greatly assist its germination and growth as a cover crop for planting in orchards. The defendants received some of these circulars, and were induced thereby to call upon the plaintiff with a view to purchasing some of its said preparation, and, upon doing so, were strongly advised by the officials of plaintiff to purchase from it the vetch seed with which said Westrobac was to be mixed, insisting that their said seed was of a superior quality, and that if the defendants would purchase it at a somewhat higher price than that quoted by other dealers in vetch seed the plaintiff would guarantee that such seed, when treated by its special preparation and planted and cultivated according to its direction upon the premises of the defendants, would germinate and grow. The evidence sufficiently shows that the plaintiff's assurance of such a result was not only express, but was unqualified, and was made with the full knowledge on the part of the plaintiff as to the purpose of the purchase of said seed and as to where the same was to be planted and grown. The evidence further sufficiently shows that it was this express

and unqualified warranty which induced the purchase by the defendants of the plaintiff's said seed and preparation.

[2, 3] The appellant, however, contends that, even if such express warranty was given and made, and even though it formed the chief inducement to defendants for their said purchase, it is not such a warranty as would be enforceable, for the reason that there are other elements which enter into the problem as to whether seed, however reinforced as to its germinating qualities, and however carefully or correctly planted, will germinate and grow to its expected maturity, such as conditions of soil and location, and also the particular climatic conditions of the season of the planting and growth of said seed, which matters, according to thhe plaintiff's contention, would always be beyond the control of the vendor of the seed. The difficulty with this contention consists in the fact that, in so far as the matters of soil and location are concerned, the plaintiff knew at the time said warranty was given in just what soil and location said seed was to be planted. It was purchased by defendants for planting in growth as a cover crop within their said orchard, which facts were fully known to plaintiff at the time of said sale. With respect to the seasonal conditions, it is true that this would be beyond the control of the plaintiff; and that, if it could be shown that the seasonal conditions of the particular place where and time during which said seed was to be planted and was expected to grow were abnormal, and that whatever failure there was in said seed to germinate and grow was attributable to such abnormal conditions, this would be a good defense to the enforcement of such guaranty. It must be conceded that there is some evidence in the record going to indicate that the season during which said seed was sown was unusual as to the time and amount of rainfall. This evidence, however, was educed from officials and employees of the plaintiff, and evidently did not impress the trial court, either as to its truth, or as to the sufficiency of its explanation why none of the seed sold by plaintiff to the defendants, and by them treated, planted, and cultivated in all respects in conformity to the plaintiff's directions, either germinated or grew. Upon this subject the evidence is positive and direct that absolutely none of said seed so treated and sown by the defendants within their said orchard either germinated or grew; and this failure of the defendants' said seed to measure up to the plaintiff's express warranty thereof the trial court finds to have been due to the breach of said warranty, and not to the fact that any alleged abnormal seasonal conditions contributed to the failure of said seed to germinate and grow. We are of the opinion, therefore, that the plaintiff failed to sufficiently establish its alleged excuse for the failure of its seed to measure up to the requirements of its warranty.

[4, 5] The appellant's next contention is that the trial court was in error in excluding certain testimony offered by plaintiff with respect to certain tests made of portions of the particular vetch seed sold by it to the defendants and later returned to it. The test to which the plaintiffs' offered witnesses would have testified were made by taking 100 grains of said seed, and, after placing them between moistened blotters subjecting them to a temperature of 98° for a specified length of time. The plaintiff offered to show that when said seed was subjected to this form of test a large proportion of its grains germinated. It will be apparent, however, that such a test as this would be one made under very different conditions from those surrounding the planting and growth of seed in an open orchard, and under conditions as to soil, temperature, and location entirely different from those under which the, so to speak, laboratory test proffered by the plaintiff was made. Trial courts are invested with a large discretion in the matter of the admission of evidence of this character, and we are unable to say that the trial court in the instant case abused its said discretion in its refusal to admit such testimony. People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833.

No other errors being urged by the plaintiff, the judgment is affirmed.

We concur: WASTE, P. J.; BEASLY, Justice pro tem.

49 Cal. App. 685

PEOPLE v. PURIO et al. (Cr. 535.)

(District Court of Appeal, Third District, California. Oct. 28, 1920.)

1. Jury 🔑136(5)—Statute providing for 20 peremptory challenges inapplicable to robbery.

Pen. Code, § 1070, entitling an accused to 20 peremptory challenges in certain cases, applies only to cases where no shorter sentences than life may be imposed, and is not applicable where the punishment in the discretion of the court may be less than life, and therefore does not apply to the crime of robbery under section 213, where it is provided that punishment shall not be less than one year.

2. Jury 🔑136(1)—Indeterminate sentence law does not affect rule as to number of peremptory challenges.

The recent change in the law providing for an indeterminate sentence has not affected the rule in regard to the number of peremptory challenges to which an accused is entitled.

3. Criminal law 🔑1137(3)—Error in instruction held invited by requested instruction for accused.

An instruction which unduly emphasized the importance of care in considering evidence on the subject of alibi could not be complained of by an accused, who requested an instruction which assumed that evidence as to alibi was easily fabricated and difficult to disprove; the requested instruction inviting the error.

4. Criminal law 🔑1172(1)—Argumentative instruction not reversible error in absence of prejudice.

Where from the entire record it can be safely said that no prejudice resulted, a judgment of conviction will not be reversed by reason of an argumentative instruction.

5. Criminal law 🔑938(1)—Granting new trial for newly discovered evidence rests largely in discretion of trial court.

The matter of granting a motion for new trial on the ground of newly discovered evidence rests largely in the discretion of the trial court.

6. Criminal law 🔑945(2)—Statements as to newly discovered evidence held too uncertain to render denial of new trial error.

In a prosecution for robbery, statements in an affidavit filed on motion for new trial, in which several witnesses deposed that they conversed with the prosecuting witness on a certain date, in which he stated: "Make no difference to me. More better let them go. No look like same man anyhow. No good send 'em jail"—were so uncertain and inconsequential that it cannot be said that trial judge abused its discretion in denying the motion, as it was for him to determine whether a new trial would result in a different verdict.

7. Criminal law 🔑945(1) — Newly discovered evidence should be such as would produce different result.

Newly discovered evidence which would require a reversal of action of trial court in denying a motion for new trial should be such as would produce a different result from that arrived at by the jury.

8. Criminal law 🔑939(1) — Diligence in obtaining alleged newly discovered evidence held wanting.

Where alleged newly discovered evidence consisted of statements of prosecuting witness concerning identification of defendants, made during the trial and the day before the case was submitted to the jury, and no reason appears why it was not immediately called to the attention of the court, action of the court in denying a motion for a new trial on the ground of such alleged newly discovered evidence was justified on the ground of want of diligence.

9. Criminal law 🔑991(3)—Judgment for indeterminate sentence held in conformity with statute.

A judgment, "It is ordered, adjudged, and decreed that you be taken hence by the sheriff of the county of M. and be by him delivered to the proper authorities of the prison of San Quentin, and there be confined pending the determination of the proper authorities as to when you shall be released," *held* a proper indeterminate sentence in conformity to the requirement of Pen. Code, § 1168, as added by St. 1917, p. 665.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Frank Purio and others were convicted of robbery, and from the judgment of conviction and an order denying their motions for new trial, they appeal. Affirmed.

L. J. Schino, of Merced, Wm. P. Toscano and F. E. Murphy, both of Stockton, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellants were convicted of the crime of robbery, and they appeal from the judgment and order denying the motion for a new trial. The evidence for the people showed that they entered a store kept by certain Chinese in the city of Merced, and by the use of force and violence took quite a sum of money from the person of several of the Chinamen, including the owner, who were therein at the time. It was a brutal crime, and there was strong and convincing evidence of the guilt of the defendants. They were positively identified by two of the Chinese. One of them made an admission which was virtually equivalent to a confession of guilt, and strong circumstantial evidence was introduced tending to connect the defendants with the commission of the crime. In fact, a careful reading of the record can leave little doubt that the verdict is just, and should not be disturbed. The situation is such that we might with propriety disregard any of the alleged errors, upon the general ground that no prejudice has been shown to the substantial rights of any of the defendants. The assignments of error, however, have been carefully examined, and, while numerous, and persistently urged by appellants, it can with confidence be said that nearly, if not quite, all of them are destitute of any merit. If two or three of them may be questioned, they are matters of such slight importance as hardly to require serious consideration. Indeed, the attitude and conduct of the district attorney and of the trial judge seems to have been characterized by the greatest care and anxiety to protect and safeguard the rights of the defendants, as well as to promote the welfare of the community. That appellants had a fair and impartial trial cannot be successfully controverted. And while we would be justified in affirming the conviction upon the foregoing statement, we proceed to notice a few of the objections that have been made by appellants.

[1, 2] The action of the court in refusing to allow more than 10 peremptory challenges is claimed as error under section 1070 of the Penal Code. It is contended that, since the crime of robbery may be punished by imprisonment in the state prison for life, the defendants, by virtue of said section, were entitled to twenty of such challenges. The

said provision, however, applies only to cases where no shorter sentence may be imposed. It is not applicable where the punishment, in the discretion of the court, may be less than life. It therefore does not apply to the crime of robbery wherein the statute has provided that it is punishable by imprisonment in the state prison not less than one year. Section 213, Pen. Code. This has been decided by the Supreme Court in the following cases: People v. Clough, 59 Cal. 438; People v. Riley, 65 Cal. 107, 3 Pac. 413; People v. Sullivan, 132 Cal. 94, 64 Pac. 90. In People v. Harris, 61 Cal. 136, upon which appellants rely, it appears that the defendant was charged with robbery and also prior convictions, and therefore under section 667 of the Penal Code, the information involved a charge which, if sustained by a verdict of conviction, would require the court to impose a life sentence without any discretion to reduce the term. It may be added that the recent change in the law providing for an indeterminate sentence has not affected the rule in reference to the number of peremptory challenges.

[3, 4] The action of the court in giving and refusing instructions, and also in modifying certain instructions proposed by defendants, is severely criticized. As to the instructions, it may be said that they contain comprehensive and accurate statements of every principle of law that was necessary for the guidance of the jury. Every appropriate instruction proposed by defendants which was rejected by the court was substantially covered by the charge. If any just criticism at all could be made of the action of the court in its directions to the jury, it would be based upon the use of the following language:

> "The fact, however, which experience has shown, that an alibi as a defense is capable of being and has been occasionally successfully fabricated; that even when wholly false its detection may be a matter of very great difficulty; and that the temptation to resort to this as a spurious defense may be very great—these are considerations attendant upon this defense which call for some special suggestion upon the part of the court. These are that, while you are not to hesitate to give this as a defense full weight, either as entirely satisfying you of the innocence of the defendants or as creating the reasonable doubt which entitles them to an acquittal, still you are to scrutinize the testimony offered in support of an alibi with care, that you may be satisfied that a fabricated defense has not been imposed upon you."

There may be some doubt as to the propriety of such caution on the part of the court. The instruction is somewhat argumentative, and might be regarded as unduly emphasizing the importance of care in considering the evidence on the subject, and as conveying a possible suggestion on the part of the court that the evidence in behalf of defendants in favor of the alibi was fabricated. It is to be observed, however, that the court in this and other instructions clearly told the jury that they were to give fair consideration to such evidence, and that if it created a reasonable doubt as to the guilt of the defendants, or any of them, they should not hesitate to find a verdict of not guilty. We may remark, also, that an instruction was requested by defendants which assumed that such evidence was easily fabricated and difficult to disprove. It could be said, therefore, that appellants are in no position to complain at the use of this language by the court, since they themselves invited it. At any rate, in view of the entire record, it can be safely said that no prejudice resulted to defendants by reason of any questionable phrase that may have been used by the court.

[5-8] Another matter that may receive brief attention is an affidavit that was filed by defendants on their motion for a new trial. This was made by Lino Piazzi, Louie Nolan, and Walter Palmer, in which they deposed that they conversed with one Yee Chung on the 21st day of May, at the hour of 5:30 o'clock p. m., in the city of Merced, in which he uttered the following words:

> "Make no difference to me. More better let them go. No look like same man anyhow. No good send 'em jail."

The matter of granting the motion for a new trial upon the ground of newly discovered evidence so largely rests in the discretion of the trial court that an appellate court would require a stronger showing than was made herein to reverse an order denying such motion. The statements contained in said affidavit are so uncertain and inconsequential and the affidavit was obtained under such suspicious circumstances as to entitle it to little consideration. Even giving full force and credit to said affidavit, it would still remain for the trial judge to determine whether, in his opinion, if such evidence were offered at a new trial, it would produce a different result from that arrived at by the jury. He undoubtedly concluded that the defendants would be convicted again, and we think such conclusion is not at all unreasonable. Besides, this purported conversation appears to have taken place during the trial, and the day before the case was submitted to the jury. There is no reason shown why it was not immediately called to the attention of the court, and for this apparent want of diligence the action of the court was justified.

Appellants seem to question the sufficiency of the judgment, which was in the following form:

> "It is ordered, adjudged, and decreed that you be taken hence by the sheriff of the county of Merced, and be by him delivered to the proper authorities of the state prison at San Quentin, and there to be confined, pending the determination of the proper authorities as to when you shall be released."

In explanation of the form the court said:

"It must be an indeterminate sentence. The court cannot fix any time at all. The authorities at San Quentin fix the term."

[9] It may be remarked that no objection was made by defendants or any of them at the time to the form of the judgment. However, the action of the court was in conformity to the requirement of the law (section 1168, Pen. Code; Stats. 1917, p. 665) as construed by this and the Supreme Court. People v. Lee, 36 Cal. App. 334, 172 Pac. 158; People v. Mendosa, 178 Cal. 509, 173 Pac. 998.

We have not deemed it necessary to review specifically the rulings of the court upon the admissibility of evidence, as they involve simple and familiar rules of practice that have often been enunciated and must be deemed clearly established.

The judgment and order are legally sound, and are therefore affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

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49 Cal. App. 668

HINCKLEY et al. v. SAN DIEGO COUNTY. (Civ. 3465.)

(District Court of Appeal, First District, Division 2, California. Oct. 26, 1920.)

1. Taxation ⚿98—Intangible personal property has situs at owner's domicile.

Generally, intangible personal property, for the purposes of taxation, has its situs at the domicile of the owner; but such rule does not apply where the property has acquired a business situs elsewhere.

2. Taxation ⚿100 — Notes held by bank for collection do not acquire business situs in state in which bank is situated.

Notes held by a bank in a state other than that of the domicile of the owner for purposes of collection do not acquire a business situs in the state in which bank is situated, so as to subject them to taxation therein, as against state of owner's domicile.

3. Taxation ⚿99—Notes of deceased resident held in other state held not taxable in California.

Where will of resident of California was probated in another state, and the estate was being administered therein, and where beneficiaries named in will were not residents of California, notes held by bank in such other state for collection at time of testator's death were not taxable in California, pending administration of the estate, since ownership of note was not vested in a resident of the state at such time.

4. Taxation ⚿20 — Property neither actually nor constructively within state not taxable.

The taxing power of the state does not extend to property which is neither actually nor constructively within the state.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Joseph J. Hinckley and Fannie Munson, as administrator and administratrix with the will annexed of the estate of Thomas S. Parker, deceased, against the County of San Diego. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. S. Utley, Dist. Atty., and Albert J. Lee, Asst. Dist. Atty., both of San Diego, for appellant.

Haines & Haines and Fred O'Farrell, all of San Diego, for respondents.

LANGDON, P. J. This is an appeal by the defendant, county of San Diego, from a judgment against it decreeing that plaintiffs recover from the county $2,608.70, theretofore paid under protest by plaintiffs as state and county taxes assessed and levied against the estate of Thomas S. Parker, deceased, for the fiscal year 1918–1919.

As stated by appellant, the sole question is whether, for taxation purposes, intangible personal property has its situs at the domicile of the decedent, who at the time of his death was a resident of the state of California, or at the place where the evidences of indebtedness are physically situated and have been reduced to possession and are under the control of executors in a foreign jurisdiction.

Briefly the facts are these:

Thomas S. Parker, of whose estate plaintiffs are administrator and administratrix, respectively, died at Rochester, Minn., on July 11, 1917, and was at that time a resident of the county of San Diego, state of California. He left a will, by which he appointed the American Trust & Savings Bank of El Paso, Tex., and James G. McNary, of the same place, executors and also trustees. Said will was admitted to probate in the county of El Paso, state of Texas, on September 4, 1917. On September 27, 1917, said will was admitted to probate in the county of San Diego, state of California, an exemplified copy thereof, and of the probate thereof in the state of Texas, having theretofore been filed in the superior court of said county of San Diego, and the plaintiffs were appointed administrator and administratrix, respectively, with the will annexed.

On the first Monday in March, 1918, the plaintiffs had in their possession in the county of San Diego, belonging to said estate, certain real estate and personal property, which was valued by the assessor for taxation purposes at $1,850. As an addition to the tax return made by the plaintiffs, the assessor inserted an item of "money and solvent credits," and valued them in the arbitrary sum of $100,000, and said item was placed upon the assessment roll, and a tax thereupon levied in the sum of $2,608.70, which was paid by the plaintiffs under protest. Thereafter, and in due course and according to law, plaintiffs filed a claim with the board of supervisors against the county of San Diego for the repayment of said tax so paid, which claim was rejected by the board of supervisors. Thereafter this action was commenced, at a time when the estate of said Parker was still in process of distribution in both jurisdictions.

In addition to the property physically situated in the county of San Diego, at the time of Parker's death, he was the owner of ten promissory notes of the J. H. Nations Meat & Supply Company, of El Paso, Tex., in the aggregate principal sum of $50,000, said notes being secured by a lien on real estate situated in said city and state. These notes were in the hands of a bank at El Paso for collection. Said Parker, at the time of his death, was also the owner of money on deposit in the First National Bank at El Paso, amounting to $684.35; money on deposit in the American Trust & Security Bank, Washington, D. C., amounting to $208.37; Liberty Bonds purchased and paid for by decedent in his lifetime, amounting to $20,000, and on deposit with the bank in El Paso; and, in addition thereto, certain jewelry, of the value of $110, which was on his person at the time of his death.

On the first Monday in March, 1918, the money, jewelry, and evidences of indebtedness referred to in the preceding paragraph, and in addition thereto $1,750 collected as interest, were in the hands of the executors of the last will and testament of decedent at El Paso, and said money, jewelry, and evidence of indebtedness were physically situated at El Paso, and had not been physically in the state of California at any time subsequent to the death of Parker, and had never been in the possession or the control of plaintiffs, or either of them.

It is needless to discuss at length the general principles involved in appellant's contention. The rules governing the situs of personal property for the purposes of taxation have been clearly defined in this state and in other jurisdictions. See note to Liverpool & London & Globe Insurance Co. v. Board of Assessors, L. R. A. 1915C, 903; also note to Boyd v. Selma, 16 L. R. A. 729; Estate of Fair, 128 Cal. 607, 61 Pac. 184; Mackay v. San Francisco, 128 Cal. 678, 61 Pac. 382; Mackay v. San Francisco, 113 Cal. 392, 45 Pac. 696; San Francisco v. Lux, 64 Cal. 481, 2 Pac. 254.

[1] From these cases it is clear, as stated by appellant, that the general rule is that, if one is domiciled in the state, his personal property, in contemplation of law, has its situs there, and is taxable there. In Worthington v. Sebastian, 25 Ohio St. 1, which has been quoted in many subsequent cases, it is said:

> "Intangible property has no actual situs. If, for purposes of taxation, we assign it a legal situs, surely that situs should be the place where it is owned, and not the place where it is owed. It is incapable of a separate situs, and must follow the situs either of the creditor or the debtor. To make it follow the residence of the latter is to tax the debtor and not the creditor."

See, also, Estate of Fair, supra; Mackay v. San Francisco, 128 Cal. 678, 61 Pac. 382; Goldgart v. People, 106 Ill. 25; Scripps v. Fulton County, 183 Ill. 278, 55 N. E. 700; Hayward v. Christian County, 189 Ill. 234, 59 N. E. 601; Matzenbaugh v. People, 194 Ill. 108, 62 N. E. 546, 88 Am. St. Rep. 134.

[2] There is a well-recognized exception to this general rule, which occurs when there exist certain combinations of circumstances upon which a situs, commonly called a "business situs" may be predicated. We refer to this exception in passing for the reason that the respondents attempt in their brief to bring the facts of the present case within this exception. In reply to this contention, it is to be observed that the findings in the present case show that the notes of J. H. Nations Meat & Supply Company, aggregating $50,000, were in the hands of the bank at El Paso at the time of the death of Parker merely for the purpose of collection. It has been held that notes left in a state other than the domicile of the owner for safe-keeping or for collection do not acquire a "business situs," so as to subject them to taxation in the place of their physical location. Johnson County v. Hewitt, 76 Kan. 816, 93 Pac. 181, 14 L. R. A. (N. S.) 493; Gibbins v. Adamson, 5 Kan. App. 90, 48 Pac. 871, affirmed in 58 Kan. 818, 51 Pac. 1101;[1] Hunter v. Board of Supervisors, 33 Iowa, 376, 11 Am. Rep. 132; Bullock v. Guilford, 59 Vt. 516, 9 Atl. 360.

Upon this subject it is sufficient to say that the cases announcing the rules with reference to a "business situs" of personal property all suggest as an indispensable condition of such a situs, the necessity of something like a general, or more or less continuous, course of business or series of transactions within the state where the property is physically located, as distinguished from mere sporadic and isolated transactions. In the case of Vicksburg v. Armour Packing Co. (Miss.) 24 South. 224, the court observed that the question of what constituted a business situs was a difficult one, but from the reports on the subject it would seem that a business situs is connected with the idea of more or less permanency of location of the credits, or with a purpose to incorporate them when collected into the mass of property of the state. See, also, Metropolitan Life Ins. Co. v. New Orleans,

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 58 Kansas Reports.

205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853; State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 24 Sup. Ct. 109, 48 L. Ed. 232.

It is to be remembered that the only item of importance involved is the notes of Nations Meat & Supply Company, aggregating $50,000; it being conceded that the tax was improper upon the Liberty Bonds, and that the plaintiffs were entitled to a recovery for the amount of the tax paid thereon.

[3] Having determined that the facts in the present case do not bring it within the exception to the general rule, which is founded upon the idea of the property having acquired a "business situs" elsewhere than the domicile of the owner, let us revert again to the general rule, hereinbefore recognized, that intangible personal property, for the purposes of taxation, has its situs at the domicile of the owner. The application of this general rule in the present case, however, does not sustain the contentions of the appellant, for the reason that we are unable to agree with the appellant that the owner of the property, at the time of the levy of the tax, was domiciled within the state of California. It affirmatively appears in the present case that the court at El Paso has taken the property in question into its custody and is administering upon it—indeed, has partially distributed it. The courts of California have no jurisdiction of the El Paso executors, who have been given a qualified interest in this property during the period of administration for the purposes of such administration. In so far as the title to this property is concerned, it appears from the record that one-half of the property went to the wife of the decedent as her share of the community property. She is, and at all times mentioned in the record has been, a resident of the state of Washington, and as to her share of the property, assuredly, the owner thereof is not resident of this state. As to the remainder of the property, by the terms of the will, after administration, it was to be held by the persons appointed as executors by the El Paso court as trustees for certain definite purposes. These trustees were not residents of California. It is, of course, true that at the time of the levy of the tax the property was not being held by the trustees in that capacity, as it had not yet been distributed to them as such. It was being held by them in their capacity as executors. As such they had a limited property in the notes. Ham v. Henderson, 50 Cal. 367; Page v. Tucker, 54 Cal. 121; Jahns v. Nolting, 29 Cal. 507, 510, 511; Freese v. Hibernia Savings, etc., Co., 139 Cal. at page 397, 73 Pac. 172. As to the vested legal title, subject to this qualified right in the executors, it assuredly was in the trustees, the persons to whom the property had been bequeathed. Therefore it appears that the ownership, title, and right to the present and future possession of the property, and, indeed, each and every right, title, and interest, legal and equitable, in the same, was vested in nonresidents of this state, at the time of the levy of the tax in question.

[4] It is, of course, axiomatic that the taxing power of the state does not extend to property which is neither actually nor constructively within the state. Maxwell v. People, 189 Ill. 546, 59 N. E. 1101. Under the fiction or maxim that the situs of personal property follows the domicile of the owner, property is said to be constructively within the state of the owner's domicile to give jurisdiction for taxation. In cases where the owner is in the state, or his executor or trustees are within the state, holding the property, the state has some way to acquire jurisdiction of the property, constructively, at least, by acquiring jurisdiction of the owner or holder thereof. But in the present case there was no one in California who had either the title, the possession, or the right to the possession of these credits at the time of the levy of the tax. There was no one in the state who had either an absolute or a qualified right to the credits or to the evidences thereof. The courts of California have no jurisdiction of the El Paso executors, who have the right to the possession of this property during the period of administration, nor of the trustees, who have the vested legal title, subject to the right of the executors.

In the case of Mackay v. San Francisco, supra, a quotation is made from Judge Cooley's work on Taxation (page 376), in which it is said:

> "If a fund is in charge of a court, it is taxable in the jurisdiction having control of it."

In the present case the courts of California have no jurisdiction over the res by reason of its actual situs here, and they cannot give the credits a constructive situs in this state, because they cannot acquire jurisdiction over the owner or holder thereof.

The Political Code, by section 3629 thereof, requires the assessor to exact from each person a statement in writing showing all property "owned by such person, or in his possession or under his control." The notes in question were not owned by plaintiffs; they were not claimed by, nor in the possession of, nor under the control of, plaintiffs. Furthermore, possession of the same could not legally be secured by the plaintiffs. They could not, as a matter of right, demand that the El Paso court order the credits transmitted to them in California. In the case of Mackay v. San Francisco, 128 Cal. 678, 61 Pac. 382, the bonds sought to be taxed were held by trustees, one of whom lived in San

Francisco and the other in Nevada. The court said (128 Cal. at page 683, 61 Pac. 383):

> "The property under this rule could not be assessed to the plaintiffs in San Francisco, because that is the place of domicile of only one of them. It could not be assessed to them in Nevada, because that is the place of domicile of only one of them. The property is not in California, nor in Nevada, but, being intangible personal property, is said by defendants to follow the person of the owner. If it follows the person of the owner, it could not, as matter of law, be said to follow the person of the plaintiff who resides in California, and to forsake and refuse to follow the person of the plaintiff who resides in Nevada. It follows one as much as the other, and its situs is that of the place of domicile of its owners. Therefore, on the first Monday of March, 1895, the plaintiff Mackay was a resident of Nevada and was the owner of an undivided one-half of the bonds, and, neither the property nor the owner being within the jurisdiction of the state, the assessment, as to Mackay's interest, was void. The language of the Constitution is: 'All property in the state * * * shall be taxed in proportion to its value.' The interest of Mackay in this property was not 'property in the state' within the meaning of the Constitution."

It is true that in the last-cited case, the property was held by trustees after distribution, and in the present case the American Trust & Savings Bank of El Paso and James G. McNary of the same place are holding the notes as executors and not as trustees, because the property has not yet been distributed to them as trustees under the will. However the fundamental question presented is the same in both cases. The answer to the contention of the appellant in the present case is, in the language of the Mackay Case, that "neither the property nor the owner being within the jurisdiction of the state the assessment * * * was void." The probate court of El Paso, Tex., had the right to take this property into its custody. It had the right to distribute the same without reference to administrations pending in other states.

Again, in the language of the Mackay Case, how can it be said that the notes shall follow the person of the administrator who has never taken possession of them, and cannot secure possession of them because they are outside of the jurisdiction of the court through which he derives his authority, and forsake and refuse to follow the persons of the executors who have taken possession of them and are exercising control over them, as an arm of the court having jurisdiction over the credits by reason of their actual situs? With reference to the title to these notes, there is privity between Parker, the decedent, and his El Paso executors; but the administrators in California are unconnected with these assets in any way.

In Goldgart v. People, supra, it is said, quoting from Burroughs on Taxation:

> "If the owner be resident in the state there is jurisdiction over his person, and over his credits also, which, in legal contemplation, in the absence of anything showing they have a situs elsewhere, accompany him. If the owner is absent, but the credits are in fact here, in the hands of an agent, for renewal or collection, with the view of reloaning the money by the agent as a permanent business, they have a situs here for the purpose of taxation, and there is jurisdiction over the thing."

In the present case, the state of California has neither jurisdiction over the credits, nor over the person owning them, nor in the possession and control of them. It is not, as contended by appellants, merely a case of the construction of the statutes of this state. The question involved goes to the jurisdiction, to the power of the state to tax at all.

> "While the mode, form, and extent of taxation are, speaking generally, limited, only by the wisdom of the Legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government." Louisville, etc., Co. v. Kentucky, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. Ed. 513.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

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49 Cal. App. 634

SOUTHERN PAC. R. CO. v. McKITTRICK OIL CO. (Civ. 3356.)

(District Court of Appeal, Second District, Division 1, California. Oct. 22, 1920. Hearing Denied by Supreme Court Dec. 20, 1920.)

Public lands 🔑106(1) — Decision of commissioner and Secretary of Interior conclusive.

Where the United States government, by its duly authorized agents, the Commissioner of the General Land Office and the Secretary of the Interior, declared title to a certain placer mining claim was in plaintiff railroad instead of an adverse claimant, the matter was finally settled and closed in favor of the railroad, not only as against the adverse claimant, but also as against the United States; the title of the railroad becoming vested from and after the date of the decision.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by the Southern Pacific Railroad Company against the McKittrick Oil Company. From judgment for defendant, plaintiff appeals. Reversed.

Frank Thunen, of San Francisco, for appellant.

Geo. E. Whitaker, of Bakersfield, for respondent.

CONREY, P. J. The plaintiff brought this action to quiet its title to certain tracts of land in Kern county, described as lots 1 and 2 and south ½ of the southeast quarter of section 1, in township 30 south, range 21 east, Mt. Diablo base and meridian. Judgment was entered in favor of the defendant, and the plaintiff appeals therefrom.

Plaintiff's claim of title is based upon a patent, dated January 25, 1896, from the United States government to plaintiff, of a large number of parcels of land, one of which was designated as all of fractional section 1, containing 641.40 acres, in said township 30. The same patent also granted the northeast quarter of section 11, containing 160 acres, and being in the same township. A survey of the lands in that township, approved April 27, 1869, and known as the Reed survey, was the only official survey of that section until the year 1893. A second survey known as the Carpenter survey, was approved on November 18, 1893. In some land department cases this is called the survey of 1894. By the Carpenter survey the former section 1 was preserved and marked on the Carpenter map as "S. P. R. R. Co. Lot 37." It was not attached to any section, according to the Carpenter map. Immediately south of this lot 37, Carpenter in his survey designated and laid out a new fractional section 1, subdivided into six lots, which were designated therein as lots 1, 2, 3, 4, S. ½ of S. W. ¼, and S. ½ of S. E. ¼. Three of these parcels are subject to the present action.

On February 17, 1892, the Southern Pacific Railroad Company applied by list No. 48, to be permitted to select certain indemnity lands, including all of section 1. On January 14, 1896, indemnity selection list No. 48 was approved by the Interior Department. On January 25, 1896, the patent issued as hereinabove stated. Respondent contends that the land conveyed by plaintiff's patent was the section 1 as designated by the Reed survey. Appellant, on the other hand, contends that the description in the patent applies solely to the Carpenter survey. There have been conflicting decisions upon the question of interpretation thus presented. The present task resolves itself into the duty to determine which ones of those decisions are controlling authority in this case.

On December 30, 1899, one Carl A. Bruns made application to select, under the provisions of the act of June 4, 1897 (30 Stats. U. S. 36), the several subdivisions constituting section 1 of said township 30. On January 10, 1900, the Southern Pacific Railroad Company applied to make indemnity selection of the S. ½ of the S. W. ¼ and the S. ½ of the S. E. ¼ of said section. Both of these applications were subsequent to the approval of the Carpenter survey and the descriptions in the applications tally exactly with the subdivisions of section 1 as shown in that survey. By decision of date November 22, 1900, the Commissioner of the General Land Office rejected both of these applications upon the ground that the patent to the railroad company issued on January 25, 1896, included the land embraced in said applications. On December 15, 1900, the commissioner recalled said decision and permitted the selection by Bruns to stand, holding in effect that the railroad patent of January 25, 1896, did not embrace the land covered by said applications, because it was land added to section 1 by the Carpenter survey. From the decision of December 15, 1900, the railroad company appealed to the Secretary of the Interior. By decision of date March 26, 1902, the Secretary reaffirmed the commissioner's decision of November 22, 1900. Referring to the fact that the patent conveyed a title to "all of fractional section 1" within said township, the Secretary held that this language was clear and unambiguous, and that the land then in question was the only land meeting the description quoted according to the plat of the Carpenter survey, "which was the then accepted plat in use governing the disposal of public lands in this township." The foregoing decision of the Secretary seems to have ended the controversy so far as Bruns was concerned and so far as the United States government was concerned, and from that time has been relied upon by the railroad company, which prior thereto had been contending that the land conveyed to it in the patent of fractional section 1 was the land designated as lot 37 in the Carpenter survey and as fractional section 1 of the Reed survey.

On the 28th day of December, 1904, the McKittrick Oil Company presented in the Visalia land district an application for patent for what is called the California Oil Company No. 28 Placer Mining Claim, embracing within its limits the same parcels of land now claimed by the plaintiff in this action. This application was made under a mining location which originated on September 19, 1899, and which on December 2, 1899, was conveyed by the locators to the claimant, McKittrick Oil Company. This application was rejected by the local land officers on the ground that the land asked for had been patented to the Southern Pacific Railroad Company, and was not therefore public land of the United States subject to disposition under the mining laws. On appeal by the mineral claimant, the Commissioner of the General Land Office, by decision of April 12, 1905, affirmed the action of the local officers, citing the case of Southern Pacific Railroad Co. v. Bruns (31 Land Dec. 272), which is the decision of March 26, 1902. The mineral claimant having further appealed, the Secretary made his decision thereon of date November 13, 1908. McKittrick Oil Co. v. Southern Pac. R. Co., 37 Land Dec. 244. In this decision the department arrived at the conclusion that the decision of March 26, 1902, was erroneous in its "assumption that a patent must in all cases be read in connection with the plat of survey on file at the date of the issuance of the patent, where prior thereto two or more conflicting or inconsistent surveys had been made of the township embracing the tract named in the patent." After stating the decision made in Gleason v. White, 199 U. S. 54, 25 Sup. Ct. 782, 50 L. Ed. 87 (relating to a patent for lands in Florida), which was relied upon as authority for the new attitude of the department concerning the interpretation of the patent, the decision concludes:

> "The department is of opinion, therefore, that the assumption upon which its previous decision with respect to the land here in question was based was erroneous, and that the case should have been, and should now be, in determining the subject-matter of the patent, considered and decided with reference to the record involved in the issuance of the patent."

The department thereupon held that, in view of the circumstances stated by it:

> "The tract represented as fractional section 1 of township 30 south, range 21 east, M. D. M., on the plat of the survey of 1869, and not the fractional section 1 of that township as returned by the survey of 1894, is the tract that passed to the Southern Pacific Railroad Company by its patent of January 25, 1896. The departmental decision in the case of Southern Pacific Railroad Company v. Bruns, supra, is therefore recalled and vacated."

Thereafter the mineral claimant, the defendant in this action, was allowed to continue its proceeding to perfect its claim to this land as public land of the United States, with the result that on April 3, 1916, there was issued to the defendant the patent under which it now claims title to the land in controversy.

Appellant relies upon Southern Pacific R. Co. v. Jackson Oil Co., 164 Cal. 392, 129 Pac. 276, as authority upon which this case should be decided. In that action the land in controversy was described as lot 4 of section 11 of said township 30. The plaintiff there based its claim of title upon the patent of January 25, 1896, which, as we have shown, included a tract of land designated as the northeast quarter of section 11, of which lot 4 was a part, according to the Carpenter survey. We here refer to that decision and its statement of the case there presented. The Supreme Court in its opinion copied in full a decision rendered October 6, 1911 (40 Land Dec. 528), on appeal from a decision of the Commissioner of the General Land Office in the case there entitled Jackson Oil Company v. Southern Pacific Railway Co. In that opinion the department overruled its former decision of date November 13, 1908, in McKittrick Oil Co. v. Southern Pacific R. R. Co., and again held as has been held in the Bruns Case that the patent of 1896 to the railroad company must be interpreted according to the Carpenter survey. Not only so, but the decision further emphasized the fact that the department itself in 1903 had held, in a contest which presented the same question, that the patent of 1896, "conveyed the title to these lots to said company; and since then this department has been without jurisdiction over the lands. Any expression to the contrary, in the case of McKittrick Oil Co. v. Southern Pacific Railroad Co. (37 Land Dec. 243), must be regarded as overruled." Thereupon the Supreme Court said:

> "With the foregoing opinion we entirely agree. The United States government by its duly authorized agents declared the title to this lot to be in the plaintiff, and the whole matter finally settled and closed. * * * While the matter was pending, the Secretary of the Interior had jurisdiction to review all rulings theretofore made (Gage v. Gunther, 136 Cal. 345 [89 Am. St. Rep. 141, 68 Pac. 710]), but after the patent had issued and the government had formally declared that it conveyed the land in question, no further departmental interference was legally possible."

After the department decision in Jackson Oil Co. v. Southern Pacific R. R. Co., of date October 6, 1911, the matter of the McKittrick Oil Company and its claim for a patent was again considered by the department, which, on August 9, 1913, reaffirmed its former decision in the case of McKittrick Oil Co. v. Southern Pacific Co., and declined to follow the doctrine of the Jackson Oil Company Case.

By the decision which, on November 13, 1908, the Secretary of the Interior made in favor of the McKittrick Oil Company, and by the subsequent proceedings in the same case, the department assumed that it had jurisdiction over this land as government land. On that assumption the department called before it the Southern Pacific Railroad Company, and undertook to "recall and vacate" its decision of March 26, 1902, wherein the government had acknowledged that this was no longer public land, and had solemnly declared that it was the property of the railroad company. If in these later proceedings the Land Department did have jurisdiction to act upon the subject-matter constituting appellant's rights under its patent, then the judgment herein should be affirmed, since the state courts have no power to review the decisions of the department in the exercise of its jurisdiction over the disposition of public lands. But if in such later proceedings the department was without jurisdictional power and authority to so act, then the judgment of the superior court herein should be reversed. We think that the decision in S. P. R. R. Co. v. Jackson Oil Co., 164 Cal. 392, 129 Pac.

276, is authority to the effect that the department was without power to repudiate the finality of its former decisions. The United States government, by its duly authorized agents, on March 26, 1902, declared that the title to this land then was in appellant. Certainly the matter was then finally settled and closed in favor of appellant, not only against Bruns, but also as against the United States. The effect of that decision was that the title of appellant had become vested, to the very land in question here, from and after the 25th day of January, 1896. Thereafter, there being no further appeal, that proceeding became final and complete. It is appropriate to say here, as was said in the Jackson Case, "no further departmental interference was legally possible." It results that the respondent's claim of title under its patent must yield to the prior title of appellant.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

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49 Cal. App. 681

JENSEN v. CORNING FARMS CO. et al.

(Civ. 3547.)

(District Court of Appeal, First District, Division 1, California. Oct. 28, 1920.)

1. Vendor and purchaser 🔑86—Evidence sustained finding buyer had expressed intention to abandon contract.

On evidence showing that plaintiff orally announced his intention to abandon his contract to purchase realty, and notified the sellers in writing of his intention, a refusal which he admitted and repeated on trial, the trial court was justified in finding that plaintiff intended to abandon the contract and had expressed such intent prior to defendant sellers' notification to him that they had terminated the contract.

2. Vendor and purchaser 🔑101, 335—Buyer refusing to perform not entitled to notice allowing further time nor to recover payments before abandonment.

Where the buyer of realty abandoned his contract and expressly refused to perform, he was not entitled, as a condition to forfeiture of payments made, to notice from the sellers allowing him further time to perform, and was not entitled to recover payments made by him on his contract prior to his expressed abandonment.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Henry J. Jensen against the Corning Farms Company and others. From judgment for defendants, plaintiff appeals. Affirmed.

L. W. Hughes, of Corning, and W. A. Fish, of Red Bluff, for appellant.

Elston, Clark & Nichols, of Berkeley, for respondents.

RICHARDS, J. This action was brought by the plaintiff as the vendee under a contract for the sale of real property to recover from the defendant Corning Farms Company, a corporation, the amount paid by the plaintiff to said defendant under the terms of said contract after the same had been terminated by the vendor for the alleged failure of the vendee to make certain installment payments due upon the purchase price of said property, according to the terms of said contract.

The amended complaint was in two counts, the first of which set forth the contract in hæc verba and alleged the making of the payments thereunder for the recovery of which the suit was brought, and further alleging a mutual cancellation, termination, and rescission of said contract. The second count was in the form of the common counts for money had and received by the defendants to and for the plaintiff's use. The defendants in their answer admitted the making of the contract and the payment of the sums alleged to have been paid by the plaintiff thereunder; but they denied that said contract was canceled, terminated, or rescinded by mutual consent, and in that respect affirmatively averred that the plaintiff, after having made repeated defaults in the payment of the installments due upon said contract, had wholly abandoned any intention to carry out or fulfill the terms of the same, and had notified said defendants of his said intent, and that it was only after such repeated defaults and such express notification of the plaintiff's intent to abandon said contract and refuse to fulfill its terms that said defendants had proceeded to terminate the same by giving notice of such termination to plaintiff.

Upon the trial and submission of the cause the court made its findings of fact, in which, after finding that the plaintiff had made the payments alleged to have been made by him aggregating the sum of $6,142.58, it proceeded to expressly find that the plaintiff, after a series of defaults in making the installment payments due under the terms of said contract, had notified and informed the defendants that he did not intend to and that he refused to carry out said contract, and that he had permanently abandoned all intention to perform the same, and that thereafter the defendants had terminated the same by notice to the plaintiff as averred in their said answer. Thereupon the trial court ordered judgment entered in favor of the defendants, and it is from such judgment that the plaintiff prosecutes this appeal.

[1] The first contention of the appellant is

that the evidence is insufficient to support the findings of the trial court to the effect that the plaintiff had abandoned said contract prior to the defendants' termination of the same by notice. After an examination of the evidence in the case we are satisfied that there is no merit in this contention, since the evidence sufficiently shows that the plaintiff not only orally announced his intention to abandon said contract, and notified the defendants in writing of his said intention, but that he also, and when upon the witness stand during the trial of the cause, admitted and repeated his refusal to further perform the terms of said contract. The trial court was therefor justified in finding that such an intention existed and had been expressed on the part of said plaintiff prior to the defendants' notification to him that they had terminated said contract.

[2] The next and main contention of the appellant is that, notwithstanding his repeated defaults in making the payments required by the terms of said contract, and notwithstanding his expression of an intent to abandon the same, the defendants were not entitled to terminate said contract and thereby work a forfeiture of the payments which the plaintiff had theretofore made upon it without first giving to said plaintiff a notice granting him a reasonable time within which to make said payments and otherwise perform the terms of said contract, before exercising their asserted right to terminate the same and to forfeit the payments which the plaintiff had made thereunder. In making this contention the appellant relies upon the case of Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751, Pearson v. Brown, 27 Cal. App. 125, 148 Pac. 956, and the later line of decisions of the Supreme Court and District Courts of Appeal upholding the doctrine declared in these cases. The respondents concede the correctness of the principles enunciated in the foregoing cases, but contend that they have no application to the facts of the case at bar, for the reason that, while in each of those cases the vendee was in default in making the installment payments required under his contract, the vendors, having finally accepted such delayed payments when made, had thereby waived their right to terminate the contract without first giving to the vendee a reasonable time within which to perform the same. In the case at bar the added fact had been proven that the vendee, in addition to his repeated defaults, had expressly notified the vendor of his intention not to perform further the terms of his contract, and by such notification had rendered the giving of further time for such performance an idle and useless act; and, having done so, the vendee was not now entitled to have the vendor perform said idle and useless act before terminating said contract on its part.

We are of the opinion that the authorities sustain the respondents' contention in this regard. In the early case of Gray v. Dougherty, 25 Cal. 278, the rule is laid down that, where a vendee makes known to the vendor that he does not intend to perform the covenants of a contract by him to be performed, the vendor is not bound to do that which would amount to an idle and useless act, in view of the vendee's attitude in respect to the performance on his part of said agreement. This case was cited with approval in the recent case of Lemle v. Barry, 183 Pac. 150, wherein the doctrine was reaffirmed that, where one party to a contract had given the other notice in advance of his intention not to perform the same, the other party was absolved from the necessity of doing those things which otherwise would be required in order to work a termination on its part of the agreement.

In the case of Andrews v. Karl, 183 Pac. 838, the appellate court reviewed the cases relied upon by the appellant herein, and, after doing so, declared it to be the rule that—

> "Where a vendee in possession, neither performing nor willing to perform, has absolutely refused to complete the contract, he may be treated as one who has abandoned the contract under which he entered, and the vendor, by an action in ejectment, may recover the possession. The willful refusal of a vendee to perform his agreement amounts to an abandonment of the contract by him, and a repudiated contract is no protection to a vendee in possession against the legal title."

It is true that the court in that case also held that the evidence was insufficient to sustain the vendor's claim that the vendee had abandoned the contract; but this does not militate against the correctness of the rule announced therein upon a full review of the authorities touching the subject.

In the light of these decisions we are of the opinion that the conclusion of the trial court was correct, and that the said plaintiff, having on his part abandoned his contract, and expressly refused to perform the same, was not entitled to a notice from the vendor allowing him further time to perform that which he had expressly notified said vendor he did not intend to perform, and hence that he was not entitled to recover the payments made by him upon said contract prior to his express abandonment of the same.

It follows that the judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; BEASLY, Justice pro tem.

49 Cal. App. 631

LINDLEY v. LINDLEY. (Civ. 3283.)

(District Court of Appeal, First District, Division 1, California. Oct. 21, 1920. Hearing Denied by Supreme Court Dec. 20, 1920.)

1. Process ⟹165—Court may authorize filing of affidavit of mailing to nonresident on motion to vacate decree.

Where, in a divorce action, a copy of the complaint and summons was mailed to the nonresident defendant as ordered by the court, and the interlocutory decree so recited, the court had authority to permit the filing of an affidavit of mailing on defendant's motion to vacate the decree and set aside his default for want of service.

2. Process ⟹165—Affidavit of mailing filed by permission on motion to set aside default supports decree.

Where, in a divorce action, a copy of the complaint and summons was mailed to the nonresident defendant, and the interlocutory decree so recited, affidavits of mailing filed by permission of the court on the hearing of a motion to vacate defendant's default supported the decree as though of record before its entry, for the court's jurisdiction to render the interlocutory decree did not depend upon proof of service, but on the fact that service had been made.

3. Appeal and error ⟹865—Sufficiency of evidence may not be raised by appeal from an order refusing to vacate default.

The objection that the evidence in a divorce suit was not sufficient to establish the jurisdictional fact of plaintiff's residence should have been raised on an appeal from the judgment, and not on appeal from an order denying defendant's motion to set aside his default and vacate the decree.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action for divorce by Cecil Lindley against Scott Lindley. From an order denying a motion to vacate and set aside defendant's default, and the interlocutory decree, defendant appeals. Affirmed.

W. C. Cavitt, of San Francisco, for appellant.

J. E. White, of San Francisco, for respondent.

WASTE, P. J. The plaintiff sought and obtained an interlocutory decree of divorce. Service on the defendant, a nonresident, was by publication. Less than six months after the entry of the decree the defendant made a motion, supported by an affidavit of facts, an affidavit of merits, and his proposed answer, to vacate and set aside the default and the interlocutory decree, and for permission to answer. The court denied the motion, and from that order the defendant appeals on the judgment roll alone.

[1, 2] Only one question requiring consideration is presented. The defendant was a resident of the state of Missouri, and the court made an order that a copy of the complaint and summons be mailed to him at his last-known place of residence as set forth in plaintiff's affidavit for publication. The order was complied with, but no affidavit of the fact was made or filed. In due time the court entered the default of the defendant for failing to appear, and granted the interlocutory decree of divorce, which, among other recitals, contained a finding "that summons had been served upon the defendant by publication in the manner, and for the period of time, required by law." The defendant in his affidavit alleged that "no complaint or summons was ever served upon" him. His contention is that the court never acquired jurisdiction of his person, and that the interlocutory decree of divorce entered was a nullity. It is not necessary to discuss the sufficiency of the averment of nonservice, which is but a conclusion of law, for the uncontradicted record is that the summons was published for the required length of time, and that the copy of the complaint and summons was duly mailed to the defendant, addressed to him at his home address. Due proof of the mailing, which had not been filed prior to the granting of the interlocutory decree, was made, by permission of the lower court, at the time of the hearing of the motion to vacate and set aside the default.

The recital in the decree that the defendant was duly served with process is consistent with the facts, and the court had authority to permit the filing of the affidavit of mailing in support of the service. In re Newman, 75 Cal. 213, 220, 16 Pac. 887, 7 Am. St. Rep. 146; Sichler v. Look, 93 Cal. 601, 29 Pac. 220. Jurisdiction did not depend upon the proof of service, but upon the fact that service had been made. When the affidavits of mailing were filed, they supported the decree as fully as though of record before its entry. Herman v. Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145; Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8; La Fetra v. Gleason, 101 Cal. 246, 35 Pac. 765; Bank of Orland v. Dodson, 127 Cal. 208, 59 Pac. 584, 78 Am. St. Rep. 42.

[3] The objection that the evidence in the divorce proceeding was not sufficient to establish the jurisdictional fact of plaintiff's residence is one which should have been raised on an appeal from the judgment. However, the plaintiff testified that she had lived in the city of San Francisco and state of California "going on three years." She was fully corroborated by her sister, a witness in her behalf, who testified that she had so resided for "almost three years."

As the sole ground of the motion to set aside the interlocutory decree was the alleged want of jurisdiction, the lower court's ruling was correct.

The order is affirmed.

We concur: RICHARDS, J.; BEASLY, Justice pro tem.

49 Cal. App. 690

MATHERON v. RAMINA CORPORATION. (Civ. 3337.)

(District Court of Appeal, Second District, Division 1, California. Oct. 28, 1920. Hearing Denied by Supreme Court Dec. 27, 1920.)

1. Frauds, statute of 🔑125(2)—No damages recoverable for breach of oral contract to purchase land.

Where there was no contract or memorandum in writing subscribed by purchaser of land or by its agents thereunto authorized in writing, there was no contract, and there could be no recovery of damages for breach thereof under Civ. Code, § 1624, subd. 5.

2. Frauds, statute of 🔑129(5)—Payment of purchase price of land does not constitute part performance.

Payment of purchase price of land does not of itself constitute part performance under the statute.

3. Frauds, statute of 🔑129(1)—Part performance only considered for purpose of relief in equity.

Part performance by one contracting to purchase land does not withdraw the transaction from the effect of the statute, except for the purpose of relief in equity, under Civ. Code, § 1741.

4. Frauds, statute of 🔑125(2)—Where equitable relief was denied and damages awarded, action must be treated as one at law.

Where an action was brought to compel specific performance of a contract to purchase land, and equitable relief was denied, and the only judgment against defendant was a judgment awarding damages for breach of contract, and the defendant appealed, the action for the purpose of the appeal must be treated as one at law in which part performance on the part of defendant would not warrant awarding of damages for breach of contract.

5. Frauds, statute of 🔑118(4)—Letters and other documents held not sufficient as contract to purchase of land.

Documents consisting of letters, checks, options, and lease *held* insufficient under the statute to sustain any finding of fact to the effect that a contract to purchase land was made by the defendant.

6. Trial 🔑60(2)—Writing signed by agent inadmissible in absence of showing of written authority.

Writings signed by an agent of defendant are inadmissible in evidence to show that defendant contracted to purchase land unless it is first shown that such agent was thereunto authorized in writing signed by defendant.

7. Corporations 🔑410—President has no authority to contract to purchase lands.

The fact that one contracting to purchase land in behalf of a corporation was president of such corporation is not alone sufficient to show that he was authorized to enter into such contract.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by Alphonsine Matheron against the Ramina Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Evans, Abbott & Pearce and Arthur J. Abbott, all of Los Angeles, for appellant.

Geo. E. Whitaker, of Bakersfield, for respondent.

CONREY, P. J. This is an action wherein the plaintiff seeks to compel specific performance of an alleged contract of date October 10, 1916, for the purchase by the defendant of 298 acres of land in Kern county, and to compel payment of $8,000, the alleged purchase price. Judgment was entered denying specific performance, but at the same time awarding to plaintiff the sum of $3,000 damages for nonperformance of the contract. From this judgment the defendant appeals.

[1] Appellant presents this appeal upon several grounds, the first of which alone, if sustained, is sufficient to determine the result of the action. This is that the judgment should be reversed because there is no evidence of any contract or memorandum in writing subscribed by appellant or by its agent thereunto authorized in writing. If there is no such evidence, then there was no contract, and there can be neither breach nor consequent damages. Civ. Code, § 1624, subd. 5. Respondent contends that the contract is evidenced by a series of writings which, taken together, comply with the requirements of the statute of frauds. It will be necessary to refer briefly to this series of documents.

The first is a memorandum of lease, dated October 1, 1914, between the plaintiff and one J. W. Jennings, which was signed by these persons, and reads as follows:

> "Received of J. W. Jennings, of Tehachapi, Kern county, Cal., the sum of two hundred dollars ($200.00) as full payment for the first year's lease on 240 acres of land near Oak creek, Kern county, Cal. The said lease is to run two years at two hundred dollars per year payable in advance and that J. W. Jennings has the option to buy the said land at any time during this lease at a price to be mutually agreed upon, but said price not to exceed eight thousand dollars."

The second is a document of date September 28, 1916, signed by the plaintiff alone, which reads as follows:

"Bakersfield, Cal. Received through James F. Farraher two hundred fifty dollars on account acceptance of option to J. W. Jennings of Tehachapi, Calif., on October 1, 1914, giving right to purchase my land on Oak creek, Kern county, Cal., embracing the west half of section 32, township 12 north, range 14 west, S. B. M., and containing 297.89 acres, 50% of the purchase price of $8,000.00, less the $250.00 paid this day, to be paid on or before 30 days from date. The balance of said purchase price to be due and payable on or before one year from date. Deed of grant therefor to be executed and delivered in escrow to the First National Bank of Bakersfield, Cal. Vendee or successor to have privilege, on payment of 50% of said purchase price as stated, of receiving deed upon execution and delivery of mortgage to said vendor covering the 50% of purchase price unpaid and drawing interest at the rate of 6% per annum. Title to be fee simple and free of incumbrances. Abstract of title to be delivered to vendee within ten days from date. Dated September 28, 1916. Alphonsine Matheron. Marion H. Damon, Witness."

The third is a document dated October 10, 1916, which was deposited with the First National Bank of Bakersfield by James F. Farraher, is signed by the plaintiff alone, and reads as follows:

"First National Bank, Bakersfield, Cal.: You will please receive as an escrow the within and accompanying deed to Ramina Corporation which bears date October 10, 1916, and purports to grant the west half of sec. 32, township 12 N., range 14 W., S. B. M., in Kern County, Cal., containing 297.89 acres, and hold and deliver the same to J. W. Jennings either upon payment to you for my account and credit of the sum of seven thousand seven hundred and fifty dollars ($7,750.00) in cash or upon the payment of three thousand seven hundred and fifty dollars ($3,750.00) in cash for my credit and the delivery to you for me of a promissory note and mortgage on said property for the sum of four thousand dollars ($4,000.00), said mortgage to be accompanied by approval in writing of F. E. Borton as to form, provided said sum of seven thousand seven hundred and fifty dollars ($7,750.00) or the said sum of three thousand seven hundred and fifty dollars ($3,750) and delivery of said note and mortgage are made to you on or before the 1st day of November, 1916, and within banking hours on said date. Otherwise on demand after said 1st day of November, 1916, shall be returned to me. Interest on note at 6 per cent. semiannually. Note due November 1st, 1917. Witness my hand this 10th day of October, 1916. Alphonsine Matheron."

The fourth is an undated document signed by the plaintiff alone, which was delivered to the escrow holder, and reads as follows:

"First National Bank, City—Gentlemen: In modification of escrow instructions given you under date of October 10, 1916, I beg to advise you that said instructions are modified so as to permit, and you are hereby authorized to deliver my deed or deeds as individual owner, and my deed as guardian of the estates of my minor children, Henry, Blanche and Emile Matheron, to the Ramina Corporation providing considerations are paid or delivered to you as specified in said former instructions on or before the 23rd day of December, 1916. And you are hereby authorized to forward said deeds to Los Angeles Title Insurance Company, at 624 South Spring street, Los Angeles, for delivery by them upon payment of said consideration. Alphonsine Matheron. Witness: Louis V. Olcese."

The fifth is a check which reads as follows:

"Ramina Corporation. No. 744. Santa Monica, Cal., Oct. 20, 1916. Pay to the order of First National Bank of Bakersfield $3,750.00, thirty-seven hundred fifty no/100 dollars. Ramina Corporation, by Robert K. Walton. To the Bank of Santa Monica Commercial Savings, Santa Monica, Cal. Alphonsine Matheron escrow with Ramina Corporation."

It is in evidence that Robert K. Walton was president of the defendant corporation; that this check was received by the First National Bank of Bakersfield and collected by that bank. The words "Alphonsine Matheron escrow with Ramina Corporation," at the bottom of the check, were written in ink. The testimony is silent as to the person by whom these words were written on the check, but we shall assume for the purposes of the argument that they were written by Mr. Walton.

[2-4] According to the undisputed testimony of the secretary of defendant, the minutes of the Ramina Corporation show absolutely nothing relative to this transaction. There is no evidence that the defendant was ever in possession of the land, or that anything in the nature of part performance of the alleged contract has taken place. Payment of the purchase price does not of itself constitute part performance. Davis v. Judson, 159 Cal. 121, 131, 113 Pac. 147. Moreover, part performance does not withdraw a transaction of this kind from the effect of the statute of frauds, except for the purposes of relief in equity. Civ. Code, § 1741. Since in this action equitable relief was denied and the only judgment against appellant is a judgment awarding damages for breach of contract, the action, for the purposes of this appeal, must be treated as an action at law.

[5-7] From the documents hereinabove set forth it appears that the plaintiff on September 28, 1916, received the sum of $250 "on account acceptance" of the option theretofore granted by her to J. W. Jennings. She stipulated that her deed was to be delivered in escrow to the First National Bank of Bakersfield, "vendee or successor" to have the privilege of receiving deed upon payment of half of the purchase price and upon execution and delivery of mortgage to the vendor for the remainder of the purchase price. There is no evidence of any assignment made by the vendee of his rights under the contract, and it is perfectly clear that the vendee intended in the document was J. W. Jennings. It further appears that when the deed was placed in escrow it was made as a deed to

Ramina Corporation. The fact that this was done and that Ramina Corporation deposited the sum of $3,750 with the bank, with the notation on the check as stated, "Alphonsine Matheron escrow with Ramina Corporation," is not of itself sufficient to prove, and in fact does not by itself even tend to prove, any substitution of Ramina Corporation for J. W. Jennings as purchaser under the contract. The money advanced might have been a loan to Jennings, or pursuant to any other agreement between Jennings and Ramina Corporation by which the title was to rest in the name of the corporation instead of the name of Jennings. The documents to which we have referred are insufficient to sustain any finding of fact to the effect that the contract of purchase was made by the defendant. This defect in evidence of a contract in writing signed by the party to be charged cannot be supplied by oral evidence, or by evidence of writings signed by an agent of defendant, unless it is first shown that such agent was thereunto authorized in writing signed by the party to be charged. The plaintiff introduced in evidence a letter of date October 23, 1916, written by Farraher, to plaintiff, and another letter dated February 15, 1917, written to the First National Bank of Bakersfield by "Evans, Abbott & Pearce, by Arthur J. Abbott, Attorneys for Ramina Corporation." There is no evidence that either Farraher or Jennings or said attorneys for Ramina Corporation ever received any authority in writing from the defendant to make or to ratify any contract of defendant corporation with the plaintiff. The same observation applies to Robert K. Walton. The evidence shows that he was president of the corporation, but that fact, which stands alone, is not sufficient to show that he was authorized to enter into a contract on behalf of the corporation for the purchase of lands. All of these documents were received in evidence over objections constantly made by the defendant.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

49 Cal. App. 761

PEOPLE v. COLUMBUS. (Cr. 735.)

(District Court of Appeal, Second District, Division 2, California. Nov. 9, 1920.)

1. Criminal law 🔑736(2)—Whether confession was voluntary is question for judge.

Under Code Civ. Proc. §§ 2101, 2102, the question whether offered evidence is admissible is a question for decision by the judge not for submission to the jury, even though the determination of that question involves a decision on conflicting evidence as to whether a confession by accused was voluntary.

2. Criminal law 🔑531(4)—Exclusion of evidence confession was not voluntary before confession was admitted is error.

In a prosecution for crime where the state offered a confession by accused after testimony by the officers to whom it was made that it was voluntary, it was error for the court to refuse to hear defendant's testimony that the confession was obtained by duress and threats before admitting the confession in evidence.

3. Criminal law 🔑1186(4)—Exclusion of preliminary evidence confession was involuntary held to require reversal.

Const. art. 6, § 4½, prohibiting reversal for technical error, does not prevent reversal of a conviction for error in refusing to permit accused to testify the confession offered against him was not voluntary before the confession was admitted in evidence, where the entire cause does not enable the appellate court to determine whether the confession would have been excluded if defendant's testimony had been heard before ruling thereon, nor whether the jury would have convicted defendant if the confession had not been admitted.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

James Columbus was convicted of rape, and he appeals. Reversed and remanded for new trial.

LeRoy D. Barnett, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant appeals from a judgment of conviction and an order denying his motion for new trial. The evidence tending to establish his guilt consists of the direct testimony of a little girl, five years of age, and his own written, signed confession, made by him at the police station on the evening of the alleged crime, in the presence of a number of police officers. The prosecution's preliminary evidence upon the admissibility of the confession, as the free and voluntary act of the accused, consists of the testimony of two police officers who testified that defendant made his confession freely and voluntarily. Upon the introduction of this preliminary evidence, the district attorney offered the confession in evidence. To this offer defendant objected; his counsel stating that he wanted to put the defendant himself upon the stand, before the document was read in evidence, to testify in regard to the circumstances under which he claimed the confession was made. Defendant's announced purpose was to contradict the testimony of the two police officers that the confession had been given freely and voluntarily, by testifying that it was procured through fear, induced by the threatening manner and the violent language of the officers by whom he was surrounded when he agreed to make a confession. The objection was overruled, and the confession read in evidence.

[1] The question of the confession's admissibility as the free and voluntary act of the accused was one for the determination of the judge only.

"When a confession is offered against a defendant on trial, and he objects to it, and offers to prove that it was procured by threats or promises, or under such circumstances as would render it incompetent, it is error to receive the confession without first hearing the proof offered and ruling upon the competency of the confession as evidence against the party making it." People v. Gibson, 28 Cal. App. 334, 152 Pac. 316.

Sections 2101 and 2102 of the Code of Civil Procedure read:

"Sec. 2101. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code.

"Sec. 2102. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it."

[2] The section last quoted (2102) is a legislative recognition of the rule that, when the admissibility of any evidence depends upon a collateral fact, it is for the judge to pass upon such collateral fact in the first instance. It is expressly made the duty of the judge to pass upon all questions of fact the determination of which is a necessary preliminary to the admissibility of any testimony. The jurors are sworn and impaneled to try the issues joined between the people and the prisoner, and are not sworn or impaneled to try collateral matters preliminary to the admissibility of evidence. The duty of passing upon the facts preliminary to the admissibility of evidence is often very embarrassing, particularly where there is a conflict of testimony. This duty, nevertheless, must be discharged by the judge, and by him only. In the case of confessions, the evil of allowing the jury to pass upon a conflict in the evidence upon the collateral question as to whether the confession was or was not the free and voluntary act of the accused is this: If the confession be permitted to be given in evidence before the judge, after due consideration of all the evidence for and against its voluntary character, is satisfied that it was voluntarily made, it may be difficult for the jurors, in deciding the question of admissibility, i. e., whether it was voluntarily made or not, to be wholly uninfluenced by the confession itself, which, unless it be admissible, they ought not to hear or consider. State v. Andrews, 61 N. C. 207, 208; Nicholson v. State, 38 Md. 156–157. We are satisfied that the refusal to permit the defendant, before the confession was read to the jurors as evidence in the case, to introduce his evidence of the circumstances under which it was made, was prejudicial error. People v. Gibson, supra; People v. Cahill, 11 Cal. App. 685–691, 106 Pac. 115; State v. Sherman, 35 Mont. 512, 90 Pac. 981, 119 Am. St. Rep. 869; note to Ammons v. State, 18 L. R. A. (N. S.) 778 et seq.

[3] The salutary provision of section 4½ of article 6 of the Constitution cannot successfully be invoked to uphold the judgment. After a most careful consideration of the entire cause, including the evidence, we are unable to determine whether the trial judge would or would not have excluded the confession had he heard defendant's testimony before ruling upon its admissibility; nor are we able to say whether the jury would or would not have convicted the defendant if the erroneously admitted confession had been excluded from their consideration. This being so, we do not feel that section 4½ can aid the judgment. See People v. MacPhee, 26 Cal. App. 218, 226, 146 Pac. 522; also, People v. Gibson, supra.

The judgment and order are reversed and the cause remanded for a new trial.

We concur: THOMAS, J.; WELLER, J.

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49 Cal. App. 743

KASH et al. v. PAULE. (Civ. 3500.)

(District Court of Appeal, First District, Division 1, California. Nov. 5, 1920.)

Brokers 🔑86(4) — Evidence held to show plaintiff brokers did not consummate sale.

Evidence *held* to support finding that plaintiff brokers did not consummate the sale for which they claimed commissions.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by D. H. Kash and another against B. Paule. Judgment for defendant, and plaintiffs appeal. Affirmed.

C. W. Tackaberry, of Reedley, for appellants.

Harris & Harris, of Fresno, for respondent.

WASTE, P. J. This is an appeal from a judgment in favor of the defendant, after motion for a new trial made and denied. The action is one to recover commissions claimed to be due under a written instrument, which, it is alleged, appointed plaintiffs exclusive agents to sell certain real and personal property of the defendant. It is further alleged that pursuant to the agreement the plaintiffs procured purchasers ready, willing, and able to, and who did actually, purchase the real property for the sum of $15,500. The court found these allegations to be untrue. In seeking a reversal, appellants contend that the evidence is insufficient to justify the judgment, and that the decision is against law.

Plaintiffs were engaged in the real estate business, and Mr. Besoyan was engaged in the same kind of business in a neighboring town. They sometimes worked together, and frequently exchanged lists of available properties. On May 13, 1919, the defendant, B. Paule, one of the owners, by an instrument in writing, appointed plaintiffs as agents to sell the real property, together with certain personal property located thereon, all for the sum of $15,500, on terms specified, agreeing to pay them 5 per cent. commission on the selling price. This authorization was to remain in full force and effect for eight days, and thereafter until revoked by the defendant in writing. Appellants contend that they were appointed the exclusive agents to sell the property, but there is nothing in the writing that warrants the contention.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In arriving at a solution of the tangle arising out of the sale of the property, much depends upon the connection the real estate agent Besoyan had with it. The testimony is confused and contradictory as to the time when Mr. Besoyan first came into the transaction. Mr. Paule, one of the owners of the ranch, testified that he told Besoyan the property was for sale on May 24th, and that Besoyan returned the next day with Mr. Furlong, and the day following with Hardison, the two purchasers of the place. There is other evidence tending to corroborate this view. Newton, one of the plaintiffs, testified that on June 1st Besoyan obtained from plaintiffs a listing of the property, and that the plaintiffs took Besoyan and "his buyer" to see the place. Besoyan testified that he first learned the place was for sale about June 1st, from the plaintiffs, when he "took a couple of buyers" to see it. The property was ultimately purchased by Hardison and Furlong, and it clearly appears that Besoyan first took them to inspect the property. There is no doubt that they first learned that the property was for sale through him. Besoyan stated to them that the price of the property was $16,000. Hardison and Furlong offered $15,500, which was refused. Shortly after this, Hardison and Furlong learned through another agent, Glidden, that the property could still be purchased for $15,500. Feeling that they were under obligations to Besoyan, they then returned to him, informed him that they had learned the property could be had at the lesser figure, and again offered him a chance to make the sale on those terms. Besoyan's reply was: "Go to it, if you can. I can't do it." They thereupon completed negotiations, and effected the sale through Glidden. The buyers do not appear to have known the plaintiffs in the transaction at all, and had no dealings with them.

It is the respondent's theory of the case that Besoyan was acting in his own behalf, and in his individual capacity as agent, in the transaction. The trial court accepted this view, for it expressly found that the plaintiffs did not consummate the sale.

The judgment is affirmed.

We concur: RICHARDS, J.; BEASLY, Justice pro tem.

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49 Cal. App. 696

KING v. CLINE, Sheriff. (Civ. 3319.)

(District Court of Appeal, Second District, Division 1, California. Oct. 28, 1920.)

1. Evidence 🔑471(29)—Question as to understanding of another with his servants held to call for a conclusion.

In an action for wrongful attachment in connection with an employer's action against an employee for damages to a truck driven by him, a question as to whether the witness was acquainted with the employer's understanding with its men regarding the handling of its property was properly excluded as calling for a conclusion.

2. Master and servant 🔑66—Employee's obligation to carefully handle employer's property implied and need not be proved.

A question as to an employer's understanding with its men in regard to the handling of its property, asked for the purpose of showing an employee's obligation to carefully and skillfully manage a motor truck driven by him, was properly excluded, as such obligation was implied on proof of the employment.

3. Attachment 🔑4—Action must be for money due under obligations of contract.

Under Code Civ. Proc. § 537, authorizing issuance of writ of attachment in an action on contract express or implied for the direct payment of money, the money claimed must be due under the contract by reason of the express or implied obligations cast upon the party sought to be charged.

4. Attachment 🔑7—Employer's action against employee damaging property by negligence does not warrant attachment.

An employer's action against an employee for damages to a truck driven by him through his negligence is not an action for money due under the contract of employment so as to warrant an attachment under Code Civ. Proc. § 537; the action being one for damages which were contingent upon the employee's failure to perform his contract.

5. Sales 🔑476—Vendor under conditional sale entitled to recover property or its value when payment overdue and attachment not released.

Where a payment under a conditional sale contract was overdue when the property was attached as property of the vendee and the contract authorized the vendor to retake possession after default in payment or in any other condition of the agreement and required the vendee to release any attachment within three days, which was not done, the vendor or his successor was entitled, as against the vendee, to recover the property or its value at the time possession was demanded of the sheriff.

6. Sales 🔑480(6)—Attachment of property as property of conditional vendee held a conversion.

Assuming that one attaching property sold by a conditional contract of sale as the property of the vendee may be placed in the shoes of the vendee upon tendering performance, the vendor's assignee was nevertheless entitled to recover as for a conversion, where the attaching creditor never tendered performance of the money due under the contract and the sheriff when sued for conversion denied the assignee's right and alleged title to be in the vendee.

7. Sales ⚷475 — Assignment by conditional vendor of automobile not invalid for failure to comply with statute as to registration.

Where an automobile sold by a contract of conditional sale was registered in the name of the vendee and was attached as his property and the sheriff had possession of the automobile and presumably of the certificate of registration when the vendor assigned his rights under the contract, there was a good transfer of his interest, though the provisions of the Motor Vehicle Act as to registration and transfer of the registration were not complied with.

8. Sales ⚷479(1)—Vendor on default of conditional vendee entitled to possession and not limited to recovery of balance due from one converting property.

Where the vendee of an automobile under a contract of conditional sale was in default when the automobile was attached as his property and did not have the attachment released within three days as required by the contract, one to whom the vendor assigned his rights was entitled to the possession in order that he might proceed as authorized by the law and the contract, and was not limited to a recovery of the balance due under the contract of sale in an action against the sheriff for conversion.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by A. M. King against John C. Cline, Sheriff of Los Angeles County, Cal., for damages for conversion of an automobile. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrews, Toland & Andrews, of Los Angeles, for appellant.

R. T. Lightfoot, of Los Angeles, for respondent.

JAMES, J. Defendant appeals from a judgment entered against him for damages arising by reason of the alleged conversion of an automobile taken by him under attachment in a suit of the Union Oil Company against Parsons. The latter action grew out of the relation of employee and employer which had existed respectively between Parsons and the Union Oil Company. Parsons, while employed by the oil company as a truck driver, became intoxicated and so negligently handled the machine under his control as to greatly damage it. The oil company brought the action for damages for the alleged breach of duty, and in that action procured a writ of attachment and caused it to be levied upon an automobile then in the possession of Parsons. This automobile was being purchased from one Cook under a conditional sale contract which reserved title in the seller, and the purchase payments had not at that time been all made. After the attachment was levied, being apprised of this latter situation, Cook was approached by representatives of the oil company and asked what the balance due from Parsons was and whether he would accept the same from the oil company. Cook had at this time filed with the sheriff a third-party claim, demanding the release of the automobile from the attachment on the ground that he was the owner thereof. Cook informed the oil company in effect that he would consider the matter, and soon thereafter he made an assignment of his interest in the contract and automobile to the plaintiff King. King renewed a claim for the automobile in his own behalf to the sheriff and the sheriff refused to release the same, and King then brought this action for conversion and obtained judgment.

[1-4] Appellant makes several contentions as ground for reversal. It is insisted first that the court erred in sustaining an objection to a question asked of a witness, the question being as follows:

> "Are you acquainted with the understanding of the Union Oil Company with its men in regard to the handling of the Union Oil Company property?"

A general objection was interposed to the question and sustained by the court. Regardless of the matter which we will immediately call attention to, the objection was properly sustained for the reason that the question called for a conclusion of the witness and not for the facts as to what the contract was between the oil company and Parsons. Further than this, it is apparent that the whole purpose in asking the question was to show that the relations between Parsons and the oil company during the former's employment were such that Parsons assumed the obligation to carefully and skillfully manage and control the property of the company committed to his charge. Once admitting the employment, as to which there was no dispute, the condition sought to be proved would be implied. While the question as to the validity of the attachment is perhaps not properly presented here, in passing we express the view that the attachment was not authorized to be issued under the facts claimed. By section 537, Code of Civil Procedure, it is provided that the writ of attachment may issue "in an action upon a contract express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage or lien upon real or personal property. * * *" In order to authorize a writ of attachment to be issued, we think it clear that the money claimed in the suit must be due under the contract, by reason of the obligations, express or implied, which the contract casts upon the party sought to be charged. The action referred to was purely an action for damages which were contingent upon Parsons failing to perform his contract. In the sense of the section, the damages so sought to be recovered would not be "money due under the contract."

Appellant insists that King, standing merely in the shoes of Parsons' vendor and holding the original contract for the sale of the automobile as assignee thereof, could not claim the right to the machine until default had been committed on the part of Parsons in the making of payments and the right to the possession of the automobile had thereby become vested in the vendor.

[5-8] This action was commenced in the latter part of January, 1919. On January 2, 1919, a payment on the automobile was due to the vendor from the vendee. Plaintiff testified that shortly after the payment became due he notified the vendee of the fact. The contract of sale gave the right to the vendor to retake possession of the machine after default in the making of payments or default as to any other condition of the agreement. One of the stipulations was that the vendee should procure the release of any attachment levied against the automobile within three days. We think it clear that even as against the vendee the vendor or his successor was in a position to recover the automobile or its value at the time possession was demanded of the sheriff on the part of plaintiff. Liver v. Mills, 155 Cal. 468, 101 Pac. 299. The opinion in Morris v. Allen, 17 Cal. App. 684 (121 Pac. 690), contains the following statement of the law, sustained by authorities cited:

> "While it may be true that the vendee under a contract of conditional sale acquired a defeasible interest in the property sold, which, before default, he may sell or assign, nevertheless he has no attachable interest in the property until such time as he has fully complied with the condition concerning payment of the purchase price."

Admitting that this law is subject to modification, and that an attaching creditor may be placed in the shoes of the vendee upon tendering performance of all obligations existing against the vendee, the evidence fails to sustain such a condition of facts here. Defendant made no formal tender of the money due under the contract, to plaintiff. He denied in his answer any right in the plaintiff to assert any quality of title, and alleged that the automobile was the property of Parsons, the vendee. The case last above cited was somewhat similar in its facts on this point to the case here, and the court held that under such a condition of the pleadings the claim of the vendee's creditor that he should by the judgment be subrogated to the rights of the vendee was without merit. That the formalities regarding the registration of the machine under the Motor Vehicle Act (St. 1915, p. 397), and the transfer of such registration, were not complied with, under the particular facts of this case, will not, we think, diminish the right of the plaintiff to his judgment. The machine had been registered in the name of the vendee; the defendant sheriff had possession of the vehicle and presumably possession of the certificate of registration which defendant insists should have been indorsed to plaintiff. That under such circumstances the vendor could make a good transfer of his interest in the automobile as was attempted, we think altogether consistent with the purpose and intent of the act in question. With that conclusion in mind it will be unnecessary to consider respondent's proposition that, if the act in terms prevents such a transfer, it invades constitutional rights. Nor should plaintiff have been limited, as defendant contends, to a recovery only of the balance due under the contract of sale. He possessed the right to have the automobile delivered to him that he might proceed as his contract and the law authorized him to do. He failed to secure the automobile, after demanding it, and was hence entitled to recover its value.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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49 Cal. App. 721

BRASK et al. v. COX et al. (Civ. 3542.)

(District Court of Appeal, First District, Division 1, California. Nov. 3, 1920.)

Fraudulent conveyances ⚿300(1)—Evidence held to sustain finding deed to wife was not fraudulent.

In an action to quiet title against a sheriff's certificate of sale on execution to satisfy a judgment rendered against the husband and plaintiffs' grantors, evidence *held* to support the court's finding that the deed by the judgment debtor to his wife, which was executed before the judgment was rendered, although in form a deed of gift, was a transfer for a valuable consideration and not made for the purpose of defrauding his creditors.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Samuel Brask and others against George W. Cox and another, and Lulu E. Jordan, as guardian ad litem of Marcellus Vermont Pearson, a minor, and in her own person, to quiet title to certain tracts of land. From a judgment quieting the title of George W. Cox and another to part of the land in controversy and the title of plaintiffs to the rest of the land, the defendant Jordan appeals. Affirmed.

F. A. Berlin, of Oakland, for appellant.

J. E. Hood and Chas. E. Snook, both of Oakland, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiffs quieting their title to certain lands located in the

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

county of Alameda. The facts of the case, in so far as they are undisputed, may be briefly summarized as follows:

On the 10th day of June, 1915, one H. A. Thomas, while driving an automobile upon one of the streets in the city of Oakland, ran into and severely injured a minor named Marcellus Vermont Pearson, who was riding a bicycle along said street at the said time. Thereafter and on January 13, 1916, the said minor by his guardian ad litem commenced an action against said H. A. Thomas in the superior court of said county to recover damages for the injuries which said minor had sustained. That cause went to trial, with the result that on the 31st day of July, 1916, a judgment was rendered, entered, and docketed in favor of the plaintiff in that action for the sum of $1,000 and costs. Thereafter and on January 25, 1918, at the instance of said plaintiff, an execution was issued in said action, directed to the sheriff of said county, with instructions to levy upon the property of the defendant therein, and acting thereunder said sheriff levied said execution upon the real property involved in the present action, and on the 11th day of March, 1918, and after due and legal notice of the time and place of sale, sold all of the right, title, and interest of said H. A. Thomas in said real estate to one Frances Fowler, who was the highest bidder at said sale, for the sum of $1,179.12, and issued to said Frances Fowler his certificate of sale therein, which was duly recorded on the 12th day of March, 1918, in the office of the county recorder of said county. Thereafter and on the 21st day of December, 1918, said Frances Fowler transferred said certificate of sale to Lulu E. Jordan, as the guardian of said Marcellus Vermont Pearson, which transfer was also duly recorded; that, pursuant to said certificate of sale and of the transfer thereof, said Lulu E. Jordan, as said guardian of said minor, would on the 12th day of March, 1919, have been entitled to a deed from the said sheriff of the county of Alameda to all of the right, title, and interest of said H. A. Thomas in and to said real property. In order to prevent the said sheriff from proceeding with the execution of said deed, and to quiet the title of the plaintiffs herein against the effect of said judgment and execution sale, the present action was instituted. The chain of title upon which the plaintiffs herein rely to sustain this action is as follows:

On or about January 20, 1914, Priscilla Frances Thomas, being the owner of all of the premises involved in this action and of much other property, died testate in the county of Alameda, state of California. By the terms of her last will and testament she devised certain of her properties, including the premises in question, to certain trustees, with full power to mortgage and sell any and all portions of said trust property, and to apply the proceeds thereof to certain purposes declared in her said will. The trust thus created was to continue in force and effect during the natural life of her surviving husband, John H. Thomas, and upon his death the properties remaining in the hands of said trustees were to go to her five children share and share alike. At the time of the death of said Priscilla Frances Thomas there was an outstanding mortgage covering the property involved in this action and other properties in favor of George W. Cox and Louise Viola Cox (the latter a daughter of said decedent) for the sum of $10,650. Subsequent to the death of said decedent a settlement was brought about between the said children and heirs of said decedent and her surviving husband, John H. Thomas, by which the latter was given a portion of the property of said estate absolutely, and in consideration of which he released all claim to any interest in the balance of said estate. Thereafter and on August 28, 1917, the said John H. Thomas and all of the said heirs of said decedent, including H. A. Thomas and his wife, Hannah C. Thomas, and also the trustees of her said estate under said will, executed and delivered a deed to said George W. Cox and Louise V. Cox, his wife, covering the real estate described in said mortgage. In the meantime and on the 14th day of October, 1915, said H. A. Thomas had made, executed, and delivered to his wife, Hannah C. Thomas, a deed of gift to all of the property involved in the present action which would have constituted his share of the property of his deceased mother, which said deed of gift was recorded on February 2, 1916. Thereafter said George W. Cox and Louise V. Cox applied to the probate court in which the matter of the estate of said decedent was pending for a decree of distribution to them of the property described in said deed. Thereafter and on the 3d day of January, 1918, the said George W. Cox and Louise V. Cox conveyed the premises involved in this action to the plaintiffs herein, and thereafter and on September 30, 1918, commenced the present action to quiet their title against George W. Cox and Louise V. Cox, their grantors in said deed, and also against Marcellus Vermont Pearson and his guardian, Lulu E. Jordan; the object of said suit being to quiet the title of said plaintiffs against all of said defendants. The said plaintiffs a short time thereafter also commenced an action against Frank Barnett, as sheriff of the county of Alameda, and Lulu E. Jordan personally and as guardian ad litem of Marcellus Vermont Pearson, the object of said last-named action being to enjoin the said sheriff from the execution of a deed by him to said Lulu E. Jordan, as guardian ad litem of Marcellus Vermont Pearson, in accordance with the terms and conditions of the aforesaid execution sale.

The defendants George W. Cox and Louise V. Cox appeared in the present action, and filed a cross-complaint against the plaintiffs therein, and also against their codefendants, alleging that as to certain of the properties described in the complaint in this action they were still the owners thereof, and praying that as to such portion of said property their title be quieted both as against said plaintiffs and against their said codefendants. The other defendants herein also appeared to contest both the claims of the plaintiffs and of their codefendants, and to assert the validity of said execution sale and of the right of said Lulu E. Jordan, as guardian ad litem of Marcellus V. Pearson, to have the judgment obtained by her in said former action established, and her rights under said execution sale sustained as against whatever interest in said real estate the said plaintiffs through their said codefendants had secured in and to the interest of said H. A. Thomas in the estate and properties of his deceased mother, Priscilla Frances Thomas. In support of their said assertion the last-named defendants, both in their answer to the original complaint and to the cross-complaint of their codefendants, affirmatively averred that the aforesaid deed of gift from said H. A. Thomas to his wife Hannah C. Thomas was made without consideration and while the said H. A. Thomas was insolvent, and was made and executed by him for the sole purpose of defeating the effort of said Lulu E. Jordan, as guardian aforesaid, to obtain and enforce a judgment in favor of said Marcellus V. Pearson for damages for said injuries; and further alleging that, at the time said judgment was obtained and docketed and the said execution thereon issued and levied, the said H. A. Thomas was the owner of all of said property which had been derived by him from the estate of his deceased mother, and that as to such property the said Lulu E. Jordan, as guardian ad litem etc., was entitled to have her said judgment and execution thereof and sale thereof sustained.

Upon the trial and submission of the cause upon the issues thus framed, the trial court made its findings of fact wherein, after a recital of the foregoing facts relating to the chain of title to the several properties involved in the action, it proceeded to hold that as to the defendants and cross-complainants George W. Cox and Louise V. Cox they were entitled to a judgment quieting their title to the portion of said premises to which they asserted title in their answer and cross-complaint, both as against the plaintiffs herein and as against their codefendants Lulu E. Jordan, and Lulu E. Jordan as guardian ad litem of Marcellus V. Pearson. The trial court further proceeded to find that the said plaintiffs were entitled to have their title as to the remaining portion of the premises described in their complaint quieted as against all of said defendants. Judgment was accordingly entered in favor of George W. Cox and Louise V. Cox quieting their title as to the portion of the property claimed by them, and in favor of the plaintiffs quieting their title as to the remainder of said property as against all of said defendants. From this judgment the defendant Lulu E. Jordan, as guardian, etc., has prosecuted this appeal.

The sole question urged by said appellant upon this appeal relates to the correctness of the findings of the trial court with respect to the conveyance made by H. A. Thomas to his wife Hannah C. Thomas on October 14, 1915, which were in substance that said deed, although in form a deed of gift, was in truth and fact a transfer for a valuable consideration, conveying to said Hannah C. Thomas all of the right, title, and interest of said H. A. Thomas in and to his share of the estate of Priscilla Frances Thomas, deceased; and that said deed was not made for the purpose of defrauding said Marcellus V. Pearson or his guardian ad litem as to any rights existing in them or either of them by virtue of the injuries suffered by the former through the negligence of said H. A. Thomas and for which suit had not been commenced at the date of the execution of said deed. It is the appellants' contention that the evidence in the case is insufficient to sustain the findings of the trial court in the above regard, and hence that the judgment herein, in so far as it purports to quiet the title of both the plaintiffs and the cross-complainants herein to the properties covered by said execution sale should be reversed.

We have carefully examined the record in the case for the purpose of determining the merits of this contention; and without attempting to set it forth in detail we are of the opinion that there is ample evidence to support the findings of the trial court with respect to the validity of the conveyance from H. A. Thomas to his wife, Hannah C. Thomas. If said conveyance is to be held valid, it follows necessarily that the subsequent conveyance made on August 28, 1917, by the surviving husband and heirs of said Priscilla Frances Thomas, including H. A. Thomas and his wife, Hannah C. Thomas, and also including the trustees under the said will of said deceased, transferring the title of all of the premises affected by this action to George W. Cox and Louise V. Cox, is also beyond attack; and it further follows necessarily that whatever equities might exist as between the grantors and grantees of said deed other than said Hannah C. Thomas, the said grantees acquired whatever title she held by virtue of the conveyance from H. A. Thomas to her free and clear of any claim which the appellants herein as creditors of said H. A. Thomas might assert through the rendition of the judgment in their favor in the action for damages brought against him and through any levy or sale subsequently made thereunder.

In arriving at this conclusion we have not found it necessary to review the authorities which the appellants cite in support of their claim with respect to the fraudulent nature of the deed from H. A. Thomas to his wife, for the reason that, conceding said authorities to correctly state the law, the findings of the court to the effect that said deed was not fraudulent take the case out of the range of the appellants' said authorities.

The only error assigned by the appellants herein being that above disposed of, it follows that the judgment must be affirmed, and it is so ordered.

We concur: WASTE, P. J.; BEASLY, Justice pro tem.

49 Cal. App. 797

BRASK et al. v. BARNET, Sheriff, et al. (Civ. 3541.)

(District Court of Appeal, First District, Division 1, California. Nov. 3, 1920.)

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Samuel Brask and others against Frank Barnet, as Sheriff of the County of Alameda, and others. Judgment for the plaintiffs, and defendants appeal. Affirmed.

F. A. Berlin, of Oakland, for appellants.
J. E. Hood and Chas. E. Snook, both of Oakland, for respondents.

PER CURIAM. The facts of this case are identical with those in the case of Brask v. Cox et al. (No. 3542) 194 Pac. 292, this day decided, and which are fully set forth in said decision, wherein the judgment was affirmed.

It follows that the judgment herein must be affirmed, and it is so ordered.

49 Cal. App. 727

PEOPLE v. TRUITT. (Cr. 717.)

(District Court of Appeal, Second District, Division 2, California. Nov. 3, 1920.)

1. Robbery ⚷24(3)—**Evidence held to establish identity.**

In prosecution for robbery, notwithstanding alibi testimony of accused and his relatives, evidence *held* to identify accused as the person, who, by pointing his revolver at a druggist, took money from the latter's cash register.

2. Criminal law ⚷1159(3)—**Conflicting evidence for the jury.**

An argument based on the weight of admittedly conflicting evidence will not be considered by an appellate court in reviewing the jury's conclusions; such court's jurisdiction, in such cases as robbery trials, being confined to questions of law.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

J. W. Truitt was convicted of robbery, and he appeals. Affirmed.

A. E. T. Chapman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant was convicted of the crime of robbery. His appeal presents the single question whether the evidence is sufficient to identify him as the person who committed the crime. It is conceded that the robbery was committed by some one.

[1] On the evening of December 12, 1919, a person identified by Robert E. Sherman, the complaining witness, as this defendant, entered Sherman's drug store at 4300 Pasadena avenue, in the city of Los Angeles, and asked Sherman to sell him a small quantity of carbolic acid. While in the back part of his drug store, at the prescription case, engaged in filling the order for carbolic acid, Sherman heard the bell on the cash register ring. Concluding therefrom that some one was trying to rifle the register, Sherman hurriedly returned to the front part of the store. There, so Sherman testified, he was confronted by defendant. Sherman testified that defendant presented a revolver at him just as he returned from the rear of his store, and ordered him to turn around and go back to the prescription case and stay there. Sherman further testified that, as he turned to go back to the prescription case, in obedience to defendant's command, he saw the defendant take $11 in paper money from the cash register. In his identification of defendant as the person who entered the store and took the money from the register, Sherman, who was quite positive in his testimony, was corroborated by his wife, who testified that she fired two shots at the robber as he was walking from the store, and that, as she fired the second shot, the robber, who was then going out of the door, turned around and looked directly at her. She testified that she got a good look at him. She swore positively that defendant is the man at whom she fired the shots.

Defendant, his wife, sister, and brother-in-law testified that, at the time when the robbery was committed, defendant and wife were visiting his sister at the latter's home several miles distant from the drug store where the robbery occurred. This testimony, if believed by the jury, would establish a complete alibi. The substance of appellant's contention is that the testimony given by himself and relatives to establish an alibi was not overcome by that of Mr. and Mrs. Sherman identifying him as the person who

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

entered the drug store and took the money from the cash register. The substance of the argument advanced in support of this claim is that it is not probable that either Mr. or Mrs. Sherman, in the excitement of the moment, would pay such heed to the features of the robber that either could identify him at the time of the trial. This, and certain alleged discrepancies in the testimony of the prosecution's witnesses, constitute the sole reason for the appeal.

[2] Appellant's contention is addressed wholly to the credibility of the witnesses and the weight of the evidence—matters respecting which the jurors are the sole judges. It is too thoroughly settled to require citation of authority that an argument based on the weight of evidence which is admittedly conflicting will not be considered by an appellate court in reviewing the conclusions of the jury. Our appellate jurisdiction in these cases is confined to questions of law. The futility of urging this court to hold, as a matter of law, that the jury was not justified in finding against defendant on his claim of an alibi and in reaching the conclusion that he was the identical person who entered the drug store and stole the $11 from the cash register, must be apparent from the evidence as we have summarized it. The appeal is devoid of all merit.

Judgment affirmed.

We concur: THOMAS, J.; WELLER, J.

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49 Cal. App. 745

HALL v. ORLOFF. (Civ. 3473.)

(District Court of Appeal, First District, Division 2, California. Nov. 6, 1920.)

1. Champerty and maintenance 🔑5(6)—Contract requiring payment to attorney on dismissal of action is void.

Though an attorney may make a contract with his client for a share in the proceeds of any settlement of litigation, a contract requiring the client to pay the attorney a stipulated minimum sum as a penalty for dismissing the action without the attorney's consent, when the client received nothing for such dismissal, is against public policy and void.

2. Attorney and client 🔑134(1)—Can recover on quantum meruit for services in action dismissed by client.

Where a client dismissed the action without his attorney's consent, the attorney can recover on quantum meruit for the reasonable value of services rendered before the action was dismissed.

Appeal from Superior Court, Los Angeles County; J. J. Wood, Judge.

Action by M. D. Hall against Max Orloff to recover the amount due on a contract for attorney's fees. Judgment for defendant, and plaintiff appeals. Affirmed.

R. A. Dunnigan, of Los Angeles, for appellant.

Harry K. Wolff, of San Francisco, and I. R. Rubin, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action in which he, as assignee of the rights of R. A. Dunnigan, sought to collect $900 attorney's fees under a written contract for professional services made between said R. A. Dunnigan and defendant.

The trial court found that a written contract had been entered into between defendant and R. A. Dunnigan, under which contract the said Dunnigan was to render professional services as an attorney at law in the prosecution of two suits in which the defendant herein was the plaintiff. The only question involved in this appeal is as to the validity of certain provisions contained in said contract. The contract recites the employment of the attorney to file suit against Sam Orloff, Diana Orloff, and the Taft Junk Company, for an accounting of a partnership existing between said parties and the defendant herein, and also to prosecute another suit for damages against the said Sam Orloff for assault and battery upon the person of the defendant herein. It also provides that the defendant herein was to advance all costs of suit, and was to pay to the attorney fifty per cent. of all moneys received in said actions, either by compromise or by judgment. Then follows the provision upon which this action is based. It is as follows:

> "It is specifically understood and agreed that neither of the parties hereto are to settle said cases without the consent and knowledge of the other, and the party of the second part (Orloff) agrees in event of any settlement being made to pay to said party of the first part, 50 per cent. of said settlement, provided, however, that the said 50 per cent. so paid to the said party of the first part shall not be less than $1,000."

In accordance with this contract of employment, the attorney instituted suits in Kern county, for the purposes mentioned in the contract. Thereafter, on October 11, 1918, the defendant herein, in his own name and in his own behalf, filed in the said superior court dismissals of said actions so filed by his said attorney. The court found that the defendant herein did not receive any consideration of any kind or character from the defendants or from any other source, for his dismissal of these actions. It was agreed by the parties, and the court so found, that it was the intention of the parties to the contract between Dunnigan and Max Orloff that said Max Orloff should not have the right to settle or dismiss or compromise the aforementioned actions without the consent of his attorney, and that, if said Orloff did so dismiss said actions, he was required to pay as a penalty therefor the sum of $1,000 to his said attorney. Plaintiff herein relied upon this interpretation of the contract and gave defendant credit for $100 paid by him to his said attorney for costs and expenses, making a balance claimed of $900.

The trial court held that the provision in the contract between the parties for the payment of the $1,000 penalty was void as being contrary to public policy.

[1] Appellant relies upon the case of Hoffman v. Vallejo, 45 Cal. 564. That case does not present the same question as the present appeal. In the Hoffman case a contract had been made between an attorney and his client for a contingent fee of one-half of the amount recovered by judgment on compromise in certain litigation regarding a large tract of land. It is true the contract contained a provision that the client should not compromise the case without the consent of the attorney, but the complaint alleged that after the attorney had expended much time, money, and labor upon the litigation, the client in contravention of the agreement, without the knowledge of the attorney and in fraud of his rights, made a settlement with the defendant under which the client received $12,500 which at the request of the client was paid to his son, who invested it in real property which he was holding in trust for his father. The prayer was that an undivided one-half of the property purchased with the money received in compromise be decreed to be held in trust for the attorney in fulfillment of the agreement made by the client to pay to the attorney as his fee one-half of whatever was recovered by judgment or compromise.

The difference between that case and the case at bar is the important one that in the Hoffman Case there had been a consideration received by the client, and the attorney was clearly entitled to one-half thereof, while in the present case, according to the evidence and findings, no consideration was received by the defendant, and the sum sought to be recovered is not based upon any amount received by the defendant as the basis of compensation provided by the contract of employment. In the Hoffman Case no recovery was sought by the attorney because of the dismissal of the case by the client, but recovery was sought because of the compromise made, and for one-half of the amount secured by the compromise, which was the agreed fee of the attorney under the written contract. In the present case the recovery is for a penalty for dismissing the suit without the consent of the attorney.

The question involved here was discussed in the case In re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441, in which it is said:

> "In other states an abundance of authority is to be found for the doctrine that a clause prohibiting the client from making a settlement of his litigation without the consent of his attorney is void as against public policy. Huber v. Johnson, Supreme Court of Minnesota, 70 N. W. Rep. 806; North Chicago, etc., R. Co. v. Ackley, 171 Ill. 100; Lewis v. Lewis, 15 Ohio 715, 716; Key v. Vattier, 1 Ohio, 132; Davis v. Webber, 66 Ark. 190. * * *
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> "The clause in the contract fixing the value of the services at a certain percentage of the recovery was connected with the provision that the attorneys should have a voice in any settlement and in determining the amount of any recovery by that process. The two clauses are manifestly part of a single plan. Therefore, when the client takes advantage of the invalidity of one clause and repudiates it, the other one cannot stand alone but must fall with it, and the result of this again is to permit the attorneys to recover for the services which they have actually rendered according to their real value and independent of the original provision in the contract upon this subject. Davis v. Webber, supra; Gammons v. Johnson, 69 Minn. 488; Stearns v. Felker, 28 Wis. 594."

In the present case the defendant testified that he had become convinced that the actions instituted by his attorney were without merit, and that he had no evidence to establish his right to a recovery therein, and it was for these reasons that he had dismissed the actions. A similar situation was considered in the case of Andrewes v. Haas Bros., 214 N. Y. 255, 108 N. E. 423, where the court said:

> "The employment of a lawyer to serve for a contingent fee does not make it the client's duty to continue the lawsuit and thus increase the lawyer's profit. The lawsuit is his own. He may drop it when he will. Even an express agreement to pay damages for dropping it without his lawyer's consent would be against public policy and void. Matter of Snyder, 190 N. Y. 66, 69. The law will not imply an agreement which would be illegal, if it were express. It will not, under the coercion of damages, constrain an unwilling suitor to keep a litigation alive for the profit of its officers. Tenney v. Berger, 93 N. Y. 524; Matter of Dunn, 205 N. Y. 398, 402; Nutt v. Knut, 200 U. S. 12, 21; Mesa County Bank v. Berry, 24 Colo. App. 487. The notion that such a thing is possible betrays a strange misconception of the function of the legal profession and of its duty to society. When the defendants abandoned the action, they became liable to the plaintiff for the value of the services then rendered. That is the measure of their liability and of his right."

[2] We have been cited to other cases containing similar statements and intimations. However, appellant urges upon our attention that the attorney in the present case performed services in the preparation and filing of the complaints and in making a trip from Los Angeles to Bakersfield for a conference with the defendants in the action filed; that

after the performance of these services he was discharged by the client and the actions dismissed; and that he is entitled to $1,000 as a not unreasonable estimate of the value of such services in the event of such a dismissal of the actions. A recovery under such circumstances may be secured in an action for damages for breach of contract, upon a proper showing, or in an action upon quantum meruit, under the cases herein discussed. See, also, 6 Corpus Juris, § 321, p. 745; Swinnerton v. Monterey Co., 76 Cal. 114, 18 Pac. 135.

In a suit to recover a fixed penalty provided for by the contract in the event of a dismissal of the actions by the client, the ruling of the trial court that the provision of the contract relied upon was against public policy and void is correct.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

49 Cal. App. 737

WALSH v. DECOTO. (Civ. 3539.)

(District Court of Appeal, First District, Division 1, California. Nov. 4, 1920. Hearing Denied by Supreme Court Jan. 3, 1921.)

Parties 🔑59(4)—Court authorized to order that individual defendant sued in corporate trade-name by mistake be substituted.

Where defendant, doing business under the name "Blue Taxicab Corporation," injured plaintiff, who sued as against the corporation, then moved for order to amend complaint to bring in defendant as real defendant, the court was authorized to order that the true name of defendant as an individual doing business under the corporate name be inserted in pleadings and proceedings, and that they be amended accordingly, particularly in view of Code Civ. Proc. § 389.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Menzie Walsh against Ezra W. Decoto, doing business under the name and style of Blue Taxicab Company. From judgment for plaintiff, defendant appeals. Affirmed.

J. A. Kennedy, of Oakland, for appellant.

Stanley Moore and Geo. K. Ford, both of San Francisco, for respondent.

BEASLY, Justice pro tem. On April 23, 1915, the plaintiff, Menzie Walsh, filed in the superior court of Alameda county an unverified complaint against Blue Taxicab Corporation as defendant. The Blue Taxicab Corporation was named as defendant in the title of the action, and in the body of the complaint the corporate character of the defendant was set out. By her complaint the plaintiff sought damages for certain personal injuries alleged to have been sustained by her on September 1, 1914, through the negligent operation of an automobile by the defendant on the streets of the city of Oakland. On August 14, 1915, the summons was served upon the appellant, Ezra W. Decoto, for the first time. At the time of service, according to an affidavit of R. W. Palmer, the process server, the summons and a copy of the complaint were handed by him to Decoto, who then told him to make return that it was served upon the president of the Blue Taxicab Corporation. The Blue Taxicab Corporation appeared by demurrer, and the demurrer was overruled. On October 8, 1915, the Blue Taxicab Corporation filed its answer, in form a general denial, and also set up the special defense of contributory negligence and assumption of risk by plaintiff. Like the complaint, this answer was unverified. On March 15, 1916, the plaintiff gave notice that she would move the court for a jury trial of the case. On July 27, 1916, about two years after the accident, the plaintiff served and filed a notice of motion to amend her complaint in three respects, namely: First. By inserting therein as a portion of the title of the cause the words, "Ezra W. Decoto, doing business under the name and style of." Second. By striking out the whole of the paragraph of the complaint referring to the corporate character of the defendant, and inserting in lieu thereof the following: "That at all the times herein mentioned Ezra W. Decoto was doing business under the name and style above mentioned, and that said name was a fictitious and false name." Third. That the proposed amendment be filed as of April 23, 1915, the date of the commencement of the action. The grounds of this motion, as stated in the notice, were that a mistake had been made in the name of the party defendant in the complaint, and also a mistake as to the capacity in which the defendant was sued. At the time plaintiff filed and served her proposed amendment and with the motion there was an affidavit filed in support thereof, stating that she had been mistaken in the name of the defendant, and that Mr. Decoto was doing business under the false and fictitious name Blue Taxicab Corporation, that plaintiff was ignorant of that fact when she filed her complaint, and that under said name at the time of the accident Mr. Decoto was operating the taxicab by which the plaintiff was injured.

Prior to the hearing of this motion, and on August 1, 1916, the plaintiff returned and filed the summons issued in this action, with the affidavit of service upon Ezra W. Decoto, personally, indorsed thereon. It will be noticed that this return was subsequent to the appearance of the Blue Taxicab Corporation by demurrer and answer as above stated.

The motion to amend was heard on August 4, 1916; but before the court had ruled on it the plaintiff filed another notice of motion for an order to allow plaintiff to file an amended complaint upon the same grounds as those which formed the basis of the first notice above recited. Affidavits supporting and in opposition to this motion were also filed; and on August 21, 1916, the court granted leave to file the amendments proposed therein. These amendments were all practically to the same effect, namely, to bring in Mr. Decoto as the real defendant in the action in place of the Blue Taxicab Corporation. On September 22, 1916, a copy of the amendment was served on Mr. Decoto by mail, his office being in Oakland, and that of the plaintiff's attorneys in San Francisco. On October 4, 1916, the judge of the superior court before whom the action was pending, without, as it is said, notice or suggestion of anyone, but solely upon his own initiative or motion, made and caused to be entered upon the minutes of the court the following order:

> "It appearing that the plaintiff herein was ignorant of the name of the defendant at the time of the commencement of the above-entitled action, and that such fact is stated in the amendment to said complaint on file herein, and that the defendant herein was and is designated in the pleadings and proceedings herein by the name Blue Taxicab Corporation, and that at all of the times referred to in said complaint said Ezra W. Decoto was operating the automobiles referred to in the complaint, and was doing business under the false and fictitious name Blue Taxicab Company, now, therefore, it is hereby ordered that the true name of said defendant, to wit, Ezra W. Decoto, doing business under the name and style of Blue Taxicab Company, be, and it is hereby, ordered inserted in all of the pleadings and proceedings herein in place and stead of the name Blue Taxicab Corporation, and that all of the pleadings and proceedings herein be amended accordingly."

On the 20th day of April, 1917, the summons, complaint, and amendment to the complaint, as the said summons, complaint, and amendment to the complaint were amended by the order above recited, were personally served upon Mr. Decoto in city of Oakland. At the same time and place the amended complaint was served upon Mr. Decoto in the same manner. Meantime perhaps it should be noted, although it appears to be immaterial that a default already entered in the action had been set aside on motion of Mr. Decoto, who specially appeared for that purpose; and after the entry of the order of October 4, 1916, the court had permitted the withdrawal of the summons for service as above set forth. After the denial of a motion to quash the service of summons and the affidavit of service thereof, upon the ground that no copy of the summons had ever been served and the defendant had never appeared and had never submitted himself to the jurisdiction of the court, interposed by Mr. Decoto upon a special appearance for that purpose, the default of the appellant Decoto for failure to further defend was entered, and after hearing, a judgment for $5,000 damages was entered against him. From this judgment he has duly appealed.

The only question involved in the appeal is whether or not the trial court had authority to substitute Mr. Decoto personally for the Blue Taxicab Corporation in the action. The substitution was made admittedly long after the statute of limitations would have run against Decoto had no action been commenced thereon. There is not very much conflict in the evidence upon which the various motions were submitted, and the facts seem quite clearly established as follows: Mr. Decoto was doing business under the name Blue Taxicab Corporation or Company, and operating a cab by which the plaintiff was injured through the negligence of its driver. An action was thereupon begun by the plaintiff, Walsh, for redress of her injuries sustained in this accident. Not knowing the name of the party operating the cab, she sued the Blue Taxicab Corporation. It was supposed that Mr. Decoto was an officer of this so-called corporation. The Blue Taxicab Corporation appeared in the action, and sought to defend it. Upon the discovery that the name Blue Taxicab Corporation was a trade or business name under which Mr. Decoto was operating the cab, the plaintiff sought to have him substituted by his name in place of the name under which he was doing business. The court, after hearing various motions and making an order which in effect ought to have accomplished this purpose, probably thinking the order not sufficient, made the sweeping order above recited for the amendment of all of the pleadings and proceedings in the case by substituting Mr. Decoto's name for the name under which he was doing business. There was no suit here against a false entity, so the plaintiff claims, but an action simply against a defendant by the name under which the business was being conducted; and it is claimed that the case of Thompson v. Southern Pacific Co., decided by the Supreme Court on July 28, 1919, and found in 180 Cal. 730, 183 Pac. 153, is decisive of the question before us.

We are inclined to accept this position as correct. In that case a complaint was filed against the Southern Pacific R. R. Company, in which the defendant was described as a corporation organized and doing business as a railroad company in the state of California pursuant to its laws. Summons was issued, and an alias summons was given in the action. This alias summons with a copy of the complaint was served upon the agent of the Southern Pacific Company upon whom process might be served in the state of California under a due authorization. The Southern Pacific Company was a corporation organized and existing under the laws of the state of Kentucky. The Southern Pacific Railroad Company answered, and subsequently the Southern Pacific Company appeared specially for the purpose of moving to quash the alias summons served on it and to set aside the service upon the grounds, among others, that it was not a party to the action. This motion was denied; and subsequently upon motions duly noticed the word "railroad" was striken from the name of the defendant in the title to the action upon the ground that the Southern Pacific Company had been properly served and had appeared in the action. The Supreme Court sustained this position in the following language:

> "In this case the real defendant's agent received the summons and knew the contents of the complaint, because the corporation appeared specially in the action."

So Mr. Decoto here knew the contents of the complaint, and appeared specially in the action; the "real defendant," in the words of the Supreme Court, having received the summons. "True," that court continues, "there was a misnomer of the party defendant in the pleadings; but the court having acquired jurisdiction of the person of the defendant, as well as the subject-matter of the suit, possessed the power to correct the misnomer." It is true that in that case the correction was in the name of a corporate defendant; but it seems to us that there is no difference in principle between such a case and the case at bar. The substance of the matter is the real thing to be considered; and we do not think that a defendant who does business under a trade-name by which, although no deceit is necessarily intended thereby, a party injured is misled to the loss of his cause of action, should be heard to say after service upon him personally and with full notice of the situation, that the action had been begun in the wrong name, and should therefore be abated.

This view makes it unnecessary for us to consider the cases relied upon by appellant, except to say that the case of Altpeter v. Postal Tel. Co., 26 Cal. App. 705, 148 Pac. 241, is distinguished in the case of Thompson v. Southern Pacific Co., supra. See Nisbet v. Clio Min. Co., 2 Cal. App. 441, 83 Pac. 1077.

It may be said in addition that this is not an action against a non-existing entity, nor an action against a corporation in no wise connected with the enterprise from which the plaintiff received her injury. It was an action against Mr. Decoto by the fictitious name under which he was conducting the business during the course of which the injury to the plaintiff occurred. It is true that there is a contention to the effect that there was such a corporation as the Blue Taxicab Corporation. In one of the affidavits in the case the existence of such a corporation at and prior to August 15, 1915, is averred, and it is also stated that Mr. Decoto was the president thereof. The injuries of plaintiff occurred on September 1, 1914. This affidavit, therefore, does not show the existence of a corporation at the time of the accident; nor that the corporation owned the cab by which the plaintiff was injured.

Nor do we think that the court exceeded its authority in making the sweeping order for the amendment of the pleadings in the action which is above set forth (30 Cyc. 141; Code Civ. Proc., § 389); and there is abundance of authority that the court may so act on its own motion in furtherance of justice (31 Cyc. 476).

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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49 Cal. App. 729

HARTER v. DELNO. (Civ. 3474.)

(District Court of Appeal, First District, Division 2, California. Nov. 4, 1920.)

1. Sales ⚷473(1)—Bona fide purchasers from conditional buyers get no claim to property.

Conditional sales being recognized fully, even bona fide purchasers from persons to whom property is delivered under conditional sales get no valid claim to the property.

2. Contracts ⚷147(3) — Intent to be ascertained from whole document.

Contracts ought to be interpreted not upon any single clause, but the intent of the parties is to be ascertained from the whole document.

3. Sales ⚷459—Contract regarded as one of absolute sale where it appears credit was given.

If, on the entire contract, it appears there was a valid sale and credit given, regardless of any language which may have been used whereby the vendor sought to retain title until payment of the debt, the contract will be considered as one of absolute sale, and the provision in regard to title as inserted for security only.

4. Contracts ⚷155 — Sales ⚷467 — Ambiguous language to be construed most strongly in favor of party not using it, but claiming under it.

If language in a claimed conditional sale contract was ambiguous, it is to be construed most strongly in favor of the party not using it, but claiming title under it.

5. Sales ⚷479(1)—Conditional vendor bound by election to affirm or rescind on default.

Under conditional sale contracts, where an option is retained by the vendor on default of the vendee either to consider the transaction as a sale with the right in the vendor to collect the balance of the purchase price or to stand on the condition that title remains in the vendor and to sue for the property on default, the vendor must elect, and, having elected, is bound thereby.

6. Sales ⚷480(2)—Conditional vendor's right to recover property may be lost.

A conditional vendor's right to recover the property on default may be lost by delay or by his estoppel to assert a right to the property in the hands of innocent third parties.

7. Sales ⚷480(2)—Conditional vendor estopped to claim property as against owner of premises on which it was installed.

Conditional vendor of ice-making machinery, which, at the time of default by the buyers, did not promptly exercise its right of election to collect the balance of the debt, *held* estopped, as against the owner of the property in which the machinery was installed by the buyers, to claim it, where, if the conditional vendor had promptly exercised its right of election, it might have given notice to the owner of the property in time to enable him to protect it from the amount he still owed his contractors, the buyers.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Action by A. Harter against H. Delno. From judgment for defendant, plaintiff appeals. Affirmed.

Stewart & Stewart, of Los Angeles, for appellant.

Hert & Watt, of Colton, for respondent.

BRITTAIN, J. The plaintiff appeals from a judgment against him in a suit brought for the return of certain property or for its value.

The plaintiff-appellant is the assignee of Frick Company, a Pennsylvania corporation, manufacturers of ice-making and other machinery. For many years it maintained an agent named Meltzer in Los Angeles. Horstmann & Plomert, partners, engaged in the contracting business, or at least in the business of installing ice plants, in Los Angeles, were negotiating with the respondent, Delno, for the installation of an ice plant on property owned by him in Colton, in San Bernardino county. He wanted the Frick machinery. Meltzer, the Frick agent, was present during the negotiations between Horstmann & Plomert, on the one side, and Delno, on the other, but was not present when the contract between them was executed. Under this contract Horstmann & Plomert undertook to furnish to Delno an ice-making and cold storage plant, specifying a refrigerating machine made by the Frick Company. They agreed to deliver a machine and apparatus f. o. b. Waynesboro, Pa., and Los Angeles, respectively, about May 31 and May 28, 1916, respectively. Delno agreed to pay $17,252, $1,500 on the signing of the contract, 25 per cent. less $1,500 when the machinery and apparatus should be ready for shipment, 25 per cent. when the plant was ready for charge and test run, and the last 25 per cent. within 45 days thereafter. Ten thousand dollars of the purchase price was to be placed in escrow immediately with a Los Angeles bank, for disbursement in accordance with escrow instructions. The title to the machinery and apparatus was to remain in Horstmann & Plomert until all payments should be made. It was agreed that the machinery should not become a part of any real estate on which it was to be located or attached before settlement; title not to pass from Horstmann & Plomert until all cash and securities contracted for should be given, and on default of any payment the whole of the unpaid indebtedness should, at the option of Horstmann & Plomert become due and demandable. The purchaser agreed that Horstmann & Plomert should have the right to file mechanics' liens for labor and material. The contract was dated April 15, 1916.

On or about April 19, 1916, Horstmann & Plomert told Meltzer they had contracted with Delno to furnish him machinery for his plant, and he thereupon, for Frick Company, entered into the contract upon which this suit is based. It bore date April 19, 1916. It was on a form supplied by Frick Company to its agents. Under the head "specifications" at the first part of the form was a proposal on the part of Frick Company to Horstmann & Plomert to furnish one refrigerating machine with condensers and other details in accordance with the specifications. They called for a steam engine, gas compression pumps, shafting, ammonia gauges, ammonia condenser, receiver and oil separator, compression system, traveling crane, accumulator, mercury wells, and other parts, evidently to be built in a complete refrigerating plant. The purchaser was required to furnish and erect all foundation work, masonry, and carpentry work. The last provision of the specifications was that the purchaser, from the time of its arrival, should keep the machinery and apparatus insured against fire for an amount equal to the unpaid portion of the purchase price, with loss payable to the Frick Company as its interest appeared. Following these specifications under the word "Miscellaneous" was the contract proper in which Frick Company agreed to furnish Horstmann & Plomert "for use in the ice plant of H. Delno, situated in the city of Colton, county of San Bernardino," one refrigerating machine, together with the apparatus mentioned and described in the attached proposal and specifications and in accordance therewith, they being made a part of the agreement. The contract continued "the land upon which said machine and apparatus are to be erected is described as follows." Then follows a description of five lots by block and number and of the entire tract by metes and bounds in the city of Colton, the entire tract having a frontage on the Southern Pacific Company's right of way of 161.3 feet and on H street of 69.8 feet, with a depth between H street and an alley of 150 feet, its frontage on the alley being 128½ feet. Frick Company was to deliver f. o. b. Waynesboro 50 days from the date of receipt of order. The price was $3,373, payable 25 per cent. with bill of lading, and equal payments on July 10, August 10, and September 25, 1916. After provisions immaterial to the present controversy, the contract continued:

> "Settlement to be fully completed on arrival of machinery. All payments not due at time of settlement to be evidenced by negotiable notes bearing interest at 7 per cent. per annum, which notes are to be secured in the manner indicated in paragraph (c) next below."

Paragraphs (a) and (b) provided respectively for mortgage of the entire plant and mortgage upon machinery alone. Paragraph (c) reads:

> "The title to machinery and apparatus remaining in Frick Company until all obligations given to it in settlement for same have been paid in cash."

There was a stipulation that the machinery should not become a part of the real estate on which it was erected or to which it might be attached before settlement, and "the title to the machinery herein ordered is not to pass from Frick Company until all the cash and securities contracted for are given, and in case of failure or refusal to make any of the payments when due, or to make settlement as hereinbefore agreed, or to pay any note that may be given when it falls due, the whole of the unpaid indebtedness arising under this agreement shall thereby at the option of Frick Company, become immediately due and payable." The contract by its terms is required to be approved by Frick Company at its home office, and was so approved April 25, 1916.

Delno recorded in San Bernardino county his contract with Horstmann & Plomert, and upon completion of their work on October 19, 1916, he filed with the recorder a notice of completion of the work. According to the notarial certificate the notice was acknowledged instead of being sworn to. No claim is made by Delno that the notice was sufficient to start time running as against mechanics' liens, but in this case there is no question of such liens. It is claimed that the recordation of the Delno contract and notice was sufficient to charge Frick Company with notice of the facts that the machinery was being installed on his property in such a manner as to cause it to become a part of the realty, and that he was dealing with Horstmann & Plomert upon the assumption that they were the owners of the property and could pass title. He held his final payment, amounting to something over $4,000, for 33 or 35 days after the notice of completion and then paid Horstmann & Plomert. The last payment became due from Horstmann & Plomert to Frick Company nearly one month before the notice of completion was filed, so that for a period of nearly 60 days Delno had in his hands more than enough to have paid the entire cost of the machinery sold by Frick Company to Horstmann & Plomert. During the installation of the plant Delno dealt with Meltzer, and at no time did Meltzer or the Frick Company inform Delno, on whose property they were contracting for the erection of the machinery, that they made any claim of title to the machinery or against him. Being interrogated in regard to this matter by the court, Mr. Meltzer stated that he followed the instructions of Frick Company. He said that he was not to interfere in the sale, notwithstanding his knowledge that the buyer from Horstmann & Plomert understood they were the owners. Being further interrogated, he stated that he understood he was not to volunteer any information, but, that, if anybody had asked him, he "would probably" answer exactly how the case was, leaving out the price. The attention of Delno to the claim of Frick Company was first called on February 25, 1917, by a letter from Meltzer stating that he had received from the Frick Company home office a telegram reading as follows:

> "Horstmann Plomert ignore balance their Delno account credit department interest on payment investigate please wire."

In his letter he said he was writing simply to let Delno know that Horstmann & Plomert still owed Frick Company a balance which was due quite some time ago, and—

> "I believe, if I remember correctly, Frick Company held title to the machinery bought from Frick Company until fully paid for in cash. I would be pleased to hear from you what can be done with regard to this matter, thinking that in case you should have to make some other payments to them you would kindly hold off doing so until I have fully reported to our home office."

The next that Delno heard from any one concerning the Frick Company's claim was through a letter dated October 10, 1917, from Stewart & Stewart, as attorneys of Frick Company, with reference to a balance of $873.16, and interest on the same from August 15, 1916, $70.47, making a total of $943.63 "yet unpaid on the ice machinery installed at your place by Horstmann & Plomert." Paragraph (c) of the Frick Company contract is quoted, and the substance of the provision in regard to title remaining in Frick Company is given, including the statement that, in the event of default, the whole of the unpaid indebtedness arising under the agreement should at the option of Frick Company become immediately due and demandable. The letter closed with the statement:

> "Frick Company will be loathe to make unnecessary trouble or expense, but must insist upon early payment."

The evidence showed that by installation the machinery and apparatus became integral parts of Delno's building.

The trial court made findings substantially in accordance with the foregoing statement of facts, and that the Frick Company, in failing to assert its rights in said personal property, acted in negligent disregard of the defendant's rights, and by its dealings with regard to the property and with Horstmann & Plomert actually induced a belief in defendant's mind that Horstmann & Plomert were the owners of the legal title of the property, and concluded as a matter of law that the plaintiff, as the assignee of Frick Company, should be estopped from asserting any right, title, or interest in or to the property; that the defendant is the owner and entitled to a decree quieting his title and to judgment against the plaintiff for costs.

[1-4] The appellant claims that the contract between Frick Company and Horstmann & Plomert was the ordinary conditional sale contract under which Frick Company retained title, that Horstmann & Plomert could give no better title than they acquired, and that Frick Company had the right to the property in the hands of Delno or its value. In this state conditional sales are recognized to the fullest extent, and even bona fide purchasers from persons to whom property is delivered under conditional sales get no valid claim to the property. Van Allen v. Francis, 123 Cal. 474-477, 56 Pac. 339; Kellogg v. Burr, 126 Cal. 38, 58 Pac. 306; Lundy Furniture Co. v. White, 128 Cal. 170, 60 Pac. 759, 79 Am. St. Rep. 41. Contracts are to be interpreted, not upon any single clause, however, but the intent of the parties is to be ascertained from the whole document. If upon the entire contract it appears there was a valid sale and credit given, regardless of any language which may have been used by which the vendor seeks to retain title until payment of the debt, the contract will be considered as one of sale, and the provision in regard to title as one inserted for the purpose of security only. Palmer v. Howard, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60. In that case it was said:

> "The intention must be taken to have been to transfer the ownership of the property, reserving a security for the price, and nothing more. The possession was delivered. The promise to pay was absolute."

In the present case it will be noted that the insurance required was for an amount equal to the unpaid portion of the purchase price, not for the entire value of the property. There was no provision in the contract for the forfeiture of partial payments as rental for the use of the property, such as is customary in condition sale contracts. "Settlement" was to be fully completed on arrival of the machinery, and negotiable notes were to be given at that time for payments not due. The stipulations of paragraph (c) that title should remain in Frick Company until all obligations given to it "in settlement for same" had been paid in cash show an intent to hold the property as security for the payment of the promissory notes given in settlement. If settlement was made, sale was completed, and, if Frick Company desired to hold the machinery as security for the notes, it might have accomplished this object under paragraph (a) or paragraph (b), which provided for mortgages, and the recordation of such mortgages would have advised Delno, who was admittedly an innocent purchaser, of the claims of Frick Company. The provision for settlement implied a completed sale when settlement should be made. The language was that of the plaintiff's assignor. If it was ambiguous, it is to be construed most strongly in favor of the other party and one claiming title under it.

[5, 6] It is fundamental that under conditional sale contracts, where an option is retained by the vendor upon default of the vendee either to consider the transaction as a sale, with the right in the vendor to collect the balance of the purchase price, or to stand on the condition that title remains in the vendor and to sue for the property, upon default the vendor must elect, and, having elected, is bound thereby. The vendor's right to recover the property may be lost by delay or by his estoppel to assert a right to the property in the hands of innocent third parties. In the present case the contract provided that on failure to make settlement on delivery of the machinery by giving negotiable notes for deferred payments, or to pay any note when it should fall due, the whole of the unpaid indebtedness arising under the agreement should thereby, at the option of Frick Company, become immediately due and demandable. If it be assumed that settlement was made on the delivery of the machinery, the sale was complete and title passed to Horstmann & Plomert, from whom it was acquired by Delno. If settlement was not then made, Frick Company had the option immediately to declare the entire debt due. The contract called for the last payment from Horstmann & Plomert to be made on September 25, 1916. It was not made. If Frick Company at the time had promptly ex-

ercised its right of election to collect the balance of the debt, it might have given the notice to Delno, which it subsequently did give, in ample time to have enabled Delno to protect the Frick Company from the amount he still owed Horstmann & Plomert. By failing to act promptly and to advise Delno of its rights and election, it permitted him to change his position in relation to Horstmann & Plomert, and it would be a fraud on him to permit the plaintiff, whose assignor slept on its rights, to require him to pay even the debt of $900, and most inequitable to require him to pay the full value of the property.

Before the assignment to the plaintiff, Frick Company, through its agent, Meltzer, in February, 1917, five months after the default, advised Delno that it was seeking to collect the balance of the debt. Again, in October, 1917, more than a year after the default, through its attorneys, it advised him they were seeking to collect the balance of the debt. It exercised its right of election upon default, and in seeking to collect from Delno the balance of the Horstmann & Plomert debt it treated the transaction as a sale. Having made its election, it is bound by it. The fact that after default it sought to collect the balance strongly tends to show that the contract should be construed as indicated herein, and that the provisions of the contract in regard to the retention of title were inserted to evade the provisions of law requiring the recordation of chattel mortgages.

[7] The conclusion of estoppel from the findings was correct, and the findings showing the laches and estoppel were supported by the evidence. It further appears upon the entire record that no injustice has been done by the judgment. The substantial rights of the parties being thus determined, it becomes unnecessary to consider the minor contentions of the appellant.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

50 Cal. App. 48

BENNETT v. BENNETT. (Civ. 3070.)

(District Court of Appeal, Second District, Division 1, California. Nov. 19, 1920.)

Divorce ⚷203—Provision for alimony held unwarranted by complaint.

Where complaint in wife's divorce action did not pray for alimony, and did not contain allegations upon which to base such a prayer, the court, under Code Civ. Proc. § 580, had no power, on defendant's default, to provide in its interlocutory decree for payment of alimony.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Kathryn A. Bennett against Merlin H. Bennett. From that part of an interlocutory decree requiring defendant to pay alimony, defendant appeals. Modified.

Isaac Pacht, of Los Angeles, for appellant.
Alfred H. McAdoo, of Los Angeles, for respondent.

SHAW, J. In this action for divorce, the prayer of the complaint, to which no answer was interposed, was for a judgment dissolving the bonds of matrimony existing between the parties, and for general relief. Defendant, claiming the same to be erroneous, appeals from that part of the interlocutory decree rendered upon his default and in favor of plaintiff, whereby it was adjudged that, until the further order of the court, "defendant pay plaintiff $25 per month alimony."

Clearly, the trial court erred in making the order, the effect of which was to grant relief in excess of that demanded in the complaint. Not only was there an absence of any prayer for alimony, but the complaint contains no allegations upon which to base such prayer. Section 580, Code Civ. Proc., provides that, where no answer is filed by defendant, the relief granted plaintiff "cannot exceed that which he shall have demanded in his complaint." As stated, the prayer was for a dissolution of the bonds of matrimony only, and the power of the court to grant such relief was not enlarged by the prayer for general relief against defendant, who had made default. Staacke v. Bell, 125 Cal. 309, 57 Pac. 1012. See, also, Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520; Foley v. Foley, 120 Cal. 42, 52 Pac. 122, 65 Am. St. Rep. 147; Benton v. Benton, 122 Cal. 395, 55 Pac. 152.

The decree is modified, by striking therefrom the following clause:

> "It is further ordered that until the further order of the court defendant pay plaintiff $25 per month alimony."

We concur: CONREY, P. J.; JAMES, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

49 Cal. App. 750

JOHNSTONE et al. v. GLOSTER et al.

(Civ. 2158.)

(District Court of Appeal, Third District, California. Nov. 8, 1920. Hearing Denied by Supreme Court Jan. 6, 1921.)

1. Estoppel 🔑26—No estoppel by deed of one not connected with claimants' title.

Where defendants and their predecessors in interest acquired a title by prescription to a water ditch and water flowing therein, they were not estopped from urging said claim by a deed conveying the water, executed by a third party not connected with their source of title to the land claimed by them.

2. Appeal and error 🔑1071(4)—Use of word "plaintiffs" for "defendants" in findings disregarded as clerical error.

Where the context showed that the word "defendants" was intended to be used in findings, the use of the word "plaintiffs" instead would be disregarded on appeal as a mere clerical mistake.

3. Adverse possession 🔑117—Findings held sufficient where using term "adverse."

A finding that defendants' use had been continuous, uninterrupted, and adverse to plaintiffs, and under a claim of right was not insufficient to uphold a decree of title by prescription, in that it did not appear that such use was open, notorious, or with knowledge and acquiescence of plaintiffs, for to say that a use is "adverse" is equivalent to the declaration that it is open, notorious, under a claim of right and with the knowledge of the owner of the legal title.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse.]

4. Trial 🔑404(1)—Findings are liberally construed.

Findings are to be construed so as to support rather than to defeat the judgment.

5. Waters and water courses 🔑152(10)—Findings as to water rights held inconsistent.

In action involving conflicting claims to water rights, findings, in effect, that plaintiffs were the owners and entitled to the use of 750 inches of the water, and defendants were also the owners and entitled to the use of 25 inches of said water, were inconsistent and contradictory, necessitating reversal of judgment based thereon.

6. Appeal and error 🔑1122(2)—Conflicting findings cannot be changed by appellate court.

Although conflicting findings result from inadvertence or oversight, the appellate court is powerless to change them, but this may be done only by the trial tribunal.

7. Trial 🔑398—Findings to be upheld if possible.

As against the claim of inconsistency in the findings, the findings must be considered together, and should be upheld if possible.

Appeal from Superior Court, Modoc County; H. D. Burroughs, Judge.

Action by Walter A. Johnstone and others against Daniel A. Gloster and others. From order denying plaintiffs' motion for judgment on the findings, and from order denying new trial and from judgment in part for defendants, plaintiffs appeal. Order refusing to enter judgment for plaintiffs affirmed, and the judgment and order denying new trial reversed.

Daly B. Robnett, of Alturas, for appellants.

Jamison & Wylie, of Alturas, for respondents.

BURNETT, J. The controversy was over the title and right to the possession and use of the waters of Raider creek in Modoc county. Plaintiffs claimed that they were entitled to 750 inches of the water measured under a 4-inch pressure, and that the defendants wrongfully entered upon the channel of said Raider creek at a point above the lands of the plaintiffs and diverted a portion of the water from the main channel of said stream so as to deprive plaintiffs of a part of the water to which they were entitled, and which was necessary for the irrigation and maturing of their crops, greatly to the damage of said plaintiffs. Plaintiffs, therefore, sought the decree of the court to establish their rights to the waters of said stream, as set forth in their complaint, and the right of plaintiff Walter A. Johnstone to maintain "his said dams and ditches upon and across the lands of defendants," and that said defendants be enjoined and restrained from diverting or interfering with the flow of the water of said creek to the lands of plaintiffs in the quantities mentioned in the complaint, and from in any manner interfering with the maintenance by said Johnstone of the said dams and ditches. The material allegations of the complaint were denied by the answer, and therein defendants set up a title by prescription to 200 inches of said water, and also to the ownership of the said dam and ditch across the lands of defendants claimed by said Johnstone, and they asked for a decree of the court, establishing their said right in accordance with the allegations of their answer. The court filed lengthy findings of fact, and therefrom drew the following conclusions of law:

"That plaintiffs, as against the said defendants, have the right to take and use for the irrigation of their lands all of the waters of said Raider creek, except 25 inches, measured under a 4-inch pressure, at the head of what is known as the Gloster ditch, and that said defendants be forever enjoined and restrained from in any manner interfering with the natural flow of the waters of said creek to the lands of said plaintiffs, except said 25 inches measured at the head of the Gloster ditch.

"That as to the waters of said creek above the amount of 25 inches which may be permitted to flow into the Gloster ditch, the defendants Gloster are entitled to 75 inches, measured under a 4-inch pressure, and the plaintiff Johnstone to 10 inches, measured under a 4-inch pressure, or such a pro rata thereof as may be permitted to flow in said ditch.

"That said Gloster ditch be declared to be the joint property of said defendants and said plaintiff Walter A. Johnstone, to be used in the manner hereinabove set forth, and that plaintiffs have their costs herein expended."

Plaintiffs were dissatisfied with the award that was made to defendants of the said 25 inches and with the disposition of said ditch and surplus water. They made, therefore, a motion under sections 663 and 663a of the Code of Civil Procedure to have a judgment entered upon the findings of fact in favor of plaintiffs as prayed for in their complaint. This motion was denied, and they appeal from said order. They also moved for a new trial, and they have appealed from the order denying the same and also from the judgment.

One claim of appellants is that the evidence is insufficient to support the contention that defendants have a title to said 25 inches of water, and also the right to the joint use of said ditch and of said surplus water that may be permitted to flow in the same. It may be said, however, that there is substantial evidence disclosed by the record to support such claim. The testimony upon which respondents rely is set forth in their brief, and, without reproducing it, we deem it sufficient to say that it is a fair inference therefrom that defendants are entitled to said right as so indicated in the conclusion of the trial court.

[1] It may be said, also, that there seems to be no substantial merit in the claim that defendants are estopped from claiming said right by virtue of a certain deed which it is claimed conveyed all the water here in controversy. Said deed, though, was executed by D. M. Gloster, Mary E. Gloster, and Maurice J. Gloster. Respondents, however, connect themselves with the title of Honoria Monica Gloster, to whom the land now owned by defendants was patented March 19, 1895. It is the claim of respondents, that at the time of the execution of said deed, said grantors had no interest whatever in said land now owned by respondents or in said water right. Their position is that the Gloster ditch was built for the use of said land which is called the desert claim; that said ditch was used to carry water to this claim, and that one D. M. Gloster sold his improvements to his daughter Honoria Monica Gloster in 1889, and that this Gloster ditch and the water right connected therewith went to her as a part of the improvements. But, be that as it may, there is sufficient evidence in the record to support the theory that said Honoria Monica Gloster and her successors in interest in the ownership and possession of said desert claim acquired a title by prescription to said water ditch and water, and manifestly they would not be estopped from urging said claim by reason of the act of some other party with whom they do not connect their source of title to the land.

[2-4] Another claim of appellants is that the conclusion of the court as to the adverse use by defendants of said 25 inches of water is not supported by the findings of fact. Finding No. 12 is one upon which defendants rely in that respect, and is as follows:

"That for more than five years next preceding the commencement of this action, the defendants have continuously, uninterruptedly and adversely to the plaintiffs, and to all of them, used and appropriated 25 inches, measured under a 4-inch pressure, of the waters of said stream, at the head of what is known as the Gloster ditch, and have continuously, during all of said times, uninterruptedly and adversely to the plaintiffs and their grantors, and under claim of right, used and applied said 25 inches, measured at the head of said Gloster ditch, for the purposes of irrigating the garden of defendants at the house of said defendants on the lands described in defendants' complaint, and during all of said time have paid all taxes of any kind or character levied or assessed upon or against said ditch or dam or said water right; that said 25 inches of water is necessary for the irrigation of the garden, shrubbery, and trees at the house of plaintiffs upon their said lands."

As to the use of the word "plaintiffs" in the last line of the above, we think it is a clerical mistake and should be disregarded as the context shows that the word "defendants" was intended. It is the claim, though, of appellants that said finding is fatally defective in that it does not appear that such use was open, notorious, or with knowledge or acquiescence of the plaintiffs. These are undoubtedly material elements of a title by prescription, and said finding is subject to criticism in its failure to set them forth. We think, however, that the finding is not so defective as to furnish no support for the conclusion of the court. The term "adversely" as used in said finding, is so generally recognized in the statutes and in the decisions as including these elements of title by prescription, that we think it should be so construed as thus used. To say that a use is adverse is equivalent to the declaration that it is open, notorious, under a claim of right, and with the knowledge of the owner of the legal title. In view of the well-established rule that findings are to be construed so as to support rather than to defeat the judgment, and also the fact that the court found that said use had been continuous, uninterrupted, and under a claim of right, we think it should not be held that said finding is entirely insufficient to uphold a decree of title by prescription.

[5] Another criticism by appellants that seems to present a graver question is to the

effect that the findings of fact on material issues are wholly inconsistent and contradictory, and that therefore the judgment of the trial court must be reversed. Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Dorsey v. Newcomer, 121 Cal. 213, 53 Pac. 557.

We deem it unnecessary to quote in full said findings, but in simple and unambiguous language the court found that the grantors of the several plaintiffs made valid appropriations of 750 inches of the waters of Raider creek, measured under a 4-inch pressure, prior to any use or appropriation of any of the water by the defendants or their grantors, and that ever since said first and prior appropriation of said 750 inches, said plaintiffs and their grantors have used, diverted, and conveyed said waters upon their said lands for beneficial purposes particularly specified in said finding, and that during all of said time the said respective amounts of water have been and are necessary and indispensable for the proper irrigation of said lands and crops. It further appears clearly from the finding that at the time of the appropriation of these waters and the use of the same they were unappropriated and unused water, and that the ditches were constructed over and across the lands of the United States, and that said ditches have ever since been maintained as a matter of right. In brief, these findings covered every element of a right by prior appropriation, and they show absolutely and conclusively that plaintiffs are the present owners and entitled to the use of said 750 inches of the waters of Raider creek, and have been such owners ever since said appropriation. There is a finding also to the effect that any and all appropriations by the defendants or their grantors were subsequent to the foregoing appropriations of 750 inches of the water, and that no use whatever was made of any of the waters of Raider creek by defendants or their grantors until after all of these appropriations had been made. Said findings in favor of plaintiffs are not qualified in any manner by the finding in favor of defendants. The situation is substantially this, that the court finds plaintiffs to be the owners and entitled to the use of 750 inches of the water and the defendants to be also the owners and entitled to the use of 25 inches of said water. It is manifest that these two conditions are irreconcilable and cannot coexist. The case would be the same if the action involved land and the court had found that plaintiffs are the owners, in the possession and entitled to the possession, of 750 acres, and the defendants are entitled to 25 acres of the same.

[6, 7] Of course, the trial court did not actually intend to make conflicting findings. The embarrassment is no doubt due to inadvertence or oversight, but we manifestly are powerless to change the findings of the lower court. That may be done only by the trial tribunal. Although it is true that the findings must be considered together and should be upheld, if possible, yet since there is nothing to indicate that plaintiffs' title is subject to defendants' right to said 25 inches, we see no other alternative than to reverse the judgment. The case, if retried, should be conducted with as little expense as possible to both parties. If it is had before the same trial judge, it should be submitted upon the evidence already received, and any additional evidence that the parties or either of them may desire to offer.

The order refusing to enter judgment in favor of plaintiffs is affirmed; the judgment and the order denying the motion for a new trial are reversed.

We concur: PREWETT, Justice pro tem.; HART, J.

50 Cal. App. 109

PEOPLE v. DE MARTINI. (Cr. 536.)

(District Court of Appeal, Third District, California. Nov. 23, 1920.)

1. Perjury 🔑33(1)—Evidence held insufficient to show perjury by juror as to performance of duty.

In prosecution for perjury in accused's falsely swearing that he as juror intended to try the case upon the evidence, evidence *held* insufficient to sustain conviction.

2. Perjury 🔑33(1)—Evidence held insufficient to prove the "corpus delicti."

In prosecution for perjury in accused's falsely swearing that he as juror intended to try the case upon the evidence, evidence *held* insufficient to establish the corpus delicti, which means the fact of the crime or the body of the crime.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corpus Delicti.]

3. Criminal law 🔑409—Admissions insufficient to convict until corpus delicti proved.

Evidence of the admissions of a party are never sufficient to convict unless and until the corpus delicti is proved.

4. Criminal law 🔑409, 534(1)—Admissions or confessions alone insufficient to convict.

No person can ever be lawfully convicted of a crime, be it great or small, upon his admissions or confessions alone.

5. Perjury 🔑32(3)—Evidence in prior case inadmissible to show perjury by juror.

In prosecution for perjury in accused's falsely swearing that he as juror intended to try the case upon the evidence, evidence given in the case in which accused acted as juror was inadmissible to show accused violated his oath, or that he intended to do so from the beginning.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. Criminal law ⚷563—Corpus delicti to be proved independently of admissions.

The corpus delicti must be proved by evidence independently of admissions of the accused.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

George De Martini was convicted of perjury, and appeals from the judgment and order denying his motion for new trial. Judgment and order reversed.

See, also, 190 Pac. 468.

George E. Foote, of Sacramento, E. R. Vaughn (Downey & Downey, of Sacramento, of counsel), for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PREWETT, Presiding Justice pro tem. A jury convicted the appellant of the crime of perjury. He appeals upon the ground chiefly that the evidence is insufficient to convict. The indictment charges that the appellant testified falsely in making certain answers to questions propounded to him while being examined on voir dire as a prospective juror in a criminal case in which one Fuski was being tried for a felony. These questions and answers are as follows:

> "Q. If you are chosen as a juror in this case, you will try this case solely upon the evidence produced in court and the instructions of the court? A. Yes, sir.
>
> "Q. Nothing outside of the case, that is, outside of the evidence and instructions of the court, will enter into your deliberations when you go to the jury room? A. No, sir."

The appellant was not asked to state any facts as to the then present condition of his mind, nor indeed, to state any fact of any kind; but only to declare under oath that he would try the case solely upon the evidence and the instructions of the court, and that he would not let anything outside of the case enter into his deliberations in the jury room. His declaration to this effect was not more than his solemn oath that he would well and truly try the case on the evidence. His answers constitute, in effect, the usual oath administered to trial jurors. He merely swore or promised that he would keep his oath as a juror.

[1] I. It is charged in the indictment that appellant well knew that the answers which he gave were false. Such an allegation, followed by proof thereof, is essential to a conviction. Such knowledge may be shown, and ordinarily must be shown, by the circumstances of the case, since such mental condition cannot usually be shown by direct evidence. Two lines of evidence were introduced on the trial of the case. The first consisted of the entire volume of evidence produced on the trial of said Fuski, the evidence being read to the jury in this case by the court reporter. This was introduced to show how unfounded was the stand taken by appellant in the jury room. This point will be noticed later.

The second line consisted of the evidence given by certain fellow jurors of appellant; and it becomes necessary to examine this second line of evidence to ascertain whether the testimony of any one of them or of all taken together is sufficient to establish the crime. We take it that to justify a conviction herein it must be established beyond a reasonable doubt by the testimony of these fellow jurors: (a) That appellant believed, beyond a reasonable doubt, that the party on trial was guilty, since otherwise, it would have been his duty to vote as he did for acquittal; (b) That he did not try the party solely on the evidence and instructions; and (c) That he knew when he was answering questions as a prospective juror that he would not try the case on the evidence and instructions.

A juror, Mr. Sturges, testified that the appellant said to him, while in the jury room, that he believed Fuski to be guilty, but that he would not vote for a verdict of guilty. This falls very far short of showing that, at the beginning of the trial, he knew that he would not try the case on the evidence and instructions. It does not even show that, at the moment these admissions were made in the jury room, he believed that Fuski should be convicted.

The law exacts from a juror very much more than a belief that an accused person is guilty. The law requires that this belief must be so strong that it amounts to a belief beyond a reasonable doubt, and that, if it falls short of this degree of certainty, the juror must vote for a verdict of not guilty. The appellant, in his admissions to the above-named juror, gave no intimation that he knew or believed from the beginning that Fuski was guilty. His entire opinion as to the guilt of Fuski may have grown up from disclosures made by witnesses during the progress of the trial. Two or three other jurors corroborated the testimony of the juror above named. Another juror, Mr. Bauer, testified that the appellant said in the jury room "that he thought it was a frame-up—there were others that ought to be convicted, the same as Fuski." The last clause of this admission is broad enough to warrant the inference that the appellant was convinced of the guilt of Fuski to that degree that would demand a verdict of guilty. Still, it is coupled in the same sentence with a statement that is wholly inconsistent with the idea that he believed him guilty, since he expressed the belief that the prosecution was a "frame-up." But even this strong and unsavory statement is entirely consistent with innocence of the crime, since it does not relate back to the beginning of the trial. It does show a degree of moral obliquity rarely observed in the class of persons listed as jurors. But the appellant is not on trial for general moral delinquency. The charge is the commission of a specific act criminal in its nature, to wit, falsely stating that he would try the accused solely on the evidence and the instructions, knowing that he would not do so. He can, of course, be convicted of no other. At most, the testimony of these fellow jurors generates a bare suspicion that the appellant is guilty of the specific act charged; but it falls far short of sustaining a legal inference to that effect. Perjury requires a higher measure of proof that any other crime known to the law, treason alone excepted. Any other crime may be established by the testimony of one witness who is entitled to full credit. Both perjury and treason require more than the testimony of one witness. And the charge against the appellant is much more difficult of proof than perjury cases in general. In the ordinary perjury case, the falsity of the oath may be shown by extraneous proof showing the existence or nonexistence of the alleged fact; but in a case like this, where the very essence of guilt consists in misrepresenting the state of the offender's own mind, it is difficult to meet the demands of the law in showing the necessary mental condition. But the difficulty of showing this does not relieve courts and juries from the duty of requiring evidence that shows guilt beyond a reasonable doubt, and this reasonable doubt is not overcome by the testimony of a single witness, be he ever so truthful. The evidence submitted to us on this appeal would not sustain a verdict against him even in a civil action, where the mere weight or balance of evidence governs, far less sustain the conclusion beyond a reasonable doubt.

[2-4] II. But independently of all other considerations, the verdict cannot stand because the corpus delicti was not proved. The entire evidence thus far discussed consists solely of admissions made by the appellant while in the jury room. It is an inflexible rule that evidence of the admissions of a party are never sufficient to convict unless and until the corpus delicti is proved. Moreover, it is a fundamental rule that no person can ever be lawfully convicted of a crime, be it great or small, upon his admissions or confessions alone. This rule is universally recognized. No one presumes to question it. The term "corpus delicti" means simply the fact of the crime or the body of the crime. This does not necessarily involve proof that the accused person is the person committing it, but only that the crime has in fact been committed by some one. This may be illustrated by a concrete example. A man is accused of murder. The body of the victim is not found, and there exists no direct evidence that the victim was murdered. The accused person confesses at great length all the alleged details of the crime. Such confession is radically insufficient to justify a verdict of guilty. We are not concerned with the reasons for the rule, but when it is recalled that a great number of cranks confess to alleged crimes of which they know nothing, its propriety cannot be questioned.

After it is proved that the crime was committed by some person, then and then only may the admissions of the accused be used to show that he is the one committing it. Cases of the kind charged against the appellant are unique in this particular, that proof of the corpus delicti is so interwoven with proof of the identity of the person committing the offense that it is difficult to establish the first fact without also at the same time establishing the other. In other words, since proof of the admissions of the appellant is not competent to establish the fact of the perjury, and since proof of the fact of the perjury must, in this particular case, show that the appellant is the person committing it, evidence of his admissions cannot do more than confirm other and basic proofs. These basic proofs are wholly wanting.

[5] The prosecution, doubtless recognizing and seeking to avoid this rule, offered in evidence in this case the entire volume of evidence that was given in the case of the People v. Fuski. This was offered for the avowed purpose of showing that the appellant was not justified in believing from that evidence that the prosecution was a "frame-up" and in persisting in voting for an acquittal. This procedure was, in effect, asking the jury in this case to retry the Fuski Case for the purpose of determining whether or not the appellant was justified therefrom in voting for acquittal. But this rule might lead to some bizarre results. If it is admissible in this case, it must all be carried over into a hypothetical case involving a juror who sat on the trial of appellant, and so on ad infinitum. But if that evidence shows that this appellant is guilty, it likewise shows that the other two jurors who voted with him for an acquittal are guilty. But the evidence in the other case was inadmissible in this case for any purpose whatever. The law provides no machinery whereby the jury in this case could review the evidence submitted in the former case. Still less could this jury determine the weight of the evidence and the credibility of the witnesses. The weight of evidence depends much upon the manner of the witness and the connection in which it is given. The credibility of a witness can be judged only by one who hears him testify. One of the highest functions of a juror is to measure up the credibility of a witness. This is a duty that can be neither delegated nor reviewed. The mere disagreement of three jurors does not ordinarily lead to the conviction that they have committed perjury or otherwise violated their oath as jurors.

Nor could this evidence in the Fuski Case show, or tend to show, that the appellant intended from the beginning to vote for an acquittal.

This was the only evidence, apart from the admissions of the appellant, that was offered in the case. This leaves the corpus delicti wholly unproved. It is not a case where the evidence on this point is weak. It is a case where it is wholly wanting.

[6] So many California cases hold that the corpus delicti must be proved by evidence independently of admissions of the accused that it would be impracticable to refer to more than a few of them. In People v. Tapia, 131 Cal. 651, 63 Pac. 1001, 1003, the Supreme Court says:

> "Of course, it is well-settled law that the *corpus delicti* must be established independently of evidence which merely tends to connect the defendant with the crime charged and independently of any asserted extrajudicial admissions or confessions of the party charged, *and that such admissions or confessions cannot be considered as evidence of the corpus delicti.*" (The italics are ours.)

Other cases to the same effect are: People v. Grill, 3 Cal. App. 514, 86 Pac. 613; People v. Simonsen, 107 Cal. 345, 40 Pac. 440; People v. Frey, 165 Cal. 145, 131 Pac. 127; People v. Jones, 31 Cal. 566; People v. Thrall, 50 Cal. 415; People v. Jones, 123 Cal. 65, 55 Pac. 698.

Viewed from every angle, it seems impossible to uphold the conviction. The judgment and order appealed from are reversed.

We concur: HART, J.; BURNETT, J.

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49 Cal. App. 773

HOEFT v. HOTCHKISS. (Civ. 2129.)

(District Court of Appeal, Third District, California. Nov. 10, 1920.)

1. Partnership ⚷53—In suit for accounting, defendant's testimony against a partnership held sufficient to support verdict in his favor.

Where in a suit for an accounting under an alleged partnership agreement, plaintiff's cause of action was predicated on the theory that a written agreement was signed by both parties, defendant's positive testimony that he never signed the instrument or entered into the partnership claimed was legally sufficient to support a verdict in his favor.

2. Partnership ⚷47—Evidence of different partnership agreement held admissible to show agreement sued on was not made.

In an action on an alleged partnership agreement between plaintiff and defendant for the purpose of mining for chrome ore, evidence that on the date of the alleged agreement plaintiff, defendant, and a third person entered into a partnership for the same purpose was admissible as tending to show that the agreement alleged by plaintiff was not made.

3. Trial ⚷62(2)—Defendant may be asked whether he entered into particular agreement or any agreement and permitted to state its nature.

Where defendant denies the partnership agreement alleged by plaintiff, it is proper in rebuttal to ask him if he entered into the particular agreement and to follow that with the question if he entered into any partnership agreement with plaintiff, and, in answer to such question, to permit him to state the nature of such agreement.

4. Appeal and error ⚷1039(13)—No reversal because defensive matter was not pleaded when plaintiff not prejudiced.

A judgment will be affirmed, though defensive matter was proved without being pleaded, where it does not appear that appellant was at all prejudiced by the omission to plead it, and appellant protested amendment to meet evidence.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Eleanore E. Hoeft against A. M. Hotchkiss. Judgment for defendant, and plaintiff appeals. Affirmed.

W. B. White, of Grass Valley, for appellant.
W. E. Wright, of Nevada City, for respondent.

BURNETT, J. The action was brought for a partial accounting of an alleged partnership in the proceeds of a certain shipment of chrome ore made in June, 1918.

Plaintiff's claim of the partnership relation was based upon the asserted execution of the following written instrument:

> "Nevada City, August 25, 1917. This is to certify that A. M. Hotchkiss and Eleanore E. Hoeft have this day and date entered into a partnership for the purpose of chrome mining on equal shares in every and all discoveries made by A. M. Hotchkiss during the term of this partnership and equal interest in any lease that may be secured by said A. M. Hotchkiss during the term of said partnership."

The cause was tried with a jury, and their finding was in favor of defendant generally, and also specially that no such agreement of partnership was made.

Two points are urged by appellant: One, that the evidence is insufficient to justify the verdict; and, second, that the trial court erred in admitting certain evidence over the objection of appellant.

[1] As to the first, it is surprising that it should be seriously urged. The defendant testified positively that he never signed said written instrument or entered into any such partnership. We cannot say from the record that he did not tell the truth, and his testimony is, of course, legally sufficient to support

the finding of the jury. It is not disputed that plaintiff's whole cause of action was predicated upon the theory that said writing was signed by both parties, and, having found upon sufficient evidence that said purported agreement was not so executed, the jury could consistently reach no other verdict.

[2, 3] The other point relates to the evidence that another partnership agreement on the part of plaintiff, defendant, and one Bob Locke was entered into on said August 25 or thereabouts for said purpose of chrome mining, and that this partnership was subsequently recognized and admitted by appellant.

The purpose of the evidence was to make more probable the inference that no such agreement as claimed by appellant was executed; for it was hardly to be supposed that on the same day she would enter into two different partnership agreements with different parties for the same purpose. We think the evidence was admissible as bearing upon the question of the probabilities of the situation. One partnership was inconsistent with the other, and according to the recognized standard of human conduct, we could not expect the average person to assume such an inconsistent attitude. The circumstance, therefore, was a proper one for the jury to consider in weighing the testimony of plaintiff and defendant to determine which was worthy of belief. In order to rebut the evidence of plaintiff, it was proper, of course, to ask the defendant if he entered into the particular partnership agreement, and to follow that with the question if he entered into any partnership agreement with her for said purpose. In answer to this latter question he would be permitted to state the nature of such agreement. The foregoing indicates virtually the course that was pursued.

[4] Indeed, in the closing brief appellant makes this statement:

> "Our contention in this matter is that this claim of another and distinct partnership having been entered into between the plaintiff, defendant, and the third party, 'Locke,' was defensive matter, and should have been pleaded by the defendant in his answer. If the same had been, that would have altered the situation entirely."

If we admit that it should have been set up in the answer, it would not follow that the judgment should be reversed. To the contrary, we must hold that it should be affirmed for the reason that it does not appear that appellant was at all prejudiced by such omission. Appellant seems to lose sight entirely of the familiar principle that must control in the consideration of such alleged error.

Moreover, at the trial, when this objection was made to the admissibility of such evidence, respondent asked permission to amend his answer in that respect, but appellant stoutly protested, and the court declined to permit the amendment. Under such circumstances this objection does not come with very good grace and should not be regarded with much favor.

Without multiplying words, we may say that there does not appear to be any merit in the appeal.

The judgment and order are affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

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50 Cal. App. 45

Ex parte SILL.

Application of FRAZIER.

(Cr. 739.)

(District Court of Appeal, Second District, Division 2. California. Nov. 18, 1920.)

1. Habeas corpus ⚷117(1)—Judgment as to custody of child res judicata.

Judgment in habeas corpus proceeding for custody of a child is res judicata in a like subsequent proceeding on the same state of facts and between the same parties; the proceeding being essentially one to enforce private rights, and the gist thereof that the restraint of the child is in violation of petitioner's right to its custody.

2. Habeas corpus ⚷117(1)—State of facts relative to res judicata not different on two proceedings because of a fact known not being shown.

The state of facts on a second habeas corpus proceeding for custody of a child are not different from those on a prior proceeding, so as to render inapplicable the principle of res judicata to the judgment against petitioner in the first case, because of the fact of her divorce existing and known at the time of the first proceeding, but not attempted to be shown therein, appearing in the second proceeding.

Original habeas corpus proceeding by Viola Frazier on behalf of Gulda Ramona Sill, a minor. Writ discharged.

George W. Bush, of San Francisco, for petitioner.

B. F. Thomas, of Santa Barbara, for respondents.

WELLER, J. This proceeding was instituted to recover from the respondents the custody of Gulda Ramona Sill, a minor child about nine years of age.

It is alleged that petitioner, who is the mother of the child, placed her in the custody of respondents in order that they might enjoy her comfort and companionship, but without any intent to abandon the child, and that respondents have not adopted the child, but now unjustly claim the right to retain her custody. Further allegation is made that a petition for a writ of habeas corpus to recover the custody of the minor was filed by this petitioner against the respondents here in the superior court of Santa Barbara county, which, upon a hearing in that court was denied.

Respondents set forth in their return that, on or about the 13th day of July, 1911, the petitioner abandoned the child to their care and custody, since which time the mother has visited the child but three times, and has never contributed anything to her support. They aver that when the little girl was placed in their keeping it was agreed that petitioner should secure a divorce from her husband, from whom she was then separated, and that thereupon the respondents could adopt the child. This they are now willing to do, being abundantly able to maintain and educate the girl, and desire to treat her in all respects as if she were their natural child.

The facts found by the superior court in the habeas corpus proceeding wherein it awarded the custody of the child to the respondents here are set forth fully in the return filed in this court by respondents, and are substantially as we have above summarized the return, with additional details unnecessary to be repeated, but in no material respect different from the showing made on the hearing of the proceeding in this court.

Counsel for petitioner advances, with much persuasive force, the right of the natural mother to the custody of her offspring. With equal cogency the respondents present their claims, based upon the affection born of the years of loving care bestowed upon the infant consigned to their charge. The argument of each party to the controversy strikes a responsive chord in the heart and stirs the tender emotion of parental instinct in the breast. Were the question open for our consideration, we would with reluctance attempt to solve this delicate problem. However, this grave responsibility has already been assumed by another tribunal, to which the parties have submitted their respective claims. By the judgment of the superior court in a similar proceeding between the same parties it was determined that the best interests of the child would be subserved by awarding its custody to the respondents, and under the circumstances of this case we are bound by that decision.

[1] The great weight of authority is to the effect that, in a contest for the custody of an infant, the gist of the action is not that the child is unlawfully deprived of its liberty, but is that such restraint is in violation of the petitioner's right to its custody, and is essentially a proceeding to enforce private rights by the process of habeas corpus. For this reason it is held that a former judgment upon the same state of facts may be set up as res adjudicata when the same parties appear in a subsequent proceeding of the same nature. In re Holt, 34 Cal. App. 290, 167 Pac. 184; Cormack v. Marshall, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787, 1 Ann. Cas. 256.

[2] Petitioner argues that a different state of facts was presented in the hearing in this court than those proven in the superior court. Allusion is made to a decree of divorce granted to the husband of petitioner in Idaho, whereby the custody of the child was awarded to the mother, which fact counsel was unable to prove in the superior court. Nevertheless, the fact existed at the time of that trial, and the failure to prove or offer to prove it does not change the state of facts. The principle of res adjudicata applies as well to matters which might have been proven as to those actually offered in evidence. Were this not the law, the doctrine would not be efficacious, for a party could withhold evidence in one case and defeat the plea of res adjudicata by introducing it at a later trial of the same issues. The fact of the divorce existed, and was known at the time of the former hearing, and petitioner cannot now take advantage of her failure to produce the evidence.

Writ discharged.

We concur: FINLAYSON, P. J.; THOMAS, J.

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50 Cal. App. 115

ABDULLAH v. ABDULLAH. (Civ. 3464.)

(District Court of Appeal, First District, Division 2, California. Nov. 24, 1920.)

1. Parent and child 🔑6—Evidence held to support finding that defendant was not in loco parentis to plaintiff.

Evidence *held* sufficient to support a finding that defendant was not in loco parentis to plaintiff, his nephew, and as such entitled to his services and earnings for which suit was brought.

2. Appeal and error 🔑996—Finding conclusive when testimony capable of conflicting inferences.

When the testimony is susceptible of conflicting inferences, the trial court's findings are conclusive on the Court of Appeal.

3. Appeal and error 🔑1033(8)—Error in adopting wrong basis for estimating reasonable value held favorable to appellant.

In an action for services, if it was error to base an estimate of their reasonable value upon the agreed average earnings of other employees, the error was favorable to defendant, where the only evidence of reasonable value was testimony giving a higher value.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Infants 🔑58(1)—Entitled to repudiate express contract of employment and sue on quantum meruit.

Though an infant is employed on an express contract, it is his privilege to repudiate the contract and recover for the services on a quantum meruit.

5. Infants 🔑58(1)—Suit on quantum meruit held sufficient notice of repudiation of express contract of employment.

The filing of an action by an infant to recover for services upon a quantum meruit is a sufficient notice to the employer of the infant's disaffirmance of the express contract of employment.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Mustapha Abdullah, by Mike Aliskeroff, his guardian ad litem, against A. Abdullah. From a judgment for plaintiff, defendant appeals. Affirmed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellant.

Fred J. Spring and A. J. Getz, both of Los Angeles, for respondent.

NOURSE, J. This is an appeal by the defendant from a judgment against him in favor of plaintiff, who is a minor and sues by his guardian ad litem. The plaintiff is the nephew of the defendant, and this action was brought to recover $572, money had and received by the defendant, together with $4,250, the alleged reasonable value of services as a masseur, rendered by the plaintiff over a period of 3½ years at a turkish bath establishment conducted by defendant, which services were rendered at the special instance and request of the defendant.

Defendant answered, denying the indebtedness for money had and received, and denying that the reasonable value of the services rendered was the sum alleged by plaintiff, and alleging that plaintiff had been fully paid for all services rendered for defendant. The answer was later amended so as to include an allegation that at all the times mentioned in the complaint the plaintiff was a member of the defendant's family, and the defendant bore to him the relation of a parent.

The trial court found:

> "That it is not true that at all times mentioned in plaintiff's complaint or at any time at all plaintiff was a member of defendant's family, and it is not true that defendant maintained plaintiff at all or any times according to his circumstances or in any other manner, and that it is not true that defendant was in the place of a parent toward plaintiff, but the court finds that the defendant never at any time exercised any control whatsoever over the plaintiff or stood in any relation whatsoever to this plaintiff, except as master and servant, and that it is not true that defendant did not make an agreement to pay plaintiff for his services, but the court finds it to be true that defendant did agree to pay plaintiff for his services."

[1, 2] Appellant contends that, under the evidence, the court should have found that the defendant was in loco parentis to the plaintiff, and under such a state of facts was entitled to receive without compensation the services of plaintiff and also the money earned by plaintiff by his services to others. The testimony upon this question is susceptible of conflicting inferences; and under such circumstances the findings of the trial court are conclusive upon us. The record contains testimony from which the findings just quoted may reasonably be made, for it appears that the plaintiff was living in Asia Minor with his parents when the defendant sent him money to come to California. When plaintiff reached Los Angeles, defendant paid for his room and board for about a week until he went to work at the Lankershim Hotel. After that plaintiff was given his meals at the hotel, and also received a salary of $40 a month. The check for his salary he regularly gave to the defendant, who told him he would save his money for him, as he could not keep money himself, being a minor. Defendant also told plaintiff that he would secure a bank book for him, and later showed him a bank book, which plaintiff did not examine. During the eight months that plaintiff worked at the hotel he gave all his salary checks to the defendant, and the defendant paid plaintiff's room rent, which was $6 a month. Defendant also bought plaintiff one $15 suit of clothes, and one $4 pair of shoes. He gave plaintiff no money during this time, and after eight months he told him to come and work for him at his turkish bath establishment at the Athletic Club in Los Angeles. Plaintiff testified that the defendant said to him in connection with this employment:

> "I have four or five others working for me. I will make a lot of money, and you will make the same thing as the others are making. Anything the others make they get 50 per cent. of. They are making $25 or $30 a week, or more. I mean 50 per cent. of the money they take in. If they take in $10, they get $5 of it."

Plaintiff testified that he went to work for the defendant on that understanding.

It was customary at the baths for the employees to sign their own names to the checks of the customers they serve, as a basis for computation of the amounts due them, upon the 50 per cent. basis, at the end of each week. Defendant instructed plaintiff to sign the defendant's name to plaintiff's checks, which he did, and in this way no accurate record was kept of the plaintiff's individual work, and defendant was given the money earned by them both. Plaintiff testified that during the 3½ years that he worked for the defendant at the baths defendant gave him in all $80, $75 at one time and $5 at another; that during this time plaintiff slept at the baths and bought his meals with the "tips" which he received from his customers, which amounted to something over $15 each week.

It was stipulated, among other things, that during plaintiff's employment at the baths he delivered to defendant two checks given by the Athletic Club to plaintiff as Christmas presents, which amounted to approximately $200. It was also stipulated that the average earnings, exclusive of tips, of the men employed by the defendant on a 50 per cent. basis during the period of plaintiff's employment was about $90 a month. There was introduced by the plaintiff the testimony of several employees of the establishment to the effect that the plaintiff did as much work as the other employees of the baths; that he was skillful and successful with his work and worked long hours; that many of the customers called for him personally. It also appears in the record that while the defendant was in Washington for a period of about eight or nine months plaintiff managed his business for him. Under these facts the court found that the reasonable value of plaintiff's services during the period from January 1, 1915, to July 17, 1918, was $3,870. Obviously this computation was made in accordance with the stipulation regarding the average earnings of other employees at the establishment.

The court also found that there was due the plaintiff $520, the amount of the salary checks and Christmas checks belonging to plaintiff which he had turned over to the defendant. The court then deducted the sum of $1,142 as money paid on account, which included all sums spent by defendant for the plaintiff of which there is any evidence at all, including traveling expenses from Asia Minor to Los Angeles, spending money advanced to him, room rent paid, etc., leaving a balance of $3,248, for which judgment was given.

[3] Apart from the contention regarding the domestic status of the parties, appellant objects to the method of proof of the amount found due to the plaintiff. He contends that, as plaintiff testified to an express contract to pay him 50 per cent. of his earnings, it is incumbent upon the plaintiff to prove definitely the amount of the checks signed by him representing his work, and that the reasonable value of his services cannot be based upon the agreed average earning capacity of the other employees of the establishment doing similar work. If there was any error made by the court in basing the estimate of reasonable value upon the agreed average earnings of other employees, it was one favorable to the appellant under the facts in evidence here, because, if this basis were not adopted, then the record upon this subject contains only the testimony of the witnesses who testified that the reasonable value of plaintiff's services was from $110 to $125 a month.

[4, 5] There remains then only the question whether, under the proof, which appellant contends shows an express contract, recovery can be had for the reasonable value of the services, which is the theory of the complaint. Conceding that the proof showed that the inception of the business relations of the parties was in an express contract, this would not defeat a recovery by the plaintiff upon a quantum meruit basis. It is the privilege of an infant to repudiate an express contract for his services and recover for the same upon quantum meruit. See note to Tennessee Mfg. Co. v. James, 15 L. R. A. 211. The filing of the action for a recovery upon quantum meruit would be a sufficient notice to the defendant of a disaffirmance of the contract under the holding in the case of Spencer v. Collins, 156 Cal. 298, 303, 304, 104 Pac. 320, 20 Ann. Cas. 49, where the Supreme Court refers to the fact that it has been held that a deed of a minor may be disaffirmed by his subsequent conveyance to a third person.

We find no errors in the record which are prejudicial to the appellant.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

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50 Cal. App. 70

PEOPLE v. WARNER. (Cr. 533.)

(District Court of Appeal, Third District, California. Nov. 19, 1920.)

Criminal law ⚷1178—Failure to argue may be deemed admission that no cause exists for reversal.

Where accused has not argued the case on appeal, either orally or by brief, such failure may be deemed an admission that no cause exists for a reversal.

Appeal from Superior Court, Stanislaus County; L. M. Fulkerth, Judge.

Archie Warner was convicted of assault, and appeals. Affirmed.

Wm. N. Graybiel, of Turlock, and L. J. Maddux, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was charged with the crime of assault with a deadly weapon. He was convicted of assault and sen-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tenced to pay a fine of $125. The appeal is from the judgment. The evidence has not been brought up, and only the judgment roll is available to ascertain whether any error was committed. The record has been examined, and, outside of a clerical mistake in the information, nothing of an irregular nature has been discovered. Said mistake consists of the omission of the defendant's name in one portion of said information, but it is manifest that no prejudice resulted therefrom. Indeed, appellant has not argued the case in this court either orally or by brief, and this failure may be deemed an admission that no cause exists for a reversal.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

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50 Cal. App. 26

RYAN et al. v. BUSICK, Judge, et al. (Civ. 2203.)

(District Court of Appeal, Third District, California. Nov. 15, 1920.)

Injunction 🔑223(1)—Violation of temporary restraining order after determination of suit held not contempt.

Even if a temporary restraining order in mandamus proceedings against a judge remained in force for 30 days after the entry of the judgment denying the prayer of the petition, the judge and other officers of the court are not in contempt for violating the restraining order within that time, where they acted after full consideration of the question and with a bona fide intent to carry on the mandate of the court.

Mandamus proceedings by Ella Ryan and another against Hon. C. O. Busick, Judge, and others. On application by petitioners for an order declaring respondents in contempt of court for failure to observe terms of restraining order. Order to show cause vacated, and proceeding dismissed.

Meredith, Landis & Chester and White, Miller, Needham & Harber, all of Sacramento, for petitioners.

Hugh B. Bradford, Dist. Atty., and J. R. Hughes, Asst. Dist. Atty., both of Sacramento, for respondents.

PREWETT, Presiding Justice pro tem. This is a proceeding auxiliary to a matter pending in this court wherein the above-named petitioners prayed for a writ of mandate against the superior court and Hon. C. O. Busick, judge thereof, which prayer was denied on August 25th last. In that proceeding a restraining order pendente lite was issued. A few days after the entry of judgment denying the prayer of the petition the respondents proceeded to enforce the decree in the original action, the subject-matter of the application for the writ and restraining order.

Petitioners filed in this court their affidavit on proceedings to bring respondents into contempt for failure to observe the terms of the restraining order. An order to show cause was issued on August 30th last, and the matter has remained on the calendar since that date awaiting the filing of briefs by the respective parties. The matter ripened for decision only on November 10th.

The petitioners contend that, as the judgment of a District Court of Appeal does not become final until the lapse of the constitutional period of 30 days after rendition, the temporary restraining order which accompanied the alternative writ of mandate in this case continued in force for a like period. At the hearing on this contempt proceeding it was freely conceded by counsel for the petitioners that the respondents intended no contempt. In truth, it is wholly obvious that they were merely acting as officers of the law in the discharge of what they conceived to be their duty. It was shown that they examined into the matter with great care before proceeding. It clearly appears that, if any contempt was committed, it was purely technical. Even conceding that there existed a technical contempt, we conceive that the ends of justice and the dignity of the court would be conserved by discharging the order. However, we have examined the entire record with care, and we are persuaded that respondents are not in contempt.

The order to show cause is vacated, and the proceeding dismissed.

We concur: BURNETT, J.; HART, J.

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50 Cal. App. 94

BRAGA v. PONTE. (Civ. 3557.)

(District Court of Appeal, First District, Division 1, California. Nov. 22, 1920.)

1. Malicious prosecution 🔑64(2) — Evidence held not to show full disclosure to prosecuting attorney.

In an action for malicious prosecution, evidence *held* not to show that defendant, who understood and spoke English imperfectly, had made a full disclosure of all the facts to his counsel and to the prosecuting attorney, on whose advice he instituted the prosecution.

2. Trial 🔑260(6)—Requested instruction as to disclosure to prosecuting attorney held covered.

In an action for malicious prosecution, where defendant relied on advice by the prosecuting attorney, the refusal of defendant's requested instruction that if he communicated to the district attorney all the material facts and acted upon the advice of the district attorney, malice was rebutted, and the jury should find for defendant, was not erroneously refused, where the court's instructions gave defendant the full benefit to which he was entitled from the fact that he consulted his own attorney and the district attorney.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action for malicious prosecution by James Braga against Joe Ponte. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. F. Lopez and Frank Kauke, both of Fresno, for appellant.

J. O. Traber, of Fresno, for respondent.

RICHARDS, J. This action was commenced by the plaintiff to recover damages for malicious prosecution. The facts of the case were, briefly, these: The plaintiff, in February, 1918, sold to one Joe T. Silva certain personal property, consisting of cows, horses, harness, a derrick, some milk cans, and 15 tons of hay, executing to the latter a bill of sale of said property, and delivering the same to him, and taking back a mortgage upon such of said personal property as was mortgageable to secure the payment of the purchase price thereof, which was to be made at the rate of $50 monthly on the 15th day of March, 1918, and continuing with interest until the whole amount was paid. Silva took the property in question, with some further personal property of his own, to the premises of the defendant herein, leaving the same in the latter's custody. A few months went by, when Silva, finding himself unable to keep up his payments, practically gave up his contract and went away to parts unknown. Before going he told the defendant to tell the plaintiff to come and get his property, and this information the defendant conveyed to the plaintiff, who acted upon it and went over to the premises of the defendant to get said personal property. When he arrived there the defendant was not at home, but came before plaintiff went away. In taking said property it appears that the plaintiff also took away certain small articles, such as a carpenter's level, a hammer and staples, a washtub and kettles, a set of harness and a hay derrick, which had not been included in his contract. The defendant, after making some effort to have these articles returned to him, went to see an attorney named Lopez, who, after hearing his story, advised that the matter be placed before the district attorney, whereupon the defendant and his attorney went to the office of the district attorney, and there saw one of the deputies, to whom he made some statement as to the facts of the case, and upon said statement was advised that he should swear to a complaint, charging the plaintiff with the commission of grand larceny. He thereupon made such complaint, charging the plaintiff with having stolen the aforementioned articles, which were not covered by his contract with Silva, and which were alleged in said complaint to be of the value of $60. The plaintiff was arrested, but upon his preliminary examination before the magistrate was discharged. He thereupon commenced this action against the defendant for malicious prosecution.

The main defense pleaded and attempted to be proven on the part of the defendant was that in causing the arrest of the plaintiff upon said charge he had acted without malice and upon the advice, not only of his personal attorney, Mr. Lopez, but also upon the advice of the deputy district attorney, after he had made to the latter a full and fair statement of the facts of the case, and upon such statement had been advised to make and prosecute said charge. Upon the trial of the cause the plaintiff relied, not only upon the facts as narrated by him concerning the taking of the property in question from the premises of the defendant, but also upon the fact that he had been discharged by the committing magistrate. The defendant in his own behalf offered evidence tending to show that prior to making the arrest he had consulted his own attorney, and had stated to him all the facts of the case, and had also and upon his advice consulted the deputy district attorney of the county, and had made to him a full and fair statement of the facts of the case. Upon the submission of the cause the trial court gave certain instructions to the jury relative to the plaintiff's proofs and the defendant's aforesaid defenses. The jury retired, and presently returned a verdict in the plaintiff's favor for the sum of $750 damages, for which judgment was presently entered, and it is from such judgment that the defendant prosecutes this appeal.

[1] The appellant makes two main contentions upon this appeal. The first of these is that the uncontradicted evidence in the case shows that before making the complaint charging the plaintiff with grand larceny the defendant in this case fully and fairly stated all of the facts of the case to his own attorney and also to the district attorney, and upon such statement was advised to make said complaint. As to this contention we are satisfied that the evidence was sufficiently in conflict with reference to the defendant's statement of the facts of the case to his counsel and to the deputy district attorney to justify the jury in finding that the statement which the defendant made to his attorney and to the district attorney prior to the filing of said complaint was not such a fair and full statement of all of the facts of the case as would suffice to relieve defendant from liability in the event of a dismissal of said charge. The evidence in the case shows that the defendant both spoke and understood the English language indifferently, and that in making whatever statement he did

make to his attorney and to the deputy district attorney he failed—possibly for this reason—to make that full disclosure of the facts of the case which he should have done, and, it may be, would have done had he understood and spoken the English language better. Further than this, it appears that upon his statement of the case to his personal attorney he was not advised by him to make a criminal complaint against the plaintiff herein, but was advised to see the district attorney. Furthermore, it appears that Mr. Lopez did not appear as a witness in the case to testify that the defendant's statement to him was such a full and fair disclosure of all of the facts of the case as would have relieved the defendant of liability. The testimony given by the deputy district attorney, when tested by the plaintiff's cross-examination, brought forth a number of details affecting the merits of the case which were not conveyed to that official at the time his advice was sought. Evidently the jury did not believe that the defendant had made such a full and fair disclosure of the facts attending the taking of the property in question from the defendant's premises as would suffice to protect him against an action for malicious prosecution. The finding of the jury in that regard will not, therefore, be disturbed upon appeal.

[2] The defendant's next contention is that the trial court was in error in refusing to give the following specific instruction requested by him:

> "I instruct you that if the defendant before he commenced criminal prosecution against the plaintiff communicated to the district attorney all the material facts affecting the question of the guilt of the plaintiff about to be accused which were known to him, or of which he had notice, and he then acted upon the advice of the district attorney, the presumption of malice is rebutted and this action against him for malicious prosecution has failed, and you should find for the defendant."

We are of the opinion that the defendant was not injured by the failure of the trial court to give the specific instruction which he requested, for the reason that the instructions which the court did in fact give sufficiently and correctly stated the law upon the subject, and in doing so gave to the defendant the full benefit of any advantage or protection, to which he would otherwise be entitled, growing out of the fact that he consulted both a deputy district attorney and his own private counsel prior to making said criminal charge against the plaintiff. Under the instructions which the court gave, had the jury determined that the defendant had made a full and fair disclosure of the facts of the case either to his own counsel or to the deputy district attorney, their verdict would have been in his favor, and he cannot therefore be said to have been injured by the refusal of the court to give the instruction in the more limited form requested by him. As to the other strictures which the appellant makes upon the court's instructions, we do not find them of sufficient merit to require particular comment. The instructions of the court upon the whole informed the jury quite fully and very fairly as to the law relating to actions for malicious prosecution.

Finding no error in the record before us the judgment is affirmed.

We concur: KERRIGAN, J.; WOOD, Presiding Justice pro tem.

50 Cal. App. 1

STROMBERG v. TANFORAN et al.

(Civ. 3603.)

(District Court of Appeal, First District, Division 1. California. Nov. 13, 1920. Hearing Denied by Supreme Court, Jan. 10, 1921.)

1. Judgment ⚷590(5)—Conclusive as to entire cause, notwithstanding erroneous requirement of election.

An action to set aside a deed for fraud and duress is a single cause of action, though the fraud and duress were alleged in separate counts, and a judgment for defendant, after the trial court erroneously required plaintiff to elect to proceed on the first count alone, was conclusive against a second action to set aside the deed for duress, where it had been affirmed on the ground that the error in requiring the election was harmless, because the plaintiff had introduced her entire evidence and failed to establish duress.

2. Cancellation of instruments ⚷37(7)—Complaint held to show that duress did not cause execution of deed.

A complaint charging defendant with threats and duress against plaintiff to procure a deed, but alleging that plaintiff resisted the duress and did not execute the deed until induced by misrepresentations after the duress had ceased, shows that plaintiff cannot set aside the deed for duress.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by Stella Stromberg against Frank C. Tanforan and others to set aside a deed. Judgment for defendants, and plaintiff appeals. Affirmed.

W. W. Sanderson, of San Francisco, for appellant.

Joseph K. Hawkins, of San Rafeal, and Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action brought by plaintiff to set aside a deed.

To the plaintiff's complaint, alleging several grounds, to be hereafter referred to, as the basis of her cause of action, the defendants filed an answer containing specific denials thereof and pleas of the statute of limitations as a bar to said action. They also alleged, by way of affirmative defense, a state of facts in support of their plea of res adjudicata. The history of the litigation between the parties as thus shown by their pleadings may be summarized as follows:

Prior to the month of February, 1909, the plaintiff, whose name was then Stella Tanforan, and the defendant, Frank Tanforan, were husband and wife. Domestic troubles had arisen between them, which led to an agreement of separation and to the execution of a deed from the wife to her husband, both of which instruments were executed on the 18th day of February, 1909. The deed covered certain undivided interests in three parcels of property in Marin county, which constituted the separate estate of the wife, and were subject to a life tenancy of her mother, who was then living, and who died in the year 1913. Subsequently, and in the year 1910, Stella Tanforan commenced an action against her former husband, Frank Tanforan, to set aside said deed upon several grounds. In the first count of her amended complaint in said action she alleged that said deed was procured by said defendant through direct fraud in the making of certain misrepresentations of fact, in reliance upon which she had executed said deed. In the second count of her said amended complaint she charged said defendant with having procured said deed through actual duress consisting of menace and threats. The defendant in that action appeared and denied the averments of both counts of said complaint, and the cause came on for trial. At the commencement of such trial the court, upon the suggestion of the defendant, declared that the plaintiff's two counts were inconsistent, and that the plaintiff would ultimately be required to elect upon which one of said counts she would stand before the defendant would be required to put in his case. The court, however, stated that he would not compel such election until the plaintiff had introduced all her testimony. When the plaintiff had done this and had rested her case, the defendant moved that the plaintiff be required to elect upon which of the counts she would stand, and plaintiff thereupon elected to stand upon the first count in her said amended complaint. At the close of the trial the court made its findings in favor of the defendant, and entered its judgment accordingly, awarding the plaintiff no relief. Thereupon the plaintiff appealed to the Supreme Court, and urged upon said appeal that the trial court was in error in requiring her to make an election. The cause on appeal was heard and decided by the Supreme Court in Tanforan v. Tanforan, 173 Cal. 270, 159 Pac. 709. In passing upon the point urged by said plaintiff upon said appeal the Supreme Court decided that, while the trial court was in error in requiring the plaintiff to make an election between the two counts in her complaint, it was an error without injury to said plaintiff for the reason that the ruling of the trial court to that effect was made after all of the plaintiff's testimony in support of her whole case had been received, and when the record showed that no evidence whatever had been introduced by her in support of the averments of the second count in her said complaint charging the defendant therein with duress. The judgment was accordingly affirmed; and after said judgment had become final by such affirmance the plaintiff commenced the present action.

In her amended complaint in this action the plaintiff again seeks to set aside said deed, and in so doing undertakes to set forth in a single count substantially the same matters as those embraced in the two counts of her amended complaint in the former action. It is to this complaint that the defendants interposed the plea of res adjudicata, setting forth the rendition and finality of the former judgment. The trial court sustained said plea, and again rendered judgment in the defendant's favor, and from such judgment so rendered upon said ground this appeal has been taken.

[1] The main contention which the appellant urges upon this appeal is that the former judgment cannot be availed of by the defendants in bar of the present action, for the reason that in part at least the present action is founded upon the restatement of the facts set forth in the second count of her former action, and that since the trial court in such action had compelled her to make an election between the two counts in her amended complaint in said action, and to thus abandon the second count in said complaint, the judgment rendered in said action cannot be made the basis of a plea in bar of this action in so far as the same is based upon the defendant's alleged duress. This contention on the part of the appellant is founded upon the conception that, since her amended complaint in said former action contained two counts, it therefore contained two separate causes of action, one of which she was compelled to abandon in that action, and is therefore entitled to reassert in this one.

We are of the opinion that this is a mistaken conception on the appellant's part; that she had originally but one cause of action against the defendant, Frank Tanforan, namely, a cause of action to cancel and set aside her said deed to him upon whatever grounds she might assert as the reasons for its invalidity. She chose in her amended complaint in said former action to embody these grounds in two separate counts, but she did not thereby create two separate causes of action; and while the trial court in said cause was in error, as the Supreme Court in Tanforan v. Tanforan, supra, has stated, in requiring the said plaintiff to elect upon which count she would stand, it was an error which was harmless, for the reason that it was not committed until after the plaintiff had had her full opportunity to present all of the evidence she possessed in support of both counts of her complaint; and since she presented none in support of her second count in her said complaint the ruling of the trial court in that regard amounted to nothing more than its finding that there was no evidence before it to sustain the averments of said second count. It is true that the Supreme Court in its decision of said cause upon appeal made use of some loose language to the effect that the election which the trial court required amounted in effect to a nonsuit as to that count; and the plaintiff's insistence in the present action is largely based upon that statement. The record in the former case shows that the plaintiff therein not only failed to produce any evidence in support of the averments which were embraced in the second count of her complaint therein, but that she also failed to produce sufficient evidence to support the averments of the first count in said complaint; and she thus upon the trial of said action, with the full opportunity so to do, failed to support her cause of action, which was, as we have seen, an action to set aside said deed upon the grounds of fraud, misrepresentation and duress. Having thus had her full opportunity to present her single cause of action upon the merits thereof, and having failed so to do, and having suffered a judgment to be taken against her sustaining said deed against her assault upon these grounds, she cannot again be heard to assert either or any of said grounds in a new action against said defendant brought to set aside said conveyance.

It is not necessary to cite authorities upon the general subject of the applicability of the doctrine of res adjudicata to cases of this character; nor is it necessary to comment in detail upon the cases which have been referred to by the appellant as upholding her claim further than to say that in each of the cases relied upon by her two distinct and separate causes of action were embraced in the earlier suit, but one of which was decided upon its merits. In such cases, of course, there is no basis for the plea; but such cases are not analogous to the case at bar, in which, as we have seen, the plaintiff had originally but one cause of action, upon which the judgment of the trial court against her would operate as a bar to a further prosecution of that cause of action.

[2] It may be stated, however, that we are of the opinion that the judgment in the instant case should be affirmed upon another ground, which is that the amended complaint in this section, while setting forth a cause of action to set aside said deed upon the ground of fraud, wholly fails to state a cause of action to set aside said deed sounding in duress, since said amended complaint expressly alleges that while the defendant Tanforan did exercise toward her certain acts of menace and duress, she steadfastly refused to execute said deed while under the influence of such menace and duress, and that such deed when finally executed by her was so executed after the cessation of such menace and duress, and that the same was executed by her by reason of and under the influence alone of a mistake of fact arising out of the defendant's misrepresentations to her. This being the state of the plaintiff's own pleading, we are constrained to hold that her present action amounts to nothing more than a restatement of her former cause of action in so far as the same sounded in the defendant's alleged fraud and misrepresentation, and as to these grounds the judgment of the trial court in the former action is conclusive.

This determination of the main point urged by the appellant upon this appeal against her contention renders unnecessary a consideration of the question as to whether this action was not also barred by the statute of limitations.

Judgment affirmed.

We concur: KERRIGAN, J.; WOOD, Justice pro tem.

49 Cal. App. 789

DIERKS v. NEWSOM et al. (Civ. 3095.)

(District Court of Appeal, First District, Division 1, California. Nov. 12, 1920. Rehearing Denied Dec. 10, 1920. Hearing Denied by Supreme Court Jan. 10, 1921.)

1. Master and servant 🔑330(1)—Automobile operator presumed to be owner's agent.

In an action for injuries occasioned by an automobile negligently operated, the plaintiff makes out a prima facie case by showing that the automobile belonged to the defendant; and, to successfully rebut the presumption of agency of the negligent operator, evidence must be introduced which carries conviction to the mind of the court.

2. Evidence 🔑588—Court may reject uncontradicted unimpeached positive testimony.

The court may reject positive testimony, although it is not contradicted or impeached by any direct testimony, since its inherent probability may be such as to deny it all claims to belief, and a witness' manner of testifying may give rise to doubts as to his sincerity, or create the impression that the facts testified to by him are colored or not correctly stated.

3. Master and servant ⚷332(1)—Agency of automobile operator held question for jury.

In an action for injuries in a collision between defendant's automobile and plaintiff's motorcycle, whether the operator of the automobile was an agent for defendant at the time of the accident *held* for the jury, although defendant testified that the operator was not his agent.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by William Dierks, a minor, by his guardian ad litem, Henry Dierks, against William A. Newsom and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Hearing Denied by Supreme Court; WILBUR, J., dissenting.

Cooley & Lachmund, of San Francisco, for appellant.

Geo. K. Ford, A. S. Humphreys, and Elliott Johnson, all of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendant William A. Newsom from a judgment in favor of the plaintiff for damages resulting from a collision between said defendant's automobile and a motorcycle operated by the plaintiff.

For the purposes of the appeal the parties have stipulated that the evidence introduced at the trial of the case shows that the plaintiff was injured, and damaged to the full amount of the judgment by reason of the negligent operation of the appellant's automobile by his codefendant, Charles Gregory, who while driving the car, ran into plaintiff, who was riding upon a motorcycle, exercising proper care in its operation and guilty of no contributory negligence. The sole question presented for determination is whether or not the appellant, as the owner of the automobile. is responsible for the negligence of said Gregory.

The latter, as a witness upon the trial, testified:

"I am one of the defendants and am 20 years old. I was a student at the Vocational High School in Oakland, and on September 4, 1917, I was driving the defendant Newsom's automobile when I ran into and injured the plaintiff. I was going to Mr. Newsom's home to leave the machine there. I had taken the machine from Mr. Newsom's garage that morning. * * * I took it down to the Vocational High School for the purpose of repairing the starter. * * * It was a frequent occurrence for me to drive Mr. Newsom's machine. On one occasion I believe I drove Mr. Newsom down to Twenty-Third Avenue Station. I think that is the only occasion I ever drove him in the machine, but I had driven it on a number of occasions. The first occasion of my driving that machine was on the invitation of Mr. Newsom's son, Jack Newsom. That was about May, 1917. I had taken the Newsom car down to the school for repairs on two or three occasions prior to September 4, 1917. My memory is not clear as to the number of occasions upon which I took the car down.

"Q. Well, had anybody asked you to take the machine down to the school to be repaired on the occasion other and prior to the one of September 4th? A. Yes, sir.

"Q. Who had done that? A. I think on one occasion it was Mr. Newsom.

"Q. And those are the only two occasions prior to this that you had taken the car down? A. So far as I can remember. Jack Newsom asked me to take the car to the school on September 4, 1917. * * * I do not remember Mr. Newsom ever saying anything to me about going to the garage and taking out the machine to have it repaired. He would say, 'Well, Charley, can't you take the machine down to the school to-day and have it greased up?' something of that sort; I don't know his exact words. I took the machine to the school for other purposes than greasing it on occasions previous to September 4th. I might repair a crank case. I did not take the machine out for other purposes than greasing and repairing it, at the request of Mr. Newsom. On the day of the accident, September, 4, 1917, Jack Newsom requested me to take the machine down to be repaired. He did so about 7:30 that morning in Mr. Newsom's yard. I do not know who first told me on this occasion that the machine needed repairing. I do not remember that Mrs. Newsom told me—I have no recollection of that. I was at the Newsom home September 3, but did not talk with anybody in particular, except Mr. Newsom's daughter. Half of the family was out on the porch, and I think I got the idea from their talking between themselves that the car was not running good. Mrs. Newsom and her two daughters were there, but Mr. Newsom and Jack Newsom were not there. * * * My best recollection is that on the morning of the accident, while I was in the car, I saw Mr. Newsom going to the street car, and said 'Good morning' to him."

Appellant William A. Newsom testified as follows:

"Q. Had you authorized or told your son Jack Newsom to have your machine repaired or turned over to Gregory on this occasion? A. No, sir.

"Q. Have you ever at any time given your son authority to have your machine repaired? A. No, sir.

"Q. Mr. Gregory had taken your machine on previous occasions, had he not, to the school to be repaired? A. Yes, sir.

"Q. On those occasions you gave him permission to take it, or gave instructions with regard to repairing it? A. I did. * * * On the day of the accident I was in Fresno, and did not know that any work at all was being done on my car."

On cross-examination he said:

"Mr. Gregory has spoken of repairs on my different machines over a period of three or four years, and it may have been that particular machine might have been fixed by him, but I have no recollection of it. He had always taken my other two cars down to the school to be repaired, with my permission and consent. * * * Gregory had been doing repair work on my machine over a period of two or three years. I had had two other cars besides this one, and he had worked on them. He had taken them to the school—always with my permission and consent. I am not sure about the time this particular machine was taken to the school before—it may have gone once; I could not answer that question to be sure. * * * I remember some 4 or 5 months previous I sent the car down by Gregory. I had had this car about 16 or 18 months. I did not have more than one car at a time. All my cars had been for the general use of the family. I did not drive the car myself. Our boy, Jack, drove the car, with my permission. I did not know anything about the mechanism of automobiles myself, but I took an interest in its mechanical condition, and I certainly knew about it when it was to be repaired. I would find out that the car needed repairs by some one informing me of the fact. The car never went out without my being one of the passengers, hardly. About the only time that the car went out was on Sunday, when I would always be with the family.

"Q. Your boy Jack had permission to take it out? A. Well, if he did—he took it without me.

"Q. If your son Jack had your permission to take that car out, would you go with him, or his mother? A. Well, he would have to get permission at the time, on the occasion he went out.

"Q. He had no carte blanche to take it, and by that, if he had made the request, you would have granted the request? A. When he asked me sometimes I let him take it out.

"Q. What was the arrangement about your wife having the use of this car, the machine? A. Most times, when my wife went out, she would tell me before she went out she was going to take a ride, and Jack was going to take her out.

"Q. She would tell you? A. She would ask me about it; yes. She sometimes went out without my being present. She would ask me if she could have Jack drive her out.

"Q. Did your daughters or your son, with your permission or your consent, take that car out there very much without consulting yourself and your wife? A. No.

"Q. They did not? A. No; they did not.

"Q. Was there any permission granted to Gregory on the day he took this automobile involved in the accident, down to the school? A. No.

"Q. Had there in fact been a permission? A. No—by me, you mean?

"Q. Yes. Well, I might go back on these previous occasions when he had taken it down; did you object to his having taken it? A. No; because I always told him to take it on all previous occasions; I had told him to take it. On the previous occasions when the car had been taken by Gregory to the school to be repaired, I had learned it needed repairs by driving out in the car with my boy Jack, and I would notice something was wrong with the car. I would not know what particularly went wrong with it. I would simply know that the car was not working right. Up to the time of the accident, September 4, 1917, Jack was the only one in the family that knew how to drive the car."

[1, 2] The plaintiff made out a prima facie case against the appellant when he showed that the auto causing the injury by the negligent manner of its operation belonged to the appellant. It has been held in California and other jurisdictions that evidence of the ownership of a vehicle raises a prima facie presumption, amounting to evidence of the fact, that the person operating it is doing so as the agent of the owner. McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417. To successfully rebut this presumption evidence must be introduced which carries conviction to the mind of the court. Here it may be said that the evidence introduced by the appellant made out a complete defense if full credence was given to it by the trial court; but the court was not bound thus to unreservedly accept it, even if uncontradicted. The court saw and heard the witnesses testify, and with this advantage, not enjoyed by us, it was for it to determine the degree of credence to be accorded to this testimony. It is not essential that the credulity of the court should correspond with the positiveness with which a witness testifies. A court may reject positive testimony, although it be not contradicted or impeached by any direct testimony. Its inherent improbability may be such as to deny it all claims to belief. A witness' manner of testifying may give rise to doubts as to his sincerity, or create the impression that the facts testified to by him are colored or not correctly stated. Co. of Sonoma v. Stofen, 125 Cal. 32, 35, 57 Pac. 681; Bellus v. Peters, 165 Cal. 112, 117, 130 Pac. 1186; P. C. F. Co. v. Sheriffs, 31 Cal. App. 137, 159 Pac. 986; Denison v. McNorton, 228 Fed. 401, 406, 142 C. C. A. 631.

[3] But we are also satisfied that there was a conflict in the testimony in an important respect, for Charles Gregory testified that when he took charge of the car in the morning of the accident he saw and spoke to the appellant. If the court believed this testimony it follows that it rejected that of the appellant to the effect that he was in Fresno on the day of the accident; and he may have viewed with distrust other material statements made by him. and have concluded that the appellant, having seen Gregory driving the car on that morning, and, not objecting thereto, ratified his action in taking the car for the purpose of having it repaired. In support of the judgment we are bound to assume that the court took this view of the record.

The trial court having thus concluded upon sufficient evidence that Gregory was authorized by the appellant to take the car for the purpose of having it repaired, its judgment holding the appellant responsible for Gregory's negligence in performing his mission must be affirmed, and it is so ordered.

We concur: RICHARDS, J.; WOOD, Justice pro tem.

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50 Cal. App. 98

SOURBIS v. RHODES et al. (Civ. 2207.)

(District Court of Appeal, Third District, California. Nov. 22, 1920. Hearing Denied by Supreme Court Jan. 20, 1921.)

1. Appeal and error 🔑1024(3)—Conflict in affidavits must be resolved in favor of the prevailing party.

Upon an appeal from an order granting a change of venue made under Code Civ. Proc. § 395, requiring cases to be tried in the county in which defendants, or some of them, reside, any conflict in the affidavits must be resolved in favor of the prevailing defendants, for the rule as to presentation of oral testimony for review controls.

2. Venue 🔑62—Unnecessary that all defendants join in motion for change.

Code Civ. Proc. § 395, requires the action to be tried in the county in which at least some of the defendants reside, and the consent of a defendant not residing in the county where the action is brought could not take away from the others not residing there the right to have the cause transferred to their county of residence, so it was unnecessary that all defendants join in the motion for change.

3. Venue 🔑45—A party moving for change may show by affidavits or otherwise that other defendant was fraudulently joined.

Notwithstanding a complaint is sufficient as to all defendants, a defendant moving for change of venue may make sufficient showing, by affidavits or otherwise, that plaintiff has no cause of action against a defendant consenting to the venue, and that he and plaintiff are the only real parties to the controversy, but the court should exercise a wise discretion in deciding whether plaintiff has acted fraudulently in joining the consenting defendant.

4. Venue 🔑66—Affidavit of merits on motion for change held sufficient.

An affidavit of meritorious defense upon motion for change of venue, showing that defendant had presented his case fully and fairly to one of his counsel, who is a licensed attorney in good standing, and who advised he had a good and substantial defense on the merits, *held* a sufficient compliance with the statute.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by John Sourbis against F. F. Rhodes and others. From an order granting a motion for change of venue, plaintiff appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Griffin, Boone & Boone, of Modesto, for respondents.

BURNETT, J. This is an appeal from an order granting the motion for change of the place of trial. The action was brought in San Joaquin county, and there were three defendants. Two of these, F. F. Rhodes and Robert L. Dallas, appeared in the action and filed a demurrer, and demanded that the action be transferred to Stanislaus county for trial. In support of their demand they filed an affidavit of merits, containing an allegation that each was a resident of said county of Stanislaus, and that the other defendant S. Leon was not at the time of the commencement of the action or at any time since a resident of said county of San Joaquin. They also based the motion for the change of venue, as provided in section 395 of the Code of Civil Procedure, upon the ground:

> "That the said S. Leon was impliedly joined as a defendant in said action, and was made a defendant solely for the purpose of having the action tried where he resides, and that the place of residence of said S. Leon must not and should not be considered in determining the proper county for the trial of the action."

[1] In considering the affidavits used upon the said motion this court is bound by the same rule that controls where oral testimony is presented for review. "If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established." McKenzie v. Barling, 101 Cal. 462, 36 Pac. 8; Doak v. Bruson, 152 Cal. 18, 91 Pac. 1001; Henderson v. Cohen, 10 Cal. App. 585, 102 Pac. 826. So considering the affidavits, we must hold that the moving defendants were residents of the county of Stanislaus, and that said Leon resided in another county than the one where the action was brought. It was proper, therefore, for the court to grant the motion as contemplated by said section 395, which provides that the action "must be tried in the county in which defendants or some of them reside."

[2] Nor was it necessary for all of the defendants to join in said motion. It is unimportant that defendant Leon may have been willing to have the action tried in said county of San Joaquin. The language of said section requires the action to be tried in the county in which at least some of the defendants reside. The consent of a defendant not residing in the county where the action is brought could not take away from the other defendants who did not reside there the right to have the cause transferred to the county of their residence. To hold otherwise would be a violation of the provisions of section 395. Wood Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 73 Pac. 588. See, also, Ludington Exploration Co. v. La Fortuna Min. Co., 4 Cal. App. 369, 88 Pac. 290.

[3] From the allegations of the affidavits

the court was also legally justified in concluding that plaintiff had no cause of action against said Leon, but that the latter was joined as a defendant solely for the purpose of defeating the right of the other defendants to have the action transferred to the place of their residence. Said section of the Code contemplates a case of that kind, and respondents seem to have brought themselves within the spirit and letter of the rule. Of course, upon a hearing of this character it is not proper to have a trial of the cause upon its merits. This has been clearly decided, and must be deemed settled beyond controversy. The rule, however, does not extend to the point of precluding the real defendants from showing, by affidavits or otherwise, that the plaintiff has actually no cause of action against one of the parties, who was made nominally a defendant but was joined simply for the fraudulent purpose of depriving the real defendants of their right to have the action tried in the place of their residence. If the complaint did not state a cause of action against a defendant who was a resident of the county where the action was brought, it is not disputed that the other defendants could have the action removed for trial to the place of their residence. McDonald v. California Timber Co., 151 Cal. 159, 90 Pac. 548. The same result should follow, if, notwithstanding the sufficiency of the complaint, it can be shown that the claim against the resident defendant is a mere pretense and made only for the purpose of having the action tried in the county where the complaint is filed. If the contention of appellant should prevail, it would enable a plaintiff by fictitiously joining a resident of the county as a defendant with the residents of another county, who are the real defendants in interest, to prevent the latter from having the action tried in the county of their residence. We think it is proper in such proceeding for the court to permit a defendant who is moving for a change of venue to make sufficient showing to convince the court that he, in connection with the plaintiff, is the only real party in interest in the controversy. Of course, the court should exercise a wise discretion in passing upon the question whether the plaintiff has acted fraudulently in joining another party defendant.

[4] We are satisfied that appellant's claim, that the affidavit of merits is insufficient, cannot be upheld. The allegation in that respect is:

> "That I have fully and fairly stated the case in this cause, and all the facts of the case in this cause and in the above-entitled action to Frank G. Boone, of Modesto, California, one of my attorneys and counsel, and who is an attorney at law in good standing and licensed to practice in all of the courts of the state of California, and who resides as aforesaid in the city of Modesto, county of Stanislaus, state of California, and that after such statement to my said attorney as aforesaid, I am and was advised by my said attorney and verily believe that I have good and substantial defense on the merits to the said action."

That the above is a sufficient compliance with the requirement of the statute clearly appears from Watt v. Bradley, 95 Cal. 415, 30 Pac. 557, and Nolan v. McDuffie, 125 Cal. 334, 58 Pac. 4.

We think no sound reason has been advanced for a reversal and the order is therefore affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

50 Cal. App. 71

PEOPLE v. MARTIN. (Cr. 531.)

(District Court of Appeal, Third District, California. Nov. 19, 1920.)

1. Embracery 🔑4—Indictment for attempting to influence juror held sufficiently specific.

An indictment charging that defendant corruptly and feloniously requested a juror to hang the jury was sufficient, under Pen. Code, § 95, without stating the words used by accused to the juror.

2. Embracery 🔑5—Conviction of attempting to influence juror sustained by evidence.

A conviction of corruptly attempting to influence a juror, under Pen. Code, § 95, was sustained by evidence of the juror in question that accused requested him to hang the jury.

3. Criminal law 🔑372(1)—Evidence showing general scheme to corrupt verdict admissible.

In a prosecution for corruptly attempting to influence a juror, under Pen. Code, § 95, subd. 1, in that the defendant requested a certain juror to hang the jury, it was proper to admit evidence that the accused approached another juror in the same case and requested him also to hang the jury, on the ground that it showed a general scheme or effort on the part of accused to corrupt the verdict in the case.

4. Criminal law 🔑371(1, 12) — Evidence of other crimes competent to prove intent and motive.

In every criminal trial it is competent for the prosecution to prove both an intent and a motive, and whenever proposed evidence of another crime tends to prove the intent to commit the crime charged, or the motive for its commission, it is admissible, even though it may incidentally show that the person on trial may have committed the other crime.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Embracery ⚷5—No error in admitting evidence of honesty and excluding reputation for truth.

Court did not err in permitting evidence on the part of defendant, accused of attempting to influence a juror, to show his general reputation for honesty and integrity, but excluding evidence as to his reputation for truth; the issue being as to the honesty and integrity of the accused rather than his truthfulness.

6. Criminal law ⚷1170(1) — Exclusion of evidence of reputation for truth held harmless, if error.

If court erred in permitting evidence on the part of accused to show his general reputation for honesty and integrity, but excluded evidence as to his reputation for truth, it was too trivial to warrant a reversal.

7. Criminal law ⚷829(3)—No error in refusing to define word properly defined in another instruction.

In a prosecution for corruptly attempting to influence a juror, the court did not err in refusing to give an instruction, requested by defendant, defining the word "corrupt," where such word was properly defined in an instruction given at the instance of the prosecution.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

John Martin was convicted of corruptly attempting to influence a juror, and from the judgment, and an order denying a new trial, he appeals. Affirmed.

George E. Foote, of Sacramento, and E. R. Vaughan, of Santa Rosa (S. Luke Howe, of Sacramento, of counsel), for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PREWETT, Presiding Justice pro tem. The appellant was indicted by the grand jury of the county of Sacramento, for the crime of "corruptly attempting to influence a juror, a felony." One Fuski was being tried on an indictment, and after a juror, Manuel J. Lamb, was duly impaneled and sworn, it is charged that the appellant corruptly and feloniously attempted to influence the aforesaid juror by then and there requesting him to hang the jury. The appellant, on arraignment, interposed a demurrer to the indictment upon the ground that the act charged is not stated with such degree of certainty as to state a public offense, nor to enable the court to pronounce a judgment upon conviction. The appellant claims that the indictment does not charge what words were used by the appellant to the juror. Subdivision 1 of section 95 of the Penal Code provides that any person who corruptly and feloniously attempts to influence a juror in respect to his verdict by means of any oral communication is guilty, etc.

[1] The indictment, when it charges that the appellant corruptly and feloniously requested the juror to hang the jury, charges, without other or further language, the crime denounced by the statute. The indictment is sufficient.

[2] The appellant interposed his plea of not guilty and after trial before a jury was duly convicted and sentenced. It is insisted that the evidence is insufficient to justify a conviction. But the juror in question testified clearly and distinctly that the appellant requested him to hang the jury. This, beyond question, was clearly sufficient to justify a verdict of guilty. Indeed, it is difficult to understand how this point could be seriously urged.

[3] The chief alleged error, however, relied upon by the appellant, consists in the admission of evidence that the appellant approached another juror in the same case and requested him, also, to hang the jury. This evidence was admitted by the trial court upon the ground that it showed a general scheme or effort on the part of the appellant to corrupt the verdict in the Fuski Case. For this purpose it was highly relevant and pertinent and it was properly admitted. It is true that, in general, a defendant on trial may rest secure in the knowledge that he is called upon to prepare to meet but one charge at a time, and that evidence of other crimes, whether similar or dissimilar, is not admissible. This is a very insistent rule of the law, but it has several well-defined exceptions.

[4] In every criminal trial it is competent for the prosecution to prove both an intent and a motive. Whenever the proposed evidence of another crime tends to prove the intent to commit the crime charged or the motive for its commission, it is admissible, even though it may incidentally show that the person on trial has committed the other crime. In this case, the evidence of an attempt to influence another juror in the same manner and for the same purpose is highly important as showing the guilt of the appellant. It has been held that, in a charge of forgery, evidence of the uttering of other forged notes of the same manufacture and about the same time is admissible (People v. Frank, 28 Cal. 518; People v. Whiteman, 114 Cal. 338, 46 Pac. 99), or to show the motive or intent (People v. Cook, 148 Cal. 334, 83 Pac. 43), and a long array of cases there cited. The rule is so well established that an extended examination of authorities in its support is unnecessary. It only remains to inquire whether or not this evidence tends to show either motive or intent with reference to the crime for which the appellant was on trial. That it tends to show a corrupt intent to bring about an acquittal or a hung jury in the particular case in which the juror was sitting would seem to be too plain for question; and from a like point of view it

tends to show an intent to corrupt the juror Lamb. For the purpose of showing either of these points, the evidence was admissible.

[5, 6] The court permitted evidence on the part of the defendant to show his general reputation for honesty and integrity, but excluded evidence as to his reputation for truth. In view of the close line of cleavage between the characteristics of truth and honesty, the court might well have allowed the offered evidence, though we are not prepared to say that the court erred in excluding it. The issue was as to the honesty and integrity of the appellant, rather than his truthfulness. Moreover, the error in excluding the proffered evidence, if error there was, is too trivial to warrant a reversal. But in People v. Cowgill, 93 Cal. 596, 29 Pac. 228, the court says:

> "Evidence is not admissible to prove that the character of a witness [in that case he was the defendant] for truthfulness is good, unless the opposite party has tried to impeach him by showing that his general reputation is bad."

In the Cowgill Case the defendant sought to show his reputation for truth under his general plea of not guilty.

Error is predicated upon the action of the court in striking out the answer of the witness Payne to the effect that he had never heard the reputation of the appellant questioned. The answer was stricken out upon the express ground that it was not responsive to the question. This ruling was right. The witness was subsequently permitted by the court to give even stronger answers upon the same subject. The defendant has no cause to complain of the matter.

The objection that the defendant was not permitted to state his intention in talking with the juror Lamb is not supported by the record. It is true that the court struck out an answer of the defendant concerning his intentions, but it was stricken out on the ground that it was not responsive. The answer was not responsive; but, whether so or not, the defendant, in the answers that followed, was permitted to go into the matter at length.

[7] The final point urged for a reversal is that the court refused to give two instructions offered by the defendant, one defining the word "corrupt," and the other erroneously attempting to set out the definition of a corrupt communication to a juror. The word "corrupt" was properly defined in an instruction given at the instance of the prosecution, and the instruction as to a corrupt communication is not a correct statement of the law.

On the whole case, we are satisfied that the defendant had a fair trial and that he was properly convicted. The crime committed by the defendant is one of the most grave in the whole list of crimes, since, if successful, it corrupts the very fountains of justice and it rightly merits the severe penalties of the law. We see no adequate reason to disturb the verdict.

The judgment and order denying a new trial are affirmed.

We concur: HART, J.; BURNETT, J.

49 Cal. App. 770

PEOPLE v. LEVOY. (Cr. 920.)

(District Court of Appeal, First District, Division 2, California. Nov. 10, 1920. Hearing Denied by Supreme Court Jan. 6, 1921.)

1. Infants ⚿20—Age of child assaulted must be established by evidence.

It is essential to conviction for lewd acts upon a child under Penal Code, § 288, that the child attacked was under the age of 14 years, and that fact must be established by evidence, the jury not being permitted to guess it from the appearance of the child on the witness stand, especially where the court did not instruct them they must find that fact.

2. Infants ⚿20 — Evidence prosecutrix was little child does not show that she was under 14.

In a prosecution for lewd acts upon a child under 14, testimony by witnesses referring to prosecutrix as a little child or as a little girl does not justify the conclusion that she was under the age of 14 years.

3. Infants ⚿20—Answer to questions to determine qualification cannot prove age before jury.

Answers by prosecutrix to questions by the court before any witnesses were sworn to determine her qualification as a witness are not evidence before the jury from which they can find that she was under the age of 14 years.

4. Witnesses ⚿40(2) — Competency of child a question for court.

The competency of a young girl alleged to have been the subject of a lewd attack was a question within the court's discretion and was not an issue before the jury.

5. Criminal law ⚿1186(4)—Failure to prove essential fact requires reversal; "error resulting in miscarriage of justice."

Total failure of proof of an essential fact, in the absence of which no crime was committed, is not a question of error resulting in a miscarriage of justice within the terms of Const. art. 6, § 4½, but requires a reversal of the conviction.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Frank Levoy was convicted of lewd acts upon a child under the age of 14 years, and he appeals. Reversed, and new trial ordered.

Hearing denied by Supreme Court; Lawlor and Olney, JJ., dissenting.

Kenneth M. Green, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

NOURSE, J. Appellant was tried and convicted on information charging him with the violation of section 288 of the Penal Code, which defines as a felony certain lewd and lascivious acts upon the body of a child under the age of 14 years. After the jury was impaneled and sworn to try the case, and before any witnesses were sworn, the court interrogated the little girl who was the subject of the alleged attack for the purpose of determining whether she was qualified to appear as a witness. The court, having satisfied itself that she was competent to testify, instructed the clerk to swear her as a witness. She was thereupon sworn and testified to the facts which were the basis of the prosecution. She was followed by her mother, who corroborated her in certain particulars, and the people rested. The defendant took the stand in his own behalf and denied in particular all the testimony of the prosecution's witnesses. There was no evidence of any character attempting to prove the age of the child, and this is the ground which is assigned for the reversal of the judgment.

[1] Under the provisions of section 288 of the Penal Code it is essential that the subject of the attack must be a child under the age of 14 years, and proof of that fact must be made. The answer made to the attack upon the verdict is that the jury had the child before it and could reasonably conclude from what it saw that she was under the age of 14 and that throughout the trial she was frequently referred to as a "little child" or a "little girl." But, if the jury should be permitted to fix the age of the child simply by viewing her while a witness upon the stand, this essential issue of the prosecution might be determined by mere guesswork. Probably no great harm would result to a defendant through this method in a case where the child was apparently under the age of 14 if the court would instruct the jury upon that issue, but no such instruction was given in this case.

[2] On the second proposition the mere reference to a witness as a "little child" or as a "little girl" does not alone justify the conclusion that she was a child under the age of 14 years.

[3] It is also argued that the statements of the child made in answer to the questions of the court before she was sworn as a witness may be treated as evidence of her age. But that interrogation involved only the question of the competency of the girl to testify, a matter which was not controverted by defendant. Her competency was a question within the discretion of the court (People v. Stouter, 142 Cal. 146, 151, 75 Pac. 780; People v. Bradford, 1 Cal. App. 41, 43, 81 Pac. 712), and was not an issue before the jury.

[4] The verdict of the jury must be supported by the evidence produced at the trial, and it is too plain to question that, if a verdict is based upon facts which were not in evidence, it cannot be sustained.

Furthermore, there being no competent evidence of the age of the child, and no attempt having been made by the prosecution to prove that fact, the defendant was not called upon to meet the question of the age of the child as he might have done if such evidence had been presented to the jury. In any event, it was incumbent upon the prosecution to prove the fact which was made an essential issue by the Penal Code section.

[5] This is not a question of error resulting in a miscarriage of justice within the terms of section 4½ of article 6 of the Constitution, but is a total failure of proof of an essential fact, in the absence of which no crime was committed under the Penal Code section.

The judgment is reversed, and a new trial ordered.

We concur: LANGDON, P. J.; BRITTAIN, J.

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50 Cal. App. 35

HOBSON v. SILVEA. (Civ. 2031.)

(District Court of Appeal, Third District, California. Nov. 15, 1920. Hearing Denied by Supreme Court Jan. 13, 1921.)

1. Livery stable and garage keepers ⟴7—Complaint held to allege damage from loss of automobile.

A complaint to recover for the loss of plaintiff's automobile while stored in defendant's garage, which alleged that by reason of defendant's negligence the property of the plaintiff was lost to him in the sum of $1,000, in legal effect alleges damage from the destruction of the automobile, though the word "damage" was not actually used in the complaint.

2. Livery stable and garage keepers ⟴7—Complaint held to allege negligence by garage keeper.

In a complaint for the destruction of plaintiff's automobile by fire while stored in defendant's garage, allegations that defendant neglected to remove the property from the garage when threatened by fire, and neglected to allow others to remove it, and by reason of his negligence the property was destroyed, are sufficient allegations of negligence.

3. Pleading ⟴34(7)—Defective allegation of complaint substantially sufficient does not defeat judgment.

Where the complaint taken as a whole substantially alleges negligence, the defective al-

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⟴For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes legation of such negligence will not be permitted to defeat the judgment for plaintiff, when reviewed on appeal.

4. Livery stable and garage keepers 🔑7—Tender of storage unnecessary to recover damages for negligence.

A tender of the storage charges on plaintiff's automobile is not necessary to a recovery by plaintiff for the destruction of his automobile because of defendant's negligence, though it would be necessary in a suit to replevin the automobile.

5. Appeal and error 🔑1011(1)—Findings on conflicting evidence not disturbed.

The appellate court will not interfere with the finding of the lower court, if there is a substantial conflict in the evidence, and there is sufficient evidence to sustain the finding.

6. Livery stable and garage keepers 🔑7—Evidence held to sustain finding of negligence.

In action for the destruction of plaintiff's automobile in defendant's garage, where it was stored, evidence that defendant was present half an hour before the fire, which started across the street, was communicated to his garage, and that he made no attempt to remove the automobile therefrom, nor to get others to do so, *held* sufficient to sustain a finding that he was negligent.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by G. D. Hobson against John Silvea. Judgment for plaintiff, and defendant appeals. Affirmed.

Carr & Kennedy, of Redding, for appellant.

Roscoe J. Anderson, of Redding, for respondent.

PREWETT, Presiding Justice pro tem. In this case the respondent brought his action against the appellant to recover damages for the loss of an automobile stored in the latter's garage. The allegations of the complaint are in substance that the appellant received the automobile for storage in his garage at an agreed monthly rental; that the garage was situated across the street from a large hotel; that the hotel caught on fire and was wholly consumed; that the fire spread and passed across the street and ignited the appellant's garage, and totally consumed and destroyed the automobile. The fire occurred in a small village, and within a few minutes after it was discovered the entire population of the village, including the appellant, gathered at the scene of the fire, and made efforts to suppress it. The appellant had on the same side of the street with his garage and a short distance therefrom a larger and presumably more valuable building, and he devoted his attention constantly to this building to the neglect of the garage and its contents. The precise period of time during which the appellant was at the scene of the fire and before the garage had become so far destroyed as to render a rescue of the automobile impossible is somewhat uncertain, but probably about half an hour. The appellant made no effort to remove the automobile from the garage, nor did he solicit the help of any of the bystanders for that purpose. The door of the garage was locked, and several bystanders, who attempted to force an entrance for the puropse of removing the automobile, were unsuccessful. One of the bystanders went to the appellant and asked for the key to the garage. The answer of the appellant is not known, as the commotion and noise drowned his voice, but he motioned towards the burning hotel. The party then turned towards the hotel to see if he could find any one who had the key. He was unsuccessful in his efforts. The evidence shows that the appellant is an aged man and at the time of the fire was in ill health, and also that he was unable to manipulate the running of an automobile. It is further shown, however, that the exit from the garage and from the point in the garage where the automobile stood, slopes downward, so that a person, whether skilled or unskilled in the manipulation of an automobile, could, by removing some obstructions placed before the wheels, run the automobile out of the garage without turning on the power. The complaint shows that the automobile had a value of about $1,000, although the trial court found that it was not more than $650. The trial court sustained all the allegations of the complaint, and rendered judgment in favor of the respondent for damages. The appellant offered no evidence.

The appellant insists that his demurrer to the complaint should have been sustained. We are not able to concur in this view. He complains that it is difficult to describe the complaint by reference to any of the forms known to the common law. The action, however, is an action on the case, and the allegations of the complaint are appropriate to that form of action.

[1] The appellant urges the point that the complaint does not in terms aver any damage to the respondent. It is true that the word "damage" is not actually used in the complaint, but other words, the equivalent thereof, are used. One part of the complaint reads:

> "By reason of the failure, refusal, and negligence of the defendant, as aforesaid, the said properties of the plaintiff became and were wholly lost to the plaintiff herein, in the sum of $1,003."

This, in legal effect, is an averment of damage arising from the destruction of the automobile.

[2] It is further insisted that the complaint does not aver any negligence on the part of

the appellant, but a reference to paragraph 5 of the complaint shows that this claim is without foundation. In said paragraph it is expressly averred that the appellant neglected to remove the property from the garage, and also that he neglected to allow others to remove it, and by reason of his negligence the property was destroyed. These allegations in terms show the negligence of the appellant. The demurrer (as to this point) is general, and the complaint is good as against a general demurrer.

[3] Moreover, as to a mere defective allegation, it is the rule that if the complaint, taken as a whole, substantially covers the point, then the defective allegation will not be permitted to defeat the judgment when reviewed on appeal. In this connection the cases of Rooney v. Gray, 145 Cal. 753, 79 Pac. 523, and Dennis v. Crocker-Huffman Co., 6 Cal. App. 58, 91 Pac. 425, are in point.

[4] The next point urged in support of reversal is that there is no allegation in the complaint that the respondent paid to the appellant the agreed monthly storage. This is true, but the respondent is not suing for the property. If he were suing in replevin, a tender of the charges might be necessary. He is not suing for the property, nor is he suing for its value. His action is for damages for a distinct tort, having no reference to the contract of bailment other than that the contract, by its terms, devolved upon the appellant the duty of exercising ordinary care in the preservation of the property. The suit being for a failure to exercise this ordinary care, it can be maintained without reference to the tender of any charges. These observations cover also the point that the respondent made no demand for the property. No demand is alleged in the complaint, and none was necessary. The plaintiff, however, proved a demand for damages.

[5] We think the chief point urged by the appellant is that the evidence is insufficient to support the finding of the court. The evidence in the case is such that findings in behalf of either party could and would be sustained by an appellate court. It is a familiar doctrine that a court on appeal will not interfere with the finding of the lower court if there is a substantial conflict in the evidence, and that there is sufficient evidence to sustain the finding.

[6] The evidence does substantially show that the appellant stood by for a period of time ranging from 20 to 30 minutes watching the fire, and without making any effort to remove the automobile from the impending danger. This omission occurred after the danger of destruction of the garage became imminent, and after the attention of the appellant had been drawn to the danger. Under these circumstances it would be difficult to say that the trial court was not justified in finding that the loss occurred through the negligent omission of the appellant, and this is all that is necessary to sustain the judgment.

The judgment appealed from is affirmed.

We concur: HART, J.; BURNETT, J.

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50 Cal. App. 63

CARTER v. BRODER. (Civ. 2177.)

(District Court of Appeal, Third District, California. Nov. 19, 1920.)

1. Venue 🔑66—Affidavit of merits sufficient where stating facts which prima facie fully answer action.

Affidavit of merits for change of venue, alleging that defendant stated "his case" to his attorneys, even if construed as an allegation merely that he stated "his defense," is sufficient where containing a statement of facts which, prima facie, fully and completely answer the action.

2. Venue 🔑66—Affidavits of merits considered together.

Two affidavits of merits on motion for change of venue may be considered together for testing the sufficiency of showing of defense on the merits.

3. Venue 🔑66—Affidavits of merits, showing defense to part of claim not admitted, sufficient.

Affidavit of merits on motion for change of venue is sufficient if showing defense to the part of claim in excess of amount admitted.

4. Venue 🔑66—Affidavit of merits may be good, though showing unexecuted accord and satisfaction.

An affidavit of merits on motion for change of venue is not bad because setting up an accord and satisfaction, unexecuted by defendant, of the claim sued on; it indicating that such nonexecution was due entirely to plaintiff's fault or omission of a duty imposed by the agreement on him.

5. Venue 🔑66—Affidavit of merits not necessarily bad because stating a conclusion of law.

Affidavit of merits on motion for change of venue is not insufficient because of a statement which, taken alone, is a mere conclusion of law; it being buttressed by other declarations of fact not involving conclusions.

6. Venue 🔑66—Affidavit of merits need not set out defense in full.

Affidavit of merits on motion for change of venue need not set out in full the defense relied on; but it is enough to show that defendant, on stating the facts to his attorney, was advised that he has a defense that will address itself to the merits, and not merely to matters of form.

Appeal from Superior Court, Modoc County; Clarence N. Raker, Judge.

Action by C. T. Carter against J. Broder. From an order denying motion for change of venue, defendant appeals. Reversed.

R. A. Laird and E. C. Bonner, both of Alturas, and Herbert Choynski and James Raleigh Kelly, both of San Francisco, for appellant.

Jamison & Wylie, Daly B. Robnett, and Oscar Gibbons, all of Alturas, for respondent.

HART, J. This is an appeal from an order of the superior court of the state of California, in and for the county of Modoc, denying the motion of defendant and appellant to change the place of trial of said action from the county of Modoc to the city and county of San Francisco. The defendant and appellant at the time of the filing of his demurrer also filed his demand in writing that the trial of said action be had in the proper county, and accompanied said demurrer and written demand with affidavits of merits and a notice of motion to change the place of trial to the city and county of San Francisco as the proper county for the trial.

Defendant's motion was heard on the 12th day of November, 1919, counsel for plaintiff and for defendant being personally present in court, and said motion was presented upon the complaint of the plaintiff and demurrer of the defendant as well as the defendant's written demand for change of place of trial and his notice of motion and accompanying affidavits. No counter affidavits or testimony in opposition to said motion were offered. The court denied defendant's said motion. Appellant contends that he was entitled to have the action tried in the city and county of San Francisco upon making the proper written demand and filing his affidavit of merits at the time he filed his demurrer, and that the court erred in denying his said motion.

The respondent contends that the affidavit of merits filed in the case at bar states that the defendant has fully and fairly stated his case, etc., that this is not a sufficient or proper affidavit of merits, and is only equivalent to stating his defense, etc., to his attorney. Respondent further contends that the affidavits of one Sumski, and the defendant, both disclose two reasons why there is not a sufficient defense upon the merits, viz. that both disclose the fact that there is only a partial defense relied upon, and also disclose the further fact that an accord without satisfaction is relied upon.

The complaint sets out that plaintiff sold certain cattle to defendant at an agreed price; that part of the cattle were taken, slaughtered, and paid for by the defendant; that thereafter the parties made a new agreement under which defendant should pay the plaintiff the freight of the cattle to Modesto, plus the difference between the agreed price and the amount which plaintiff could obtain for the balance of the cattle, if there should be a difference. Plaintiff accepted and sold the cattle, and the action is for the difference and freight. There remained the sum of $800 due under the original agreement, and the cattle not taken by the defendant for his own use were sold for $500 at Modesto, leaving an unpaid balance of $300 and a freight bill for $50, for which sum ($350) the action was commenced.

The affidavits of merits were by the defendant and one I. Sumski, both residents of the city and county of San Francisco. In his affidavit, the defendant deposed that—

> He was "at the time of the commencement of this action, now is, and for more than three years last past has been, a resident of the city and county of San Francisco. * * * That all the transactions involved in the action herein occurred either in the city and county of San Francisco, or in Stanislaus county, state of California. That there has been a full and fair settlement and agreement had between the parties to this action in the city and county of San Francisco, at and by which settlement had between the parties, in the presence of one I. Sumski, it was agreed that the plaintiff in this action should present his bill for the freight mentioned in the complaint at the sum of $50 to said defendant in the city and county of San Francisco, state of California, and to receive payment for said freight from said defendant in said city and county, * * * and which said freight money was to be paid and taken in full of any and all differences and demands between these parties. That affiant never paid said freight bill for the reason solely he did not know where the plaintiff was to be found, and plaintiff never personally either called for his money or left his address where he could be found. Affiant is not now and never has been a resident of Modoc county, Cal., in which this action was brought and is pending. That he has fully and fairly stated his case to R. A. Laird and E. C. Bonner, his attorneys, who reside at Alturas, Cal., and that he was thereupon advised and is advised by them, and verily believes that he has a good and sufficient defense on the merits to this action," etc.

Sumski, in his affidavit, declared that he is and has been for the past three years acquainted with the defendant, and knows that all of said time defendant was "and is now" a resident of the city of San Francisco, "and not a resident of the county of Modoc"; that he "was present at the settlement (reduced to writing by me and signed by these parties) between the parties to this action mentioned in the affidavit of J. Broder, hereunto annexed, and which affidavit I have read and know that there was a full and fair settlement between these parties, and by which settlement the amount, as then undetermined in amount but for freight only, was to be paid the plaintiff in this action by defendant in San Francisco, Cal., and nowhere else. Particularly Alturas, Cal., was not mentioned in said settlement, or agreement or in any of the talk had in connection with the same."

It will not be seriously contended that, if the motion for the change of venue was made upon a legally sufficient affidavit of merits, the motion for the change should be granted, since it appears without dispute that the defendant is and was at the time of the execution of the transaction constituting the plaintiff's cause of action a resident of the city and county of San Francisco. Code Civ. Proc. § 395.

[1-3] In support of his position that the affidavit of merits made and filed by the defendant is insufficient in law to have entitled the defendant to an order upon his motion transferring the cause as demanded, the respondent first emphasizes the fact that said affidavit merely states that "he has fully and fairly stated his case" to his attorneys, and insists that, upon the authority of People v. Larue, 66 Cal. 235, 5 Pac. 157, and Nickerson v. Cal. Raisin Co., 61 Cal. 268, such a statement is equivalent only to the statement that the defendant had stated his defense to his attorneys, which defense might be insufficient since (following the reasoning in the case last above named) it might be a purely technical one that would not touch the merits of the controversy.

There is, however, a marked distinction between the affidavits in the case named and those in the present case. Even if it be true that no other construction can logically be given to a declaration in an affidavit of merits by which a motion for a change of the place of trial is supported that the defendant has "stated his case to his attorney," etc., than that it is the equivalent of saying that he has "stated his defense," etc., a proposition which appears to be seriously questioned, if, indeed, not expressly repudiated in Hughes Mfg., etc., Co. v. Elliott, 167 Cal. 494, 500, 140 Pac. 17, yet the affidavits in this case contain the statement of facts which, prima facie, fully and completely answer the plaintiff's action herein. According to said affidavits, either of which separately or both together may be considered for the purpose of testing and determining the question whether there is a sufficient showing of a defense on the merits (Wilson v. Berryman, 5 Cal. 44, 63 Am. Dec. 78; Gardner v. Steadman, 31 Cal. App. 447, 160 Pac. 834) the parties to the action had a settlement between them of their differences, resulting in an understanding between them, whereby it was agreed that the defendant would pay to the plaintiff the sum of $50 only, being the amount of the freightage for the shipping from San Francisco of those cattle of the number taken by the defendant to said city, which he did not accept and use. Manifestly, this constituted a showing that the defendant has available to him a defense that goes directly to the merits of the action. In other words, the facts directly set forth in the affidavits, while not, as they are not required to be, stated with the technical nicety required of a pleading, and do not disclose the precise legal nature of the later agreement, are nevertheless sufficient upon their face as a defense to any claim plaintiff makes against the defendant in excess of the sum of $50. And in this connection it is appropriate to consider the point made by the respondent that where a party seeks a transfer of an action to some other county than the one in which the same is brought, he must show by his affidavit of merits that he has a complete defense on the merits to the cause of action set up in the complaint, and that the affidavits of merits in this case fail to show such a defense—that they, on the contrary, disclose, if anything at all, only a partial defense. Counsel for plaintiff have not made it clear in their brief what they mean by this contention; but if it is their position that there is only a partial defense because the defendant in effect admits an indebtedness to the plaintiff in the sum of $50 (only) on account of the transaction of which this controversy is the outgrowth, we are constrained to reply that there is no legal force to the point. The only issue between the parties is as to the alleged indebtedness of defendant to plaintiff in a sum in excess of that of $50, the defense which defendant shows by his affidavit that he is prepared to set up against any claim of plaintiff against him in excess of the sum of $50 being, as to said amount, in the nature of a plea by way of confession and avoidance, and is therefore a defense which goes to the merits of the only question in the case upon which he and the plaintiff disagree, and, as stated, it would be a full and complete defense to the extent of the only issue between them. There can be no less reason why the defendant should not be entitled to have that issue tried in the county of his residence than there would or could be if his defense were to involve a denial of any and all indebtedness whatever.

[4] But it is insisted by the respondent that the affidavit of merits by the defendant itself discloses that the settlement which it is therein stated was had between him and plaintiff involved an agreement in the nature of an accord and satisfaction (Civ. Code, § 1521), but that, the defendant having failed to execute it, the original agreement was not extinguished, but retained its integrity as an obligation to which the defendant thus virtually admits that he is still bound (Civ. Code, § 1522). The defendant negatives this position by declaring that the new or later agreement constituted a novation. The reply to this controversy is that it cannot be determined from the affidavits what the exact nature, technically, the so-called new or later agreement, was. In other words, it cannot thus be determined whether said agreement or settlement involved an unexecuted accord

and satisfaction or a novation or an account stated. The affidavit of the defendant declares, as has been shown, that—

> "There has been a full and fair settlement and agreement had between the parties to this action * * * by which it was agreed that the plaintiff * * * should present his bill for the freight mentioned in the complaint at the sum of fifty dollars to said defendant * * * and to receive payment for said freight from said defendant * * * which said freight money was to be paid and taken in full of any differences and demands between these parties."

Whether, in effecting the "full and fair settlement and agreement" between the parties, the defendant paid to the plaintiff all that he has sued for except the $50 for freight, or the plaintiff, without such payment, agreed to accept the said sum of $50 in full satisfaction of all claims he then claimed to have against the defendant, the affidavits do not show.

But, even assuming that the later transaction was to effect an accord and satisfaction as that proceeding is defined by the Code, still the defendant would have the right to show, if he could, or at least set it up as a defense, that the nonexecution of the accord was due entirely to the fault or omission of a duty imposed by the agreement upon the plaintiff, and not due to any default of the defendant under the terms of the convention. Indeed, upon the assumption just suggested, there is some semblance of ground for this theory disclosed by the defendant's affidavit, wherein it is declared that the plaintiff should present his bill for the freight "in the city and county of San Francisco," and, further, that "affiant never paid said freight bill, for the reason solely he did not know where the plaintiff was to be found, and plaintiff never personally either called for his money or left his address where he could be found."

[5] The point that the statement in the affidavit that "a full and fair settlement and agreement" between the parties was had is a legal conclusion, and therefore insufficient as a predicate for the conclusion of fact that such a settlement had been made, is, as in impeachment of the sufficiency of the affidavit of merits, without merit. It may be true that the statement, taken alone, is a conclusion of law, but it is, as we have shown, buttressed by other declarations of fact in the affidavits which do not involve legal conclusions or conclusions of the affiant. The statement in the affidavit of merits on motion for a change of venue that the defendant "has fully and fairly stated the facts of the case to his attorney," etc., really does not rise to a higher dignity than that of the statement of the conclusion of the affiant, but affidavits of merits containing such a statement and very little in addition thereto have often been approved as sufficient.

[6] It must be borne in mind that it is not required that an affidavit of merits, to constitute a sufficient predicate for the removal of a cause on a motion for that purpose, should set out in full the defense upon which the defendant will rely. Nor is it important or of any materiality in the consideration of the affidavit whether the defense may or may not be sustained. It is only sufficient to show that the defendant, upon stating the facts of the case to his attorney, has been advised by the latter that he has a defense that will address itself to the merits of the controversy, and not merely to matters of form, etc., and this we think it clear the defendant in this case has done.

The order denying the motion for a change of venue is reversed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

50 Cal. App. 27

SNELL v. NEILSON. (Civ. 2103.)

(District Court of Appeal, Third District, California. Nov. 15, 1920.)

1. Gifts ⚷17—Verbal gifts valid where there is delivery.

A verbal gift is valid only where the means of obtaining possession and control of the thing are given, or where, if the thing is capable of delivery, there is an actual or symbolic delivery to the donee, under Civ. Code, § 1147.

2. New trial ⚷93—To be granted where report of testimony is lost.

Where party desiring to appeal makes demand under Code Civ. Proc. § 953a, that reporter transcribe the phonographic report of the trial, and it appears on motion for new trial that the clerk of the court has lost his notes and cannot furnish a transcript of all of the evidence, the motion should be granted, and where a substantial amount of evidence is missing, it is immaterial that the prevailing party make affidavit, or the trial judge decide that the lost testimony had no material bearing upon the issue.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by Hattie M. Snell, as administratrix of the estate of Glenn E. Snell, deceased, against Mabel Neilson. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

H. B. Churchill, of Lakeport, for appellant.
H. V. Keeling, C. M. Crawford, and Ben C. Jones, all of Lakeport, for respondent.

HART, J. Plaintiff, as administratrix of the estate of Glenn Snell, deceased, brought this action against the defendant in claim and delivery for a Ford automobile alleged to be the property of the deceased, Glenn Snell, at the time of his death. The answer denied ownership in the plaintiff and alleged that the property belonged to the defendant, Mabel Neilson, she having obtained title by gift from the deceased, her fiancé. Judgment was rendered in favor of the plaintiff. Defendant made a motion for a new trial, which was denied, and then took an appeal from the judgment under section 953a of the Code of Civil Procedure, and demanded of the clerk that he prepare a typewritten transcript.

Glenn Snell died intestate on May 7, 1918, in the county of Lake, state of California, and his mother, Hattie M. Snell, was appointed administratrix of his estate on June 1, 1918, and letters of administration were issued to her. Thereafter she made demand on the defendant, Mabel Neilson, for the Ford automobile and accessories, consisting of spotlight, storage batteries, automobile rims, fire extinguisher, robe, etc. The court found that the Ford automobile had never been delivered, but found that the spotlight had been delivered, and gave judgment to the plaintiff for the Ford automobile and accessories, and judgment to the defendant for the spotlight. The defendant took an appeal under the new method (section 953a of the Code of Civil Procedure) within the required time, and demanded that the clerk prepare a transcript of the testimony offered and taken, evidence offered and received, and all rulings and instructions, and all objections and exceptions of counsel. The court reporter made affidavit that he had lost his notes, with the exception of those of the testimony of one witness (the defendant herself), and could not make up the transcript of the testimony required by section 953a of the Code of Civil Procedure. Counsel for the defendant also made affidavit that he did not remember the testimony of the different witnesses and could not make up a statement of the case for that reason.

Counsel for appellant makes two points for a new trial: (1) Defendant should have been granted a new trial when it was made to appear that the court reporter's notes had been lost; (2) judgment should have been in favor of the defendant, because the evidence presented shows that there was a gift and delivery of the Ford automobile.

Counsel for plaintiff and respondent has filed no brief in the cause.

[1] While the defendant testified positively that the deceased gave her the automobile, it is not clear from her testimony that there was such a delivery of the car to her by the deceased as to constitute it a legal gift. A verbal gift is valid where the means of obtaining possession and control of the thing are given, or where, if the thing is capable of delivery, there is an actual or symbolical delivery of the thing to the donee. Civ. Code, § 1147. The court could apparently have justly found from the testimony of the defendant that the deceased told her that he intended to make her a present of the car as soon as she learned to operate it, but, according to her testimony, the actual possession of the car was at all times in the deceased, he having habitually used it for his own purposes.

[2] But we think that there can be no doubt but that the court should have granted the defendant a trial of the cause de novo on the showing made, on her motion for a new trial, that a considerable portion of the testimony offered and received and the other proceedings in the trial were not available to her for the purpose of making up a proper record either for the motion or an appeal, for the reason that the phonographic report of said testimony and proceedings had been lost, and could not be found by the official court reporter in time for the preparation of such record.

As shown, there were filed and presented on the motion an affidavit by said stenographer and also one by the attorney for defendant showing the loss of the stenographer's shorthand notes of the testimony and proceedings received and had at the trial. The stenographer, in his affidavit, deposed that he officially reported the testimony and the proceedings in shorthand taken and had in the trial of this case, that, after the trial and judgment entered against the defendant, demand, as required by law, was made upon him to transcribe into longhand the shorthand notes of said evidence and proceedings so taken and had, and that "during the meantime deponent moved his office to another location and took with him what he supposed to be all of his documents and papers, but upon making due and diligent search he finds the fact to be that the shorthand notes made at said trial have been lost and cannot be found; and deponent further states the fact to be that the defendant, Mabel Nielson, and her attorney, H. B. Churchill, Esq., or either of them, directly or indirectly, never had possession or control of said shorthand notes, and that said defendant or her attorney is not responsible for the loss of the said shorthand notes, and that no other person is responsible for said loss except this deponent."

The attorney for defendant, in his affidavit, deposed that he made a demand for the transcript by the official reporter of the court of the evidence, proceedings, etc., taken and had in the trial of the case; that he was informed by said reporter that the shorthand notes of said evidence and proceedings had been lost and were beyond recovery; that said defendant intended to appeal from the judgment rendered and entered against her in said case, "but cannot now do so by reason of the loss of said shorthand notes"; that "a great many material witnesses testified at the trial of said cause, and deponent, representing said defendant, relied entirely for the preservation of the testimony given and the proceedings had upon the shorthand notes taken at said trial; that some three months have elapsed since the trial, and by reason of such lapse of time, and by reliance upon said notes aforesaid, a large portion of the material evidence given and of the proceedings had and taken, including objections and exceptions, etc., made and taken, have entirely gone from deponent's mind and memory; and that by reason of the facts aforesaid deponent believes that a record of the testimony given and proceedings taken cannot now be made."

The plaintiff filed adversary affidavits—one by the official reporter and another by the attorney for plaintiff. In the former's affidavit, as in the latter's it is stated that the testimony of the defendant was, immediately upon the close of the trial, transcribed by the reporter at the request of the attorney for plaintiff and a copy thereof given to the latter. It is further stated in said affidavit, upon information and belief, that before the motion for a new trial was made the attorney for defendant knew of the existence of said transcript of defendant's testimony and that it was in possession of plaintiff's counsel, but that the attorney for defendant never at any time requested the former to permit him to examine said testimony or to have the use thereof, although, it is further stated, affiant was "entirely willing at all times to have delivered to said H. B. Churchill for use and examination by him" said transcript and testimony. It is further deposed by plaintiff's attorney that the single issue in the case was as to the ownership of the automobile in dispute, and that defendant's was the only testimony received at the trial on her behalf bearing upon that issue and supporting her defense; "that none of the testimony of the other witnesses upon the trial of said case was, or is, material to the issue involved."

The certificate of the judge by whom the case was tried certifying to the correctness of the record as it is embraced in the transcript before us states that there were nine witnesses (naming each) whose testimony does not appear in the transcript for the reason that the said testimony "has been lost by the stenographer who took the testimony offered at the trial."

Even if it may be proper to assume that the trial court would in any event have denied the defendant's motion for a new trial, we think that, upon the showing made that the official stenographer's notes of the testimony of a large number of the witnesses had been lost before he had the opportunity to transcribe the same into longhand, a new trial should have been granted for the purpose, even if for no other, of enabling the defendant to prepare a proper record on appeal. We are not unmindful of the statement in the affidavit of the attorney for the plaintiff that the testimony not transcribed for the reason stated was not material to the issue, from which statement it is to be inferred that the theory is that, so far as the evidential features of the case are concerned, the defendant, neither in the prosecution of her motion for a new trial before the court below, nor in the prosecution of an appeal from the judgment in the appellate court, could be benefited or aided in any degree by the testimony not transcribed. But it may be assumed that the testimony referred to was regarded by the trial court as being material, since it appears to have been received into the record. At any rate, it became a part of the record of the case, and, whether it was or was not material to the issue made by the pleadings, the defendant was entitled to have it transcribed and duly anthenticated as a part of the record on appeal. Section 953a of the Code of Civil Procedure, provides that, when an appeal is taken according to the method prescribed thereby, it is the duty of the court, upon a demand being made therefor by the losing party after a notice by the latter that he intends to appeal from the judgment, to require the stenographic reporter of the court to transcribe fully and completely the phonographic report of the trial, consisting of "a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate." Thus it is plain that the vanquished party in a trial, if he desires and intends to have the judgment against him reviewed by the courts of last resort under the system established by section 953a, supra, is entitled to take before the Court of Appeal everything that has been done and said under the sanction of the trial court in the trial. The mere statement in an affidavit by the victorious party or even the decision of the trial judge that certain testimony offered and rejected or received has no material bearing upon the issue cannot conclude the losing party as to his right to a full and complete record of the case to support his appeal. Indeed, the very rulings of the court holding certain proffered testimony to be immaterial or otherwise legally objectionable may, as is very often so, involve the very question which it is desired should and which ought to be reviewed. Hence, in the interest of common justice, where, as here, the record of the trial or any substantial portion thereof has been, before it has been properly made up for the purpose of an appeal, and without any fault of the party against whom judgment has gone, lost or destroyed, a new trial should be granted, if such loss or destruction has been, as was the case here, called to the attention of the trial court on a motion for a new trial, or the judgment reversed for a new trial by the court to which the appeal has been taken. There is abundant authority for this conclusion.

In Bailey v. United States, 3 Okl. Cr. 175, 104 Pac. 917, 25 L. R. A. (N. S.) 860, the Supreme Court of Oklahoma has this to say in a case presenting a situation, in its general aspects such as we have here, saying:

> "It seems to be well established, as a general rule, that where a defendant has done all that the law requires in perfecting his appeal, and where the record necessary for a review of the case is lost or destroyed while in the custody of an officer of the court, in order to prevent a possible miscarriage of justice by depriving the defendant of his legal right of appeal, a new trial will be granted."

In Crittenden v. Schermerhorn, 35 Mich. 370, the bill of exceptions was, by stipulation of the parties, settled by the judge who tried the cause after he had retired from office. Objection raised on appeal that a stipulation could confer no such authority was sustained, but the cause was reversed on the ground that the party losing at nisi prius should not be deprived of the benefit of his exceptions for causes for which he was not responsible. "On the contrary," said Cooley, C. J., "where a party has lost the benefit of his exceptions from causes beyond his control, it is proper to give him a new trial; and this we have done in some cases where the judge's term of office expired before exceptions could be settled."

In Borroscale v. Bosworth, 98 Mass. 34, 37, it is said:

> "We * * * have no doubt that, where a party has regularly taken exceptions in a cause, and has lost the benefit of them without fault of his own, a new trial may be granted. He has a right by law to the judgment of the higher court upon the decision by which he feels himself to be aggrieved; and a new trial may be his only remedy."

Richardson v. State, 15 Wyo. 465, 89 Pac. 1027, 1034, 12 Ann. Cas. 1048, is a case in which the official stenographer, after transcribing the proceedings of the trial as required by a statute of Wyoming, lost both the transcript and his shorthand notes of the trial, and after diligent search could not find the same. The case was one of murder, and the appellant had been convicted and sentenced to suffer the death penalty. Reversing the cause because of the inability of the appellant to prepare a proper record on appeal because of the loss of the official court reporter's shorthand notes and his transcript thereof, as above explained, the Supreme Court, among other things, said:

> "Incidental to the power to compel a correct record to be sent up, or a bill of exceptions to be settled, is the power, as it seems to us, of ordering a new trial of the cause, where it is made to appear that the only record in the cause has been destroyed without possibility of substitution through no fault of the appellant, or where, without fault on the part of the appellant or his counsel, but solely because of the neglect or delay of some court official, or some accident or act of Providence for which no one is responsible, it has become impossible for a bill of exceptions to be settled, without which the errors complained of cannot be considered."

See, also, Hume v. Bowie, 148 U. S. 245, 13 Sup. Ct. 582, 37 L. Ed. 438; State v. Gaslin, 32 Neb. 291, 49 N. W. 353; Fire Association of Philadelphia v. McEnerney (Tex. Civ. App.) 54 S. W. 1053; Barton v. Burbank, 119 La. 224, 43 South. 1014; Tegler v. State, 3 Okl. Cr. 595, 107 Pac. 949, 139 Am. St. Rep. 976; note to Bailey v. U. S., 25 L. R. A. (N. S.) 860.

For the foregoing reasons, the judgment is reversed, and the cause remanded for a new trial.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

184 Cal. 508

FREEMAN v. GLENN COUNTY TELEPHONE CO. et al. (Sac. 2792.)

(Supreme Court of California. Dec. 20, 1920.)

1. Corporations 🔑346 — Statute amendment as to director's liability held applicable where action was pending at date of amendment.

St. 1917, p. 657, amending Civ. Code, § 309, relative to the liability of directors of a corporation dividing its capital among the stockholders, to provide that no liability shall exist where all debts have been paid and all the capital stock divided with the consent of all stockholders among themselves, applied to directors against whom suit was pending to recover the amount divided at the date of the amendment but against whom judgment had not been rendered.

2. Appeal and error 🔑870(5)—Ruling on demurrer reviewable on appeal from judgment.

On an appeal from the judgment, defendants have the right to review the entire record including rulings on demurrers to their answer.

3. Appeal and error 🔑1107—Amended statute subsequent to order sustaining demurrers considered.

On appeal from a judgment rendered in a suit to enforce the liability of corporate directors after the amendment of 1917 (St. 1917, p. 657) to Civ. Code, § 309, though a demurrer was sustained to the answer before such amendment, the appellate court may consider whether the answer set up a defense when measured by the condition stated in the amendment.

4. Corporations 🔑346—When statute amended after ruling on demurrer, court should have reviewed its ruling.

Where, after the sustaining of demurrers to the answer in a suit to enforce the liability of corporate directors under Civ. Code, § 309, that section was amended by St. 1917, p. 657, the court should have taken cognizance of the amendment and reviewed its ruling on the demurrer.

5. Corporations 🔑334—Directors distributing capital among stockholders by consent held not liable.

Under Civ. Code, § 309, as amended by St. 1917, p. 657, where the capital of a corporation after payment of debts was divided and distributed to the stockholders with the knowledge and consent of plaintiff, and plaintiff's share was paid to one of the directors holding a power of attorney to act for plaintiff in relation to the stock, the directors were not liable.

In Bank.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Frank Freeman against the Glenn County Telephone Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

W. T. Belieu and Charles L. Donohoe, both of Willows, for appellants.

George R. Freeman, of Willows, for respondent.

PER CURIAM. This is an appeal by the defendants from a judgment against the individual defendants in favor of the Glenn County Telephone Company in an action begun by the plaintiff as a stockholder of said corporation, to recover of the individual defendants as directors thereof, for the benefit of the corporation, a certain sum of money alleged to have been distributed to the stockholders by the said directors, constituting the entire capital stock of said corporation, contrary to the provisions of section 309 of the Civil Code. On May 21, 1917, the court below sustained a demurrer to the amended answer of the defendants and, the said defendants failing to amend, their default was duly entered by the clerk. Thereafter, on August 13, 1917, the cause came on for disposition by the court and, notwithstanding the default, the defendants appeared by their attorneys. No additional pleadings were filed, however, and the court proceeded to make findings upon the facts stated in the complaint. It appeared from certain exhibits filed with the said answer, constituting transcripts of the records of the defendant corporation, that the sums given in the complaint were inaccurate in small amounts. The findings constituted a mere reaffirmation of the allegations of the complaint, giving the corrected figures instead of those stated in the complaint. The findings were not filed until October 19, 1917. In pursuance thereof, on October 19, 1917, judgment was entered, directing the said individual defendants to pay into the treasury of the said defendant corporation the sum of $40,833.60 in money, and certain bonds for $10,000, or, in case the bonds could not be returned, to pay into the treasury the said sum of $10,000, and that the plaintiff recover from the individual defendants his costs.

[1] The Legislature of 1917 enacted an amendment to section 309, which took effect on July 27, 1917. This was during the time the court below had the matter under advisement. By this amendment it was provided that—

> "The liability of a director of a corporation heretofore incurred shall not exist in any case where, all of the debts and liabilities of the corporation to creditors having been paid, the capital stock divided, withdrawn, or paid out constituted all of the capital stock of the corporation and the same was paid out, withdrawn, or divided with the consent of all of the stockholders to or among themselves." Stats. 1917, p. 657.

In Moss v. Smith, 171 Cal. 777, 155 Pac. 90, the effect of a partial repeal of this statu-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tory liability was under consideration. It was there decided that the liability of directors under this section was purely statutory, and that—

> "Where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause." 171 Cal. 788, 155 Pac. 94.

There was no saving clause. The result is that this amendment operated as a repeal of the statutory liability formerly existing, in all cases where the distribution of capital stock was made under the conditions stated in the above-quoted part of the amended section, and under the decision in that case the further result is that the repeal operates to destroy the right of action if it occurred at any time prior to final judgment. The act took effect prior to the judgment in this case and it operated as a complete destruction of the plaintiff's case if it comes within the conditions stated.

[2-4] Upon an appeal by the defendants from a judgment they have the right to review the entire record, including rulings on demurrers against them. They have a right, therefore, to review the order of the court sustaining the demurrer to the answer in the present case. Although the repeal took place after the order sustaining the demurrer was made, this court on appeal has power to consider the allegations of the answer in the same light as if the order sustaining the demurrer had been made after the repeal, and we may therefore consider whether or not the answer set up a defense, when measured by the conditions stated in the amendment to section 309. With respect to this court the order sustaining the demurrer cannot be deemed final. The court below had the matter under consideration when the statute took effect, and it also should have taken cognizance of the amendment and reviewed its ruling upon the demurrer.

[5] The amended answer avers that all the remaining stock of the corporation, after the payment of its debts, was divided and distributed to the stockholders thereof, in certain definite proportions as there stated, that the plaintiff's portion thereof was paid over to and is now held by the defendant Barceloux as agent for him under a power of attorney executed by Freeman to Barceloux to act for him in relation to said stock, and that all this was done with the knowledge and consent of the plaintiff. It therefore shows that the distribution was made under the conditions stated in the amendment to the section, and that the plaintiff consented to the manner of distribution. This constituted a good defense to the action. Under these circumstances the judgment cannot be allowed to stand. There should be a determination in the court below of the facts set forth in the answer, to ascertain their truth, and if they are true, as alleged, the judgment should be that the plaintiff take nothing and that the action be dismissed.

The judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrer to the answer and proceed in accordance with this opinion.

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184 Cal. 514

In re AKERS' GUARDIANSHIP.

(Supreme Court of California. Dec. 20, 1920.)

1. Guardian and ward ⚷10—Parent presumed competent until contrary shown affirmatively.

In accordance with the general presumption in favor of competency, a parent is presumed to be competent to discharge the duties of guardianship of the child in the absence of an affirmative contrary showing.

2. Guardian and ward ⚷13(4)—Evidence of mother's reputation for truth, honesty, and integrity admissible on her application.

Inasmuch as the general moral character of a child's mother applying for its guardianship involves the issue of her fitness, and the particular traits of character relevant to the issue are not clearly defined, evidence of her reputation for truth, honesty, and integrity are admissible.

3. Guardian and ward ⚷13(4)—Admission of remote reputation of applicant rests in court's discretion.

In a guardianship hearing, evidence of the reputation of the applicant mother in another community at a remote time rests largely in the court's discretion, the proper exercise of which depends upon whether, under all the circumstances, such remote reputation tends to establish reputation at the time and place when and where it was in issue.

4. Evidence ⚷317(18)—That decedent had told of wife's confessions of illicit relations held hearsay.

In a guardianship contest, testimony of a chief of police that the applicant mother's deceased husband had said he was bent on killing a certain man because the applicant had confessed illicit relations with him was inadmissible, prejudicial hearsay evidence.

5. Guardian and ward ⚷10—Parent's right not forfeited by act of relinquishment under coercion, caprice, and discouragement.

The right of a parent to the custody of a child cannot be held forever forfeited by an act of relinquishment under circumstances of coercion, caprice, and discouragement, nor should the forfeiture of parental rights be decreed for mere acquiescence in support by other relatives, in a guardianship contest.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. Guardian and ward 🔑13(4)—Showing intention to abandon must be made to disqualify mother.

In a contest between a minor's mother and another for its guardianship, the mother's intention to abandon the child must be shown before a finding of abandonment can be rightfully made.

7. Guardian and ward 🔑10—Parents have paramount right to guardianship, unless forfeited by abandonment or unfitness.

In a guardianship contest the benefit of the child is not the sole consideration, since its mother, applying for guardianship, has the right to its control when under 14 years, rather than a stranger, unless she is shown unfit or to have forfeited her natural right by its abandonment.

8. Guardian and ward 🔑10—Competent parent has right to guardianship although child's welfare would be enhanced by appointing another.

In a contest between a parent and a stranger for the guardianship of a child, the paramount question is the parent's competency, and under Code Civ. Proc. § 1751 and Civ. Code § 246, subds. 3, 4 in the absence of a justifiable finding of incompetency the parent must be appointed guardian, though the child's material welfare may be enhanced by committing it to the stranger.

9. Guardian and ward 🔑10—Mother held not disqualified for nonresidence.

In a guardianship contest between a minor's mother and another, an objection that the mother is not a resident of the state is fully met by evidence that she has returned thereto with the intent and purpose of residing therein and regaining the child's custody.

10. Guardian and ward 🔑10—Mother's lack of permanent home does not disqualify her for guardianship.

In a guardianship contest between a mother and a stranger, that the mother has no permanent home of her own, and might be unable to keep the child with her personally for some time, is insufficient to deprive her of the child's legal custody, and her right to select the fit and proper place for its care.

In Bank.

Appeal from the Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the guardianship of the person and estate of William David Akers, a minor. From an order of the superior court appointing Mrs. Chrissie Shreve guardian, Grace Akers, the minor's mother, appeals. Reversed.

Lovett K. Fraser, of San Francisco, and H. B. Churchill, of Lakeport, for appellant.

Edmund Tauszky and Leon E. Prescott, both of San Francisco, for respondent.

LENNON, J. This is an appeal by Grace Akers, the mother of William David Akers, a minor of the age of 7 years, from an order of the superior court of the city and county of San Francisco appointing Mrs. Chrissie Shreve guardian of the person and estate of said minor. The guardianship proceeding was heard and determined upon the issues raised by the respective petitions for the guardianship of the said minor, and the answers thereto, of Grace Akers, the mother of the minor, and Mrs. Shreve. The issues thus presented involve the questions of the abandonment of the child by the mother and the latter's fitness and competency to have the care, custody, and control of the child. In its findings of fact, the court below found, among other things, that Grace Akers, the mother of the child, in the month of November, 1915, abandoned the child, and then and ever since then surrendered all her parental rights to said child, and, furthermore, that she was not a fit or proper person to have the care, custody, or control of the child, nor a competent person to be the guardian of the person or estate of the child. A reversal of the order is urged upon the ground that these findings are not supported by any competent evidence.

The uncontradicted evidence offered and received in support of the application of the mother shows that Grace Akers was married at the age of 17 years at the home of her mother, in Whispering Pines, Lake county, to Earl Akers, August 8, 1912, and that Earl Akers at that time was about 35 years of age. For a period of four months thereafter she and her husband were domiciled in the home of her mother. From there the couple went to reside in Lakeport, where her husband secured employment on a stage line, and there they remained for a period of five months, when they returned to the home of Mrs. Akers' mother, where the child in controversy was born. When the child was three or four months old, the Akerses removed to Cobb Mountain, where they resided for about five months, Mrs. Akers all the while being employed as a cook for a sawmill crew of seven men. Then the family moved to Napa City, where they occupied a seven-room house for the period of a year or more, and during that time Mrs. Akers, in order to support the family, took in roomers, boarded three men, and took in family washing and ironing. The Akers family returned to the home of the mother of Mrs. Akers, and, after three or four months there, Mrs. Akers secured employment at Adams Springs, in Lake county, her husband and child remaining in the meanwhile at her mother's home. During a small portion of the time mentioned, the husband was incapacitated for work and during most of the time was unable to secure more than occasional employment at his trade, that of machinist. After working four or five months at Adams Springs, Mrs. Akers decided to separate from her husband because of his refusal, or inability, to support her, and she did so, leaving the child with her mother.

Shortly after the separation, her husband forcibly took the child from the grandmother and placed it with his sister in Middletown. Mrs. Akers proceeded to Middletown and succeeded in having the child returned to and placed in the care of the grandmother. The husband again forcibly took possession of the child and placed it in the custody of Mrs. Shreve, at Calistoga, who agreed with the husband to keep and care for the child for the sum of $20 per month. The mother made no further effort to regain control of the child, and moved to San Francisco, where she resided with her sister, a married woman having a family of five children, and in that city supported herself for four years, working under the name of Grace Miller, at times, as a day waitress in restaurants, as a servant in apartment houses, and as a helper in an airplane factory. During these four years she visited the child once at Calistoga, and sent the child handkerchiefs and candy. Leaving San Francisco, she went to Globe, Ariz., where she worked for three weeks as a waitress under the name of Grace Lien (she explained that she was working under assumed names because she did not want her husband to know where she was), and then went to Douglas, Ariz., where she purchased a candy store under an installment contract, and conducted the same in person.

Her husband died in November, 1919. Upon receiving news of his death, Mrs. Akers wrote from Douglas, Ariz., to her mother to get the child, and then came to San Francisco to oppose Mrs. Shreve's application and prosecute her own application for the guardianship of the child. When leaving Douglas, Ariz., she placed the candy store in the hands of an agent to be sold, and decided that she would not return to Arizona save for the purpose of consummating the sale of the store. Mrs. Akers' mother owns and lives on a 600-acre ranch in Lake county, has a comfortable home, is well able to care for the child and its mother, and would willingly provide a home for both.

The ability and fitness of Mrs. Shreve to have the care and custody of the child was not disputed. In support of her application and in opposition to the application of Mrs. Akers, evidence was offered and received in an endeavor to show that Mrs. Akers, some 5 years prior to the institution of the guardianship proceedings, and particularly during the period of her married life when she was living with her husband, was guilty of immoral conduct of so grievous a nature as to render her incompetent to have the care and custody of the child then or at any time since then. Upon that phase of the case, the only competent evidence adduced was to the effect that, when living in Napa City, some 5 or 6 years prior to the hearing of the application for guardianship, the reputation of the mother of the child for "truth, honesty, and integrity was bad"; that at that time she associated with another woman whose reputation for "truth, honesty, and integrity was bad"; that on several occasions she was seen in restaurants at varying hours of the night with this woman and two men; that some three or four men were seen going regularly to her house, and that on one or more occasions she went automobile riding with one of these men. The mother explained, and it was not only not disputed, but it was in effect admitted, that these men were either roomers or boarders, and therefore had a legitimate purpose in going to her home. The automobile rides, so the mother explained, and in this she was not contradicted, were with a man who not only boarded with the family, but was, as well, a particular and intimate friend of the husband from boyhood. She further testified that these rides were had with the knowledge and consent of her husband. It was not shown nor claimed that they were clandestinely taken, nor that they or the visits of the mother to restaurants in company with one other woman and two men were for any but a legitimate and innocent purpose. Mrs. Akers' mother, sister, and nephew, the latter a young man of the age of 18 years, testifying in her behalf, gave evidence tending to show that her reputation before, at, and at all times subsequent to her marriage was in every respect good.

There was uncontradicted evidence to the effect that the mother, after separating from her husband, lived and worked under assumed names because he had threatened to kill her, and therefore she desired to conceal her whereabouts from him. It was also shown in evidence against the mother that some several years before the hearing, and while she was living with her husband, she had written and addressed a letter to one of the men who was boarding with her, wherein she declared that he, meaning her husband, was "getting worse and worse till it is impossible to stand it," and then begged the man to whom the letter was addressed to always remember that he "had the first pure love of one woman." It was, however, an undisputed fact in the case that this letter, evidently written in a moment of caprice, had never been mailed or delivered to the person to whom it was addressed, and that it was written in the presence of the husband.

[1-4] In accordance with the general presumption in favor of competency, a parent is presumed to be competent to discharge the duties of guardianship in the absence of an affirmative showing to the contrary. Guardianship of Salter, 142 Cal. 412, 76 Pac. 51; Matter of Forrester, 162 Cal. 493, 123 Pac. 283; Matter of Galleher, 2 Cal. App. 364, 84 Pac. 352. We may assume that, inasmuch

as the general moral character of the mother of the child is involved in the issue of her fitness to have the care of her child, and the particular traits of character relevant to the issue are not clearly defined, evidence of her reputation for truth, honesty, and integrity was admissible under that issue. Although it may not be amiss to say that a mere lack of integrity is not sufficient in itself to justify depriving a parent of the natural right to the custody of the child. Matter of Galleher, supra. It may be conceded that the admission of evidence of such reputation in another community and at a remote time rested largely in the discretion of the trial court, the proper exercise of which as a matter of course was dependent upon the question of whether or not, under all of the circumstances, such reputation, despite its remoteness as to time and place, had a tendency to establish the mother's reputation at the precise time and place when and where it was in issue. Coates v. Sulau, 46 Kan. 341, 26 Pac. 720; State v. Lanier, 79 N. C. 622; Snow v. Grace, 29 Ark. 131; Holliday v. Cohen, 34 Ark. 707; Cline v. State, 51 Ark. 140, 10 S. W. 225. While it cannot be said, under the circumstances of the case at bar that the court abused its discretion in permitting proof of the mother's prior reputation for traits of character relevant to the issue of her fitness to have her child, still we are not satisfied that, standing alone, the competent evidence adduced upon this phase of the case would have impelled the trial court to the conclusion that the mother was not a fit and proper person to have the care, custody, and control of her child. Counsel for respondent must have been possessed of the same misgiving when they insisted, despite repeated timely and appropriate objection, upon having in evidence the testimony of the chief of police of Napa City to the effect that the husband of Grace Akers had said to him, some 5 or 6 years before, that he, Akers, was bent on killing a certain man because she had confessed to him (Akers) that she had had illicit relations with that certain man. Hearsay evidence as to the statements of particular persons in regard to the commission of particular acts by a party is inadmissible for the purpose of proving character. Obviously this was hearsay, and its prejudicial effect is instantly manifest. When overruling the objection to it, the trial court made the following comment:

> "No; I want to hear about that. They don't say things like that about good women. You don't assume that a husband would go about telling stories of that kind about his wife if she were a good woman, do you?"

This statement indicates with much certainty that the evidence erroneously admitted contributed materially to, if it did not entirely control, the conclusion of the trial court, ultimately expressed in its findings that the mother was not a fit and proper person to have the care and custody of her child.

It follows necessarily that the error in this particular warrants and requires a reversal of the order, unless it can be said, as counsel for respondent contend, that the finding of the trial court that the mother had abandoned the child is supported by evidence, and that that finding alone will suffice to support the order appealed from.

[5, 6] Upon that phase of the case, the evidence in its entirety does no more than show that, being dissatisfied, if not discouraged, with the prospect of being compelled indefinitely to bear the burden of supporting herself and her husband, the mother of the child separated from her husband, and, after an unsuccessful endeavor to have the child placed with and cared for by its grandmother, left for fields anew, far removed from the "Whispering Pines," to work out her own salvation single-handed and alone. Whether or not she was justified in separating from her husband need not be determined here. Suffice it to say that the right of a parent to the custody of its child cannot be held to be forever forfeited by an act of relinquishment committed under circumstances of coercion, caprice, and discouragement. Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. St. Rep. 500. Nor should the forfeiture of parental rights be decreed against a parent who has merely acquiesced in the support of the child by other relatives. Matter of Forrester, supra; Matter of Galleher, supra. In so far as the record before us shows, the mother did nothing which indicated an intention to abandon the child, and it is well settled in this state that such an intention must be shown before a finding of abandonment can be rightfully made. In re Vance, 92 Cal. 195, 198, 28 Pac. 229; Guardianship of Snowball, 156 Cal. 240, 104 Pac. 444; In re Cordy, 169 Cal. 150, 146 Pac. 532, 534; In re Schwartz, 171 Cal. 633, 154 Pac. 304; Moch v. Superior Court, 39 Cal. App. 471, 179 Pac. 440.

The record reveals that the trial court made the order appealed from largely, if not entirely, upon the theory that—

> "The only purpose in an inquiry of this kind is to determine what is best to be done with the child for its own welfare, and the question as to the character and reputation, fitness, or unfitness, of the mother in a case of this kind, seems to me to be not the most important one."

That this was the attitude of the trial court is evidenced by the further statement:

> "I don't know of any higher law than that this child be cared for, and that it be in the custody of people who are able and willing to support it, and they have done that and shown that for these 4 years."

[7, 8] It is now insisted by counsel for respondent that regardless of the erroneous admission of palpably prejudicial evidence, and apart from the question of the insuffi-

ciency of the evidence to support a finding of abandonment, the order appealed from should be affirmed upon the theory indicated and adopted by the trial court. This we cannot do, because it is the settled rule of law in this state that the care, custody, and control of a minor child under the age of 14 years must be committed to its parents, rather than to strangers, unless it be shown and found that the parent is unfit to perform the duties imposed by the relation, or has, by abandonment of the child, forfeited the natural right to its custody. In short, in a contest for guardianship, as here, between a parent of a child and a stranger to the child, the paramount question is the competency of the parent to act as guardian, and, in the absence of a justifiable finding of the parent's incompetency, the court must appoint the parent as guardian, despite the fact that the material welfare of the child may perchance be enhanced by committing its care and custody to another person. Code Civ. Proc. § 1751; Civ. Code, § 246, subds. 3, 4; In re Campbell, 130 Cal. 380, 62 Pac. 613; Guardianship of Salter, supra; Matter of Forrester, supra; Guardianship of Mathews, 169 Cal. 26, 145 Pac. 503. The case of the Guardianship of Imperatrice, 188 Pac. 48, is not in conflict with anything now or heretofore held by this court in cases of this character. That case clearly recognizes the rule that primarily the parents of the child have the preferential right to its custody by nature and statutory enactment, and it does no more than hold that this right must give way in the presence of a sufficient showing, as was made in that case, that the mental and moral delinquencies of the parents made them unfit and incompetent to be the guardians of the child in controversy. While the recent case of the Guardianship of Hawkins, 192 Pac. 30, does not in terms make the distinction which obtains in the operation of the rule in question when applied to parents asserting the right of guardianship as against a stranger, nevertheless the decision in that case in effect recognizes the distinction by proceeding throughout upon the theory that the evidence sufficiently showed the incompetency of the parent seeking guardianship, and, of course in that situation the welfare of the child was the paramount point to be considered, in keeping with the rule so concisely and clearly stated in the case of the Guardianship of Allen, 162 Cal. 625, 124 Pac. 237, cited as an authority in the case last referred to.

[9, 10] Finally, it is said that, in any event, the mother should be denied guardianship because it appeared that she was no longer a resident of the state of California. In response to this contention it will be enough to say that the evidence showed that she returned to California with the intent and purpose of residing in California and regaining the custody of her child, and that, if she returned to Arizona, it would be only temporarily and for the purpose of disposing of her business there. In conclusion, it may not be amiss to say, as was said in effect in the Guardianship of Mathews, supra, that, even though it was shown that the mother had not, at the time of the hearing, a permanent home of her own, and therefore might be unable for the time being to keep the child with her personally, nevertheless she should not, for that reason alone, be deprived of the legal custody of the child and the related right of selecting a fit and proper place where he should be kept and cared for.

For the reasons stated the order appealed from is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; SLOANE, J.; LAWLOR, J.

50 Cal. App. 138

NEWMAN v. NICKELL et al. (Civ. 2170.)

(District Court of Appeal, Third District, California. Nov. 24, 1920. Hearing Denied by Supreme Court Jan. 20, 1921.)

1. Limitation of actions 🔑58(4)—Stockholders' liability not extended by renewal note for corporate indebtedness.

Under Code Civ. Proc. § 359, requiring action to enforce a liability against corporation stockholders to be brought within three years after the liability is created, an action against stockholders to enforce their liability for the corporation's indebtedness, evidenced by notes for balance of purchase price of land, was barred three years after the purchase, notwithstanding renewal notes were given for the original notes, where no additional security was given and no new consideration passed.

2. Bills and notes 🔑430—Execution of new note prima facie not payment.

Prima facie the execution of a new note to take the place of an old one is not a payment, unless it is expressly so provided.

3. Corporations 🔑264 — Action to enforce stockholders' liability governed by three-year statute; "liability created by law."

The obligation of a stockholder to corporate creditors is a liability created by law, and Code Civ. Proc. § 359, requiring actions against stockholders to enforce a "liability created by law" to be commenced within three years after discovery of facts on which liability was created, applies thereto.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liability Created by Law.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Peter Newman against L. W. Nickell and others. Judgment for defendants, and plaintiff appeals. Affirmed.

William A. Gett, of Sacramento, for appellant.

J. O. Prewett and Downey & Downey, all of Sacramento, for respondents.

PREWETT, Presiding Justice. The appellant commenced this action against the respondents to recover from them their proportion of an indebtedness due to him from the Nickell Investment Company, a corporation. The respondents are sued as stockholders of the corporation. The respondents by answer admit the existence of the indebtedness by the corporation and their liability as stockholders and plead the statute of limitations. The facts of the matter are stated in the findings substantially as follows:

In April, 1911, the corporation purchased from the appellant a certain tract of real property situated in the city of Sacramento, for the agreed price of $48,000, and at the same time paid on the purchase price thereof the sum of $13,000 in cash and executed its promissory notes in the sums of $5,000 and $30,000, respectively. As security for the payment of the two promissory notes, it executed its trust deed to trustees conveying the premises purchased. On March 19, 1917, the notes remaining wholly unpaid, the corporation executed to the appellant one new note for the entire indebtedness of $35,000 and secured the payment of the same by the execution of a new trust deed conveying the same premises. The old notes were delivered up and destroyed. The resolution of the directors authorizing the execution of the new note recites:

> "Whereas, the said Peter Newman is willing at this time to renew the entire loan of $35,000 and to accept a new note from this corporation," etc.

The trial court found that the execution of the new note was but a renewal of the original indebtedness, found in favor of the defendants upon their plea of the statute of limitations, and rendered judgment accordingly.

[1, 2] The appellant insists that the finding of the court to the effect that the execution of the new note was but a renewal of the former indebtedness of the corporation to him is not sustained by the evidence, and that, on the contrary, the evidence shows that the execution of the new note was an entirely new and distinct transaction. But this position is untenable. Prima facie the execution of a new note to take the place of an old one is not a payment unless it is expressly so provided. Among a multitude of authorities in this state to the same effect touching this point we will quote from but one:

> "It is a well-settled rule that, in the absence of an agreement to that effect, a promissory note is not paid by the execution of another note, but that the time for payment is thereby merely suspended until the maturity of the new note." White v. Stevenson, 144 Cal. 108, 77 Pac. 830.

[3] It is equally well settled by a like extended line of authorities that the obligation of a stockholder to creditors of his corporation is a liability created by law and that the three-year limit applies to such obligation, as provided in section 359 of the Code of Civil Procedure. This doctrine has been much discussed in this state, but it is too firmly established to be open to question. Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87; Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594, 37 Pac. 499; Wells v. Black, 117 Cal. 157, 48 Pac. 1090, 37 L. R. A. 619, 59 Am. St. Rep. 162; Santa Rosa National Bank v. Barnett, 125 Cal. 408, 58 Pac. 85; Jones v. Goldtree, 142 Cal. 383, 77 Pac. 939; Gardiner v. Royer, 167 Cal. 238, 139 Pac. 75. In the instant case no additional security was given and no new consideration passed. There never was at any time an actual borrowing of money from the appellant, and the whole indebtedness from first to last was merely for the unpaid balance of the purchase money.

This is the only point in the case. The facts are undisputed, the law applicable to the case is free from doubt, and we find no just cause to interfere with the conclusions of the lower court.

The judgment appealed from is affirmed.

We concur: HART, J; BURNETT, J.

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50 Cal. App. 75

GARVEY SCHOOL DIST. OF LOS ANGELES COUNTY et al. v. SOUTHWESTERN SURETY INS. CO. et al. (Civ. 3435.)

(District Court of Appeal, Second District, Division 1, California. Nov. 20, 1920. Hearing Denied by Supreme Court Jan. 17, 1921.)

1. Schools and school districts 🔑81(2)—Failure to advertise for bids after contractor's default held not to prevent recovery against surety.

Under Pol. Code, § 1617, subd. 20, requiring school district contracts to be let to the lowest responsible bidder after advertisement, etc., where a contract so let authorized the district to provide materials and workmen in case of the contractor's refusal or neglect, and, upon the contractor's default, and after notice to the surety, the district, in accordance with the contract, completed the work, its failure to advertise for bids, etc., for the completion of the work did not prevent recovery against the contractor's surety for the excess of the cost above the contract price.

2. Schools and school districts ⚿81(2)—Offer of contractor's surety to complete contract after district had taken charge held not to relieve surety of liability.

Where a school district contract authorized the district on the contractor's default to supply materials and workmen after three days' notice in writing and deduct the expense from the contract price and the district after such notice to the contractor and his surety took charge of the work, the surety's subsequent offer to perform the contract did not defeat recovery of the excess of the cost above the contract price, under Civ. Code, § 2839, providing that an offer of performance exonerates the surety, and section 1490 relative to the time for an offer of performance.

3. Schools and school districts ⚿81(2)—Contractor's surety not entitled to complain where additional expense incurred in completing work was reasonable cost.

Where, after a contractor's default, a school district completed the work in accordance with the contract, the contractor's surety could not complain that it was given an opportunity to complete the building after the contract price was exhausted, or that the work of completion thereafter was done by contract let to the lowest bidder; it having been found that the additional expense incurred was the reasonable cost of finishing the building.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Garvey School District of Los Angeles County and others against the Southwestern Surety Insurance Company and another. Judgment for defendants, and plaintiffs appeal. Reversed.

A. J. Hill, Co. Counsel, Hugh Gordon, Asst. Co. Counsel, and Jerry H. Powell, Deputy Co. Counsel, all of Los Angeles, for appellants.

Hickcox & Crenshaw, of Los Angeles, for respondent.

CONREY, P. J. This is an action on the contractor's bond given to the owner as security for the faithful performance of a contract made with the plaintiff school district by one B. H. Paul for the erection of a school building. The plaintiffs appeal from the judgment entered in favor of defendants.

The powers and duties of trustees of common school districts are, among others, the following:

> "To let all contracts involving an expenditure of more than two hundred dollars for work to be done or for materials or supplies to be furnished, * * * to the lowest responsible bidder who will give such security as the board may require or else to reject all bids. * * * For the purpose of securing bids the board must publish a notice calling for bids stating the work to be done or materials or supplies to be furnished, and the time when and the place where the bids will be opened, at least once a week for two weeks in some daily or weekly newspaper, published in the county. * * *" Pol. Code, § 1617, subd. 20.

The Paul contract was let in the manner required by law. It was dated August 18, 1915, and by its terms the contractor was allowed 105 working days from that date within which to complete the contract. In other words, the work was to be finished about the middle of December, 1915. It was provided in paragraph 6 of the contract that—

> "Should the contractor at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen (after three days' notice in writing given) to finish the said works, and the reasonable expenses thereof shall be deducted from the amount of said contract price."

The bond was executed by defendant Southwestern Surety Insurance Company. The other defendant company is an insurance company which later assumed the liabilities of the Southwestern Company. It was provided in the bond that the principal contract was therein expressly referred to and made part thereof.

The findings state:

> "That on or about the 16th day of October, 1915, the contractor, B. H. Paul, ceased work on said building, and thereafter continuously and at all times up to about the 12th day of January, 1916, failed to furnish labor and material to carry out said contract."

In fact, he never did anything further on the contract, unless it be held that work done after the date last mentioned, or some part of it, was done by the school district in his behalf. On November 1, November 4, and November 22, 1915, the school district gave to the contractor and to the Southwestern Insurance Company three-day notices framed in accordance with said clause 6 of the contract. The parties notified did nothing in response to those notices, and the school district did not then furnish any materials or cause any work to be done on the building. Again, on the 8th day of January, 1916, the school district gave to the same parties a fourth notice in like form as before. Thereupon the school district, on the 12th day of January, 1916, with the knowledge and consent of the contractor, took entire charge of the work, and after said time furnished all of the necessary materials and workmen, and caused the work of completing the school building to be carried on, and from and after that time the contractor took no part under the contract in the construction of the building, and all of the contracts let for labor and materials were let in the name of the school district and by the school district. Prior to the 16th day of October, 1915, the contractor had earned and had been paid the first and second installments of the contract price, and there remained unexpended of the contract price the sum of $20,535. The contractor remained in charge of the premises until the 12th day of January, 1916.

On the 14th day of January, 1916, the Southwestern Surety Insurance Company offered in writing to the school district that it would furnish all the necessary material and workmen to complete the contract, and would fully and faithfully perform the conditions thereof, and demanded that it be permitted to complete the contract. This offer was refused by the school district, which at that time had taken charge of the work. Between the 12th day of January and the 21st day of June, 1916, the school district expended in carrying out the work for the completion of said building the sum of $20,535, which was the reasonable value of all the material and workmen thus furnished. On June 21, 1916, the school district notified the contractor and said surety company that there had been expended on the school building the sum last mentioned, in addition to the sum previously paid to the contractor, and that the building was not completed, and the school district requested and demanded that the contractor and said surety company proceed to complete the work in accordance with the contract. This the contractor and surety company wholly neglected and failed to do. Thereafter the school district completed the building in accordance with the original plans and specifications, at an additional expense of $3,996.99, to recover which amount together with certain alleged special damages, this action has been prosecuted.

The work done between the 12th day of January, 1916, and the 21st day of June, 1916, whereby said sum of $20,535 was expended, was done by the school district without any publications calling for bids or specifying the time and place where bids were opened; in other words, without any attempt to let contracts in the manner described in the section of the Political Code to which we have referred.

Upon the facts found, judgment should have been rendered in favor of the plaintiff, unless the judgment should be affirmed for one of two reasons which on this appeal are relied upon by the respondents. These contentions are that the judgment should be affirmed (1) for the reason that the school district made expenditures in excess of the statutory amount without advertising for bids as required by law; (2) for the reason that the surety company offered to perform the contract and fulfill all the obligations thereof.

[1] It is contended by respondents that their first proposition is sustained by five decisions of the Supreme Court of this state. Dougherty v. Foley, 32 Cal. 403, and Meuser v. Risdon, 36 Cal. 239, are street assessment cases in which it was held that, where a contractor failed to enter upon the contract or had abandoned the work, it was necessary for the municipality to readvertise for bids. But the statute under which the proceedings in those cases had been conducted in terms provided that there must be a readvertisement for bids under the circumstances stated. In this respect they are different from the statute in question in this case, inasmuch as said section of the Political Code is silent on the subject of readvertisement for bids or reletting of contracts. In Reams v. Cooley, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A, 1260, and Matthews v. Town of Livermore, 156 Cal. 294, 104 Pac. 303, the court was dealing with a situation created by the failure of public corporations to comply with the provisions of law governing the letting of original contracts, and not with any question pertaining to the duty or power of the district or corporation to proceed under circumstances like those presented in the case at bar after a contract had been let in accordance with law.

Foxen v. City of Santa Barbara, 166 Cal. 77, 134 Pac. 1142, is the one case in which the facts are closely parallel to those in the case now before the court, with a difference, however, which we think is important. The city of Santa Barbara is a municipal corporation operating under a freeholders' charter in which there are sections which provide an exclusive method for the construction of all public works. Proceeding according to that method, the city entered into a contract for the boring of certain tunnels to develop water for use by the inhabitants of the city. It is stated in the opinion that—

> "Subsequently, with the consent of the defendant, the contractor abandoned the work and the water commissioners of the said city thereafter prosecuted the construction of the tunnels."

This work was done by employing engineers, foremen, bosses, and men to do the work, without attempting to let the contract "to the lowest responsible bidder," as required by the charter. On examining the record in that case we learn that, as set forth in the findings, the contractor "did by and with the consent of said city, relinquish and abandon the said contract or contracts so far as they obligated him to construct the then uncompleted portion" of the described work. Therefore, in passing, we express the opinion that when the court said in the decision that the contractor "abandoned the work," those words were used in the sense of the findings; that is to say, that the contract was abandoned. It was held that under those circumstances the water commissioners did not have power to perform the work on the tunnels by day's labor, and that any contract which they made with the plaintiff in that connection was void.

In the present action the contract was not abandoned by the contractor, nor was it abandoned by the school district. The contractor had failed to complete the work. The school district insisted upon its completion in accordance with its terms. In proceeding to do the work on and after the 12th day of January, 1916, the school district was proceeding in accordance with the terms of a contract still in existence, which had been let according to law, and which by its terms provided for the then existing emergency. The provision thus made was a part of the contract of suretyship. The public interests which were intended to be guarded by the provisions of section 1617, subdivision 20, of the Political Code, were fully protected by this procedure. The surety company was protected because it was first given the very opportunity provided for by the contract to complete the work, of which opportunity it did not avail itself within the time prescribed by the notice given in accordance with the contract, and further because the sum thereupon expended by the school district for carrying on the work was only the reasonable value of the materials and workmen thus furnished.

We have not deemed it necessary to discuss the numerous decisions from other states which are referred to in the briefs, most of which sustain the position of appellants on this question. It is conceded that a few decisions run the other way, notably the case of Chicago v. Hanreddy, 211 Ill. 24, 71 N. E. 834, which is cited in the Foxen Case, supra. We are satisfied that the rule contended for by respondents and indicated in the Foxen Case, even if admitted as the true rule, should not be held to apply, unless the contract has been abandoned and thereby is at an end.

In Bacigalupi v. Phœnix Building, etc., Co., 14 Cal. App. 632, 639, 112 Pac. 892, 894, the First District Court of Appeal describes in apt words the purpose and effect of contract terms similar to those contained in section 6 of the present contract which we have quoted. The court said:

> "This paragraph has no application to the case where the contractor entirely abandons the contract, but only applies where he is proceeding under the contract, but fails to supply a sufficiency of materials or workmen to complete the contract within the time limited by the contract. It was intended to give the owner the right, under such circumstances and after giving the notice, to take the completion of the contract into his own hands, and to deduct the cost thereof from the contract price. This we think to be the meaning of the paragraph as between the owner and the contractor, and by which the surety was bound."

In legal effect, the work is being done under the contract, and in its performance the owner is acting for the contractor, as it was agreed that he might do under those circumstances.

[2, 3] The offer of the surety company to perform the contract, when considered with relation to the expiration of the time limited in the three days' notice, and in connection with the fact that on January 12th the school district had taken charge of the work, was too late. On the other hand, if such offer be considered with relation to the time when the actual liability of the surety company accrued, it was premature. "Performance of the principal obligation, or an offer of such performance, duly made as provided in this Code, exonerates a surety." Civ. Code, §§ 2839. But "where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards." Civ. Code, § 1490. Upon the facts as they existed on the 12th day of January, 1916, the school district had the right which it exercised to proceed with the performance of the work, and to charge against the contract price the reasonable expense thereof. When this had been done and the full amount of the contract price had been expended by or on behalf of the contractor—that is to say, on the 21st day of June—it was found that the work was not complete. Respondents cannot complain of the fact that at that time they were given an opportunity to complete the building, which offer they declined to accept. Neither can they complain that from and after that time the work of completion was done by a contract let to the lowest bidder after proceedings in accordance with the provisions of the Political Code. The result in any form is in its essence just the same. The liability had accrued, and the amount thereof was to be determined in accordance with the reasonable cost of finishing the building. The additional expense thus incurred is found to have been the reasonable cost thereof.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

50 Cal. App. 246

CITRUS SOAP CO. v. PEET BROS. MFG. CO. (Civ. 3363.)

(District Court of Appeal, Second District, Division 1, California. Dec. 2, 1920.)

1. Sales ⚷181(11)—Evidence sufficient to sustain finding seller's failure to deliver by date set caused by influenza quarantine.

In an action by the seller of glycerine against the buyer for failure to accept delivery, evidence *held* sufficient to sustain the trial court's finding that plaintiff seller's failure to deliver all of the glycerine prior to the date specified in the contract for complete delivery was caused by an influenza quarantine and consequent delay in production; the contract having been made subject to suspension in case of interference in plant whereby buyer or seller should be prevented from producing or receiving the goods.

2. Sales ⚷81(4)—Seller can perform within reasonable time after date set on suspension in production of which notice given.

Where glycerine was sold, entire delivery to be by December 31st, the contract stipulating for its suspension if any interference in plant prevented production, and December 9th by letter the seller advised the buyer it had been forced to close down by the health authorities due to an influenza quarantine, stating that it was in hopes of being able to deliver the entire order by December 31st, and the buyer did not object to the sufficiency of such notice of suspension of the contract, under its terms the seller was entitled to perform within a reasonable time after December 31st.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by the Citrus Soap Company against the Peet Bros. Manufacturing Company. From judgment for plaintiff, defendant appeals. Affirmed.

Ransey Probasco and Robinson & Sizer, all of Oakland, for appellant.

Bischoff & Thompson, of San Diego, for respondent.

CONREY, P. J. Action to recover damages for breach of a contract for the sale of merchandise bought by defendant from plaintiff. The plaintiff recovered judgment, from which judgment the defendant appeals.

Under date of November 7, 1918, plaintiff sold and agreed to deliver to the defendant, "Sellers usual good quality soap lye crude glycerine"; the quantity specified being 11 to 12 drums, weighing approximately 1,100 pounds net each. The place of delivery was Berkeley, Cal. The goods were to be delivered "as made, but entire delivery to be completed prior to December 31, 1918." Glycerine was made by plaintiff as a by-product in the manufacture of washing powder.

The contingency of delay in performance of this contract was covered as follows:

> "This contract is made subject to suspension in case of fire, flood, explosion, strike or unavoidable accident to the machinery or the works of the producers or receivers of this material, or from any interference in plant by reason of which either buyers or sellers are prevented from producing, delivering or receiving the goods and in such event the delivery thus suspended is to be made after such disabilities have been removed; otherwise to be fulfilled in good faith. Notice, with full particulars and the probable term of the continuance of such disability, shall be given to the other party hereto, within ten days of the date of the occurrence of such disability."

Under this contract the plaintiff delivered prior to December 31st, three drums which were accepted. The remaining nine drums were shipped by the plaintiff from San Diego as follows: Four drums shipped December 21st, arrived at Berkeley December 31st; three drums shipped December 28th, arrived at Berkeley January 2d; two drums shipped December 30th, arrived at Berkeley January 7th. Acceptance of these nine drums was refused. The damages awarded are the difference between the agreed price of 30 cents per pound and 11 cents per pound, the market value of the glycerine at the time of defendant's refusal to accept and pay therefor.

The court found that the shipments were made and the dates of arrival at Berkeley were as above set forth; nevertheless, the court also found that "said goods were shipped and delivered in all respects in conformity with said contract of sale." Appellant excepts to this finding and claims that there was no evidence to sustain such finding, since it is an established fact that the nine drums which appellant refused to accept did not arrive at the agreed place of delivery before the 31st day of December, 1918.

But the court further found as follows:

> "That the factory and place of business of plaintiffs is in the city of San Diego, state of California. That during the months of November and December, 1918, there was prevalent in the city of San Diego an epidemic of Spanish influenza. That on December 5, 1918, the common council of the city of San Diego, at the request of the board of health of San Diego, to protect the health of the people of San Diego adopted a quarantine Ordinance No. 7587, entitled 'An ordinance establishing a general quarantine within the city of San Diego, Cal.,' providing that all factories and places of business, including the factory and place of business of plaintiff, should be closed for four days. That plaintiff in compliance with the provisions of said ordinance closed its factory and place of business for a period of four days, beginning with December 6, 1918. That on account of such interference plaintiff was further interrupted in the manufacture of glycerine for a period of five days. That said plaintiff on account of said interference was not able to produce and manufacture said glycerine and make

delivery of nine drums thereof prior to December 31, 1918. That the failure of plaintiff to deliver said glycerine prior to December 31, 1918, and all the delay in arrival and delivery at Berkeley, Cal., was due to said interference caused by the enforcement of said ordinance."

Appellant contends that there is no evidence to excuse plaintiff's failure to deliver the agreed amount of glycerine prior to December 31st. First, it is argued that the evidence shows without contradiction that the period of interference with plaintiff's manufacture and delivery of the glycerine, to wit, nine days, as found by the court, was not sufficient to prevent the plaintiff from delivering the goods within the agreed period of time if reasonable diligence to that end had been used. The plaintiff's vice president testified:

> "We began to produce crude glycerine for the purpose of fulfilling this contract about November 11, 1918. We commenced the manufacture of glycerine four days after the contract was executed, and we made about three drums a week."

At that rate of manufacture, practically the whole amount required by the contract would have been produced by the 6th day of December, the date when the interference by reason of influenza first occurred. The complete resumption of business by plaintiff is established as of date December 15th. Appellant contends that on these facts, established by the plaintiff's own evidence, the plaintiff's noncompliance with the contract is proved and that there is no evidence sufficient to sustain the contrary finding; that according to this evidence all of the glycerine shipped on December 21st and December 28th must have been on hand prior to December 6th, and should have been shipped at such time, since the agreement was to make shipment of the merchandise as made; that, since business was fully resumed on the 15th of December, no sufficient reason can be shown to exist justifying the delay in shipping the last two drums until December 30th, or even the shipments as made on December 21st and 28th.

[1] On the other hand, there is evidence tending to prove that the rate of production was less than three drums per week, and that, at the time the quarantine went into effect on December 6th, the plaintiff had only two drums on hand. These were not shipped until two weeks later, December 21st, when four drums were shipped, and the others followed as above stated. But the agreement to ship "as made" was not an agreement to ship one drum at a time. A reasonable accumulation for shipment would be allowed. The evidence showed that this was not at all unusual. The conflict in the evidence was such that we are not able to say that the evidence is insufficient to sustain the court's finding that plaintiff's failure to deliver all of the glycerine prior to December 31st was caused by the quarantine and consequent delay in production.

[2] Appellant further contends, however, that the evidence is insufficient to establish another fact essential to respondent's right of recovery, in this, that respondent did not give notice of the interference in operation of its plant, and probable continuance of delivery, as required by the contract. The court found that plaintiff gave notice in writing, in due time, and held that the notice sufficiently complied with the requirements of the contract. Said notice was given in due time, and receipt thereof by appellant is admitted. It was in the form of a letter, dated December 9, 1918, wherein respondent said:

> "Please be advised that we have been forced to close down by the health authorities due to the quarantine established in San Diego against the influenza. The quarantine went into effect Friday morning, the 6th of December, and we may be compelled to take advantage of the contingency clause of our contract. However, we have finished six drums of the glycerine, three of which we have already shipped, and we are in hopes of being able to deliver the entire amount by December 31st."

Appellant claims that this was not the notice required by the contract, because it failed to state the probable term of disability, and because it further stated that respondent hoped to be able to deliver the entire amount by the specified date. While the notice did not in terms set out the number of days of delay in production and shipments which would probably result from the quarantine, it did imply that the delay might carry the time of completion of deliveries to a date later than December 31st, although appellant hoped that this result might not follow. The contract did not require more than that reasonable warning be given of the fact of delay, the nature of the cause thereof, and the probable extent of interference with timely performance of the seller's obligation. The notice given was a reasonable attempt, in good faith, to meet these requirements. It does not appear that appellant objected to the sufficiency thereof, until the point was raised in the defense of this action. We are of the opinion, therefore, that under the terms of the contract, respondent was entitled to perform the contract within a reasonable time after December 31st. Since this was done, the defendant was bound to perform the contract, and should be held liable for its breach thereof.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

50 Cal. App. 11

Ex parte DEES. (Cr. 943.)

(District Court of Appeal, First District, Division 2, California. Nov. 13, 1920.)

1. Licenses 🔑7(1)—Ordinance imposing tax on reselling theater tickets invalid.

An ordinance making it unlawful to engage in the business of selling theater tickets elsewhere than at the theater office without a license, and imposing a charge of $300 a month for such license, is an unwarranted interference with the liberty of citizens of the state and the United States not based upon any reasonable consideration of the public health, morals, or safety, nor of the cost of police supervision, and cannot be upheld as an exercise of the police power.

2. Licenses 🔑15(1) — Reselling of theater tickets sale of "goods," and hence not taxable.

Under San Francisco Charter, art. 2, c. 2, § 15, providing that license taxes shall not be imposed upon any person selling goods, wares, or merchandise at a fixed place of business except such as require permits from the police commissioners, the city cannot impose a license tax on the business of selling theater tickets at a fixed place of business, such tickets being "goods."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Goods.]

3. Licenses 🔑5½—Power to license business is not power to prohibit.

A municipal corporation's power to license a business for revenue is not a power to prohibit.

4. Constitutional law 🔑70(3) — Reasonableness of license on business is question for court.

The question whether an ordinance imposing a license tax on a business is so unreasonable in character as to transcend the proper exercise of the lawmaking power is one to be determined by the court.

5. Licenses 🔑7(3) — Ordinance held invalid because of disparity between tax and that imposed on other lines of business.

An ordinance imposing a license tax of $300 a month on the business of selling theater tickets elsewhere than at the theater office, when considered as a taxing ordinance, *held* unreasonable, oppressive, lacking in impartiality, and unfair in view of the wide disparity between the tax and those levied on other and somewhat kindred lines of business, especially as the business was declared unlawful except upon the condition of prior procurement of the license, and the ordinance sought to reach mere employees of those engaged in the business.

6. Licenses 🔑7(1)—Court must look at substance when ostensible revenue measure is attacked as invalid.

While it will not be adjudged except in a clear case that an ordinance purporting to be a revenue measure is in fact an unlawful attempt to exercise a forbidden police power, courts are not bound by mere forms but must look at the substance of the thing.

7. Statutes 🔑191—Same form of expression as to number of things indicates same purpose and change of expression as to one thing indicates different purpose.

Where one form of expression is used throughout a statute dealing with a number of things, it will ordinarily be adjudged to have been used to achieve the same purpose, and, if one of many things is singled out by a notable change of expression, it is reasonable to determine that a different or modified purpose was intended.

Application by F. A. Dees for a writ of habeas corpus directed to the Chief of Police of the City and County of San Francisco to secure his release from custody under an arrest for violation of the provisions of a license ordinance relating to resale of theater tickets. Petitioner discharged.

Samuel Knight and F. Eldred Boland, both of San Francisco, for petitioner.

Mathew Brady, Dist. Atty., and Jos. T. O'Connor, Deputy Dist. Atty., both of San Francisco, for respondent.

BRITTAIN, J. The determination of this matter depends on the validity of a recent amendment to the San Francisco License Ordinance and particularly to the section thereof relating to the re-sale of theater tickets, for the violation of which the petitioner was arrested.

On behalf of the municipality it is maintained that the provisions of the ordinance were adopted by the local legislative body in the exercise of its admitted power to raise revenue by taxation, and that the courts cannot interfere with the exercise of this power. The petitioner, on the other hand, contends that the provisions in question were not adopted under the power to tax, but constitute an unlawful exercise of the police power, and further that, even considered as a revenue measure, the section of the ordinance under consideration cannot be upheld.

The frequent application to courts of this and other states to adjudicate upon similar license provisions, as well as the common experience of the great mass of people who travel and who attend theatrical performances, have made notorious the fact that it is the custom of so-called ticket speculators to buy in advance numbers of desirable reserved seat tickets for popular performances and to resell them at greatly advanced prices to those who desire to attend the performances, and the equally well-known fact that in large cities at the principal hotels patrons thereof may usually buy reserved seat tickets for the local theaters at a trifling advance over the advertised price of such tickets. However annoying it may be to one desiring to attend a play to be compelled to be satisfied with an undesirable seat, or to pay an excess price for a seat where he may see and hear what is going on upon the stage, it has been said by the Supreme Court that—

> "The sale of a theater ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to the public welfare or convenience, than is the sale of any ordinary article of merchandise at a profit." Ex parte Quarg, 149 Cal. 81, 84 Pac. 767, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747.

From the petition it appears, and upon this proceeding it is admitted by the return, that the petitioner at the time of his arrest was employed by the Van Noy Interstate Company, a corporation, and as such employee was in charge of its business, which business was described as conducting, among other things, the news stands or stores located in the Palace and St. Francis Hotels in San Francisco, paying for the privilege of conducting that business; that a part of that business conducted at said hotels is the selling of theater tickets to guests of said hotels for admission to various theaters in San Francisco, as a necessary prerequisite to its occupancy of the news stands; and that it is a convenience to the guests of said hotels. It was similarly alleged and similarily admitted that the corporation charges in addition to the price of the ticket and the revenue tax thereon the sum of 25 cents for each ticket and no more, and that the gross income from the sale of tickets has not been and is not now in excess of the sum of $600 per month.

[1] From a reference in the respondent's brief it appears the same petitioner was arrested, and on a proceeding similar to this was discharged under the provisions of the ordinance prior to the amendment now under consideration. In re Dees, 189 Pac. 1050. It was determined that the ordinance as it then read was invalid. The only difference between the section of the ordinance then under consideration and the section now before the court is that before the change it purported to make it unlawful for any person to sell any theater ticket, except at the office of the theater, without obtaining a ticket peddler's license, and it now purports to make it unlawful for any person to engage in the business of selling tickets elsewhere than at the office of the theater without obtaining a ticket peddler's license. The amount of the license charge is the same, $300 a month. By the amendment, one of the objections to the validity of the former ordinance was met. It was not necessary to the determination of the matter then before the court to consider the other objections, which were then urged and are now urged against its validity. For reasons stated in the former proceeding, the ordinance under consideration cannot be upheld as an exercise of the police power. In re Dees, 189 Pac. 1050. It constitutes an unwarranted interference with the liberty of citizens of the state and of the United States, not based upon any reasonable consideration of the public health, morals, or safety, nor of the cost of police supervision. Ex parte Quarg, 149 Cal. 79, 84 Pac. 766, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747; Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152.

> "Any attempt on the part of the state, or of the county as one of the subdivisions of the state, to take the property of an individual for public purposes by way of taxation, must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the state." Merced County v. Helm, 102 Cal. 165, 36 Pac. 400.

[2] The power to impose license taxes is vested in the board of supervisors by section 15, art. 2, c. 2, of the Charter, and is limited by the proviso reading as follows:

> "But no license taxes shall be imposed upon any person who, at any fixed place of business in the city and county, sells or manufactures goods, wares or merchandise, except such as require permits from the board of police commissioners as provided in this charter."

There is nothing in the charter requiring permits from the board of police commissioners to sell or resell theater tickets. Rapp v. Kiel, 159 Cal. 702, 115 Pac. 651. Under the rule announced in Merced County v. Helm, supra, the charter power is to be construed strictly in favor of the individual. It is admitted that the petitioner, as the employee of the Van Noy Interstate Company, was selling theater tickets at a fixed place of business. While the Supreme Court in the Quarg Case, supra, in a manner drew a distinction between theater tickets and ordinary articles of merchandise, it did not and was not called upon to consider whether theater tickets are "goods" within the meaning of the phrase, "goods, wares and merchandise." No direct decision upon this question has been found, but there is ample authority for so holding. The word "goods" in the phrase has been defined as "movable property" (Vawter v. Griffin, 40 Ind. 600); "every species of property which was not real estate or freehold" (In re Gay's Gold, 80 U. S. [13 Wall.] 362, 20 L. Ed. 606); "any personal property of which larceny may be committed" (State v. Brooks, 4 Conn. 449); "personal property" (French v. Schoonmaker, 69 N. J. Law, 6, 54 Atl. 225). It has been held to include money (Hall v. State, 3 Ohio St. 576; U. S. v. Candace, 25 Fed. Cas. 280; The Elizabeth and Jane, 8 Fed. Cas. 473; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713); shares of stock (Boardman v. Cutter, 128 Mass. 390; Banta v. Chicago, 172 Ill. 204, 50 N. E. 237, 40 L. R. A. 611); a newspaper (Smith v. Wilcox, 24 N. Y. 358, 82 Am. Dec. 302); a promissory note (New England, etc., Co. v. Commonwealth, 195 Mass. 385, 81 N. E. 385, 11 Ann. Cas. 678; Baldwin v. Williams, 3 Metc. [Mass.] 367); and, a lottery ticket (Yohe v. Robertson, 2 Whart. [Pa.] 162). The conclusion that the required power to collect the license fee on the business of selling theater tickets, they being goods, not only is not found in the charter, but is expressly withheld from the municipality, finds further support in the fact that a proposal to amend the charter in this particular was defeated at the recent general election.

[3, 4] Even though the power to license for revenue be upheld, it is not a power to prohibit. The question of whether or not the ordinance is so unreasonable in character as to transcend the proper exercise of the lawmaking power is one to be determined by the court. Merced County v. Fleming, 111 Cal. 50, 51, 43 Pac. 392. While as a general rule the power to tax may be exercised by the legislative authority without interference by courts, it is subject to many exceptions. So, also, is the general rule that for the purpose of collecting revenue the Legislature may classify different trades and business activities, and may impose widely variant license taxes. In a case where the ordinance purported to fix a license of $100 per quarter for merchants doing a business of $250,000 per quarter, if their goods were actually in the city or in transit to it, but a license of $2,000 on the same merchants whose goods were not in the city or in transit, the Supreme Court, in determining against the validity of the license, quoted with approval a statement from Dillon's Municipal Corporations, as follows:

> "An ordinance passed under a general authority of this nature must be, first, 'reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state'; second, it must not be oppressive; third, it must be impartial, fair, and general; fourth, it may regulate but must not restrain trade." Ex parte Frank, 52 Cal. 609.

In a recent case decided by the Supreme Court, in a learned opinion written by Mr. Chief Justice Angellotti, in which the ordinance in question was declared to be a taxing ordinance, and in which both general rules relied on by the respondent here were declared, and their proper limits defined, it was held that the license on merchants operating vending machines was a tax "solely on his mode of making his sales and deliveries, without any reference * * * to the amount of business done." Recognizing the power of the taxing body to classify, it was held to be based on an unreasonable classification. In re Richardson, 170 Cal. 73, 148 Pac. 213.

[5] The ordinance now under consideration is the general license ordinance of San Francisco. By section 1 it provides that every person, firm, or corporation now or hereafter liable to pay a license tax shall be liable to civil action; by section 2, the license tax shall be due and payable quarterly in advance at the office and to the tax collector; by section 3, that licenses shall not be transferred; and there are other general sections applicable to all licenses which have no bearing on the question involved in this application. From sections 78 to 89, inclusive, are definitions of different classes of businesses and specifications of the amounts to be paid for licenses. Section 90 provides for conviction of a misdemeanor for violators of the ordinance, and there are certain other general provisions. It is admitted by the return that the total gross income of the Van Noy Interstate Company from this business was not in excess of $600 per month, or less than $2,000 per quarter. The ordinance provides a license of $30 per quarter or $10 a month to be paid by express agents whose gross profits are between $1,500 and $2,500 per quarter; mercantile agencies, whose gross receipts do not exceed $3,000 per quarter, are required to pay a license of $15 per quarter, or $5 per month; real estate agents, whose commissions are less than $5,000 per quarter, pay a license of $10 a quarter; proprietors of boarding houses, lodging houses, or apartment houses, whose gross receipts are between $1,000 and $3,000 per quarter, pay a tax of $5; assayers, whose gross commissions are less than $6,000 per quarter, pay a tax of $10; auctioneers, whose sales amount to less than half a million dollars annually, pay an annual tax of $200, while ticket peddlers, if they be ticket peddlers, are required to pay $300 a month. The tax of garage proprietors is based on the amount of floor space occupied, and ranges from $12.50 to $25 per quarter; dealers in secondhand automobiles pay a tax of $50 per quarter; proprietors of baseball fields pay a tax of $150 per quarter; merchandise brokers doing business in any amount under $20,000 per quarter pay a tax of $10 per quarter. Stock brokers, whose gross profits are between $1,250 and $2,500 per quarter, pay a tax of $32; cycloramas and various amusement concerns, including skating rinks, pay $20 to $40 per quarter; junk dealers, whose aggregate sales and purchases amount to less than $5,000, pay $12.50; itinerant venders are required to pay $100 per day for a license to be issued daily. There is no definition in this ordinance of itinerant venders, but the provision is declared to be inapplicable to commercial travelers or selling agents, hawkers on the street, peddlers from vehicles, and persons selling fruit, vegetables, butter, eggs,

or other farm or ranch products. In the opinion in the former habeas corpus proceeding of Dees it was pointed out that the word "peddler" implied itinerancy or the hawking of articles for sale upon the public streets. There is no suggestion in this case that the petitioner was in any sense a peddler or an itinerant vender. Peripatetic venders are not within the protection of section 15 of article 2 of the Charter. A peddler does not sell at a fixed place of business, and he is required to procure a permit from the board of police commissioners. Charter, § 9, c. 3, art. 8.

Resuming the consideration of the taxes provided by the ordinance, it appears that bond brokers are required to pay $45 a quarter; public passenger vehicles, other than railroad cars, "jitneys" for instance, if limited to the capacity of three passengers, $3 a year, if five, $5 a year, and if from eight to ten persons, $20 a year; general peddlers pay taxes of $12 a quarter; secondhand dealers, $25 a quarter; theaters with a seating capacity of more than 1,450 people pay $600 a year for an annual license, $200 for a quarterly license, or $100 for a monthly license. With a seating capacity of 500 persons they pay a license of $100 per annum, as against a license of $3,600 per annum levied on those who resell theater tickets. Architects, attorneys, engineers, insurance adjusters, oculists, physicians, surgeons, and other professional people whose annual gross receipts are from $7,500 to $10,000 a year are expected to pay a tax of $7.50 per quarter. Stock and bond brokers whose gross profits are less than $2,500 per quarter are taxed at $32; vaudeville houses, whose maximum charge is 31 cents or over, pay a license based on the seating capacity, ranging from $125 per quarter on a seating capacity of 500 to $300 per quarter on a seating capacity of 2,000. It is impossible to consider the wide disparity between a purported tax of $300 per month and the other taxes levied on other and somewhat kindred lines of business, without reaching the conclusion that, considered as a taxing ordinance, it is unreasonable, oppressive, lacking in impartiality, and unfair under the rules approved in Ex parte Frank, supra.

[6, 7] While it will not be adjudged, except in a clear case, that an ordinance purporting to be a revenue measure is, in fact, an unlawful attempt to exercise a forbidden police power, "courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under the solemn duty, to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority." Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Ex parte Whitwell, 98 Cal. 78, 79, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. In addition to the apparent excessive amount of the license fee imposed on this single line of business, when compared with every other license fee charged, the wording of the section relating to the sale of theater tickets is so different from that concerning other lines of business as to warrant the conclusion that it was designedly changed. It is fundamental that where one form of expression is used throughout a statute dealing with a number of things it will ordinarily be adjudged to have been used to achieve the same purpose. It is no less clear that, if one of many things is singled out by a notable change of expression, it is reasonable to determine there was a different or modified purpose intended. In regard to every other kind of business the ordinance simply provides that those engaged in it shall pay a license tax. If they continue in business without paying the tax, it may be collected as a debt, or the dealer may be punished as for a misdemeanor for violating the ordinance. In section 70, alone, under the heading "Ticket Peddlers," it is declared in the first instance that "it shall be unlawful for any person * * * to engage in the business or occupation of selling any theater ticket at any other place than the office of the management of said theater," without first having taken out and obtained a license to be known as a "Ticket Peddler's License." The license is to be issued by the tax collector at the rate of $300 per month for each license. The section then provides that—

> "Every person having a ticket peddler's license, every person engaged in the business of peddling theater * * * tickets, shall, on the demand of any officer of the tax collector's department, or any peace officer, produce and exhibit the same."

Not only was the unlawfulness of the business first expressed, but it was sought by another deviation of the language used in other sections to reach mere employees of those engaged in the business. For instance, section 67 of the ordinance provides that "every person, firm or corporation engaged in the business of slaughtering cattle" shall pay a license, but there is no attempt thereby to collect multiple taxes for the same general business by collecting similar taxes from every one engaged in the occupation of slaughtering cattle. This is not an immaterial distinction. In the present case it appears by the petition, and it is admitted by the return, that the petitioner was an employee of the Van Noy Interstate Company, and was arrested for engaging in the business and occupation of selling theater tickets in violation of the terms of the ordinance. In this connection, under the admitted facts, it may well be doubted whether it can be said in any proper sense that either the Van Noy Interstate Company or the petitioner was engaged in the business or occupation in terms prohibited except upon the condition of obtaining a ticket peddler's license. It is a matter of common knowledge that photographic hand cameras are sold at stationers', opticians', and drug stores. The practically universal use of such cameras, and their frequent exchange for new or different ones, have led to equal notoriety of the custom of such dealers to accept old cameras, which are resold at reduced prices. No one would seriously suggest that, by thus rendering accommodation to the public, the well-known business of a drug store, or of an optician, or of a stationer, was converted into that of a dealer in secondhand goods, and liable to payment of the license tax imposed by section 63 of the ordinance on persons "engaging in the business of buying, selling or exchanging secondhand goods."

The question of whether the provisions of section 70 constitute it a tax measure or not, in view of the enactment that the business shall be unlawful, except upon the condition of prior procurement of the ticket peddler's license, seems to have been answered adversely to the municipality, in a case where the question arose as to whether an exaction upon foreign corporations was or was not a tax, and the Supreme Court announced the principle that laws cannot be declared unconstitutional unless clearly so, but said:

> "This principle is not disputed, * * * but it must not be pressed so far as to amount to an abdication of its functions on the part of the court, nor a denial of justice to suitors. If we can clearly see that the law is beyond the power of the Legislature, we must so declare.
>
> "It is claimed that this is a sum paid by the corporation for the privilege of acting as such in this state, and therefore not a tax. The plausibility of the claim consists in apparently identifying this case with cases in which it is clear the exaction is a condition, and from which this is made to differ only in degree. If the condition had been that the corporation should pay a fixed sum for the privilege before it was allowed to do business at all, it would no doubt be held a condition, and not a tax; so perhaps if the license were required to be renewed at stated periods. * * * So the two classes of cases, one of which is plainly taxation, and the other a sum paid for a permit, may be approximated until it is difficult or impossible to say to which class a given case may belong. These difficulties to discriminate the principles underlying different cases constantly included in different classes, and to which the same rule of decision cannot be applied, constitute the perpetual debating grounds of the law, and occasion much of the confusion in the decisions. But, as was remarked by Judge Marshall, because we cannot easily draw the line does not prove that there is no difference in principle. No one fails to note the contrast between the light of day and the darkness of night, but no one is able to draw the line between daylight and darkness, or note the precise instant when one ends and the other begins." San Francisco v. Insurance Co., 74 Cal. 120–121, 15 Pac. 380, 382 (5 Am. St. Rep. 425).

It was held the particular exaction was a tax and not a provision for payment as a condition for doing business. The decision was based on an examination of all the circumstances, concluding that the enactment purported to be a revenue measure. In the present case upon a similar examination the conclusion is reached that section 70 of the ordinance does not provide for a tax, but seeks to establish a condition for carrying on a business which has been adjudged to be lawful. Considered as a police regulation, the enactment was beyond the power of the supervisors. As a tax measure it is based on no reasonable distinction; it is unfair and oppressive, if not in fact prohibitory. Theater tickets being within the definition of goods, under the charter the board of supervisors, though vested with power to license ticket peddlers, is without power to exact such a tax on those selling such goods at a fixed place of business, and it cannot enlarge its powers by designating men as peddlers who are not such in fact. The section under consideration is invalid.

The petitioner is discharged.

We concur: LANGDON, P. J.; NOURSE, J.

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50 Cal. App. 49

BRICE v. WALKER et al. (Civ. 2983.)

(District Court of Appeal, Second District, Division 1, California. Nov. 19, 1920.)

1. Election of remedies 🔑14—When "waiver by election" occurs.

Waiver by election occurs where a party having one or more different or coexisting modes of procedure and relief allowed by law on the same state of facts, which are inconsistent with each other, elects to pursue one of these remedies.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Election; First Series, Waiver by Election.]

2. Chattel mortgages 🔑255—Commencing suit on note does not waive right to foreclose.

The mere commencing, in a jurisdiction in which the property is not situated, of an action on a note secured by chattel mortgage, which was subsequently dismissed without the court having acted thereon, does not waive the right to foreclose the mortgage, though prosecuting such action to judgment would waive such right under Code Civ. Proc. § 726.

3. Chattel mortgages 🔑172(3) — Mortgagor cannot recover possession after foreclosure is waived without paying debt.

A mortgagor of a chattel or his donee with notice of the mortgage cannot recover possession of the chattel from the mortgagee even if the latter has waived his right to foreclose the mortgage without offering to do equity by paying the mortgage debt.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action of claim and delivery by Lena Mae Brice against Howard Walker and another. Judgment for defendants, and plaintiff appeals. Affirmed.

R. T. Quinn, of Los Angeles, for appellant.
O'Melveny, Millikin & Tuller, all of Los Angeles, for respondents.

CONREY, P. J. The plaintiff, claiming to be the owner and entitled to the possession of a certain automobile, brought this action to recover possession thereof. Judgment having been entered in favor of the defendant, the plaintiff appeals therefrom.

On the 17th day of November, 1916, the plaintiff's father, Charles P. Brice, being then and there the owner of said automobile, made and delivered his note of that date at Los Angeles, Cal., due six months after date, for the sum of $300, to the Western Union Life Insurance Company, together with a mortgage of the automobile as security for payment of the note. The note and mortgage passed by assignment to the defendant First State Bank of St. Joe, Idaho. On the 18th day of March, 1918, the First State Bank commenced an action in the state of Arizona in a court of competent jurisdiction against Charles P. Brice on sundry obligations, including said note. Thereafter, and after the commencement of the present action, but prior to the trial thereof, defendant bank so amended its complaint in the action in Arizona that the count on the said note was omitted from that action. After the 31st day of May, 1918, but prior to the 10th day of June, 1918, Charles P. Brice, by gift inter vivos, presented to the plaintiff herein all of his right, title, and interest in and to the said automobile. This transfer was without consideration and without the knowledge or consent of and without notice to the defendant bank. At the time of said transfer the plaintiff knew of the existence of the chattel mortgage. Defendant has been in peaceable possession of the automobile ever since the 21st day of May, 1918.

[1] Appellant contends that by bringing the suit on the note in Arizona the defendant bank waived its mortgage lien. In general terms, waiver by election occurs when a party having two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts, and, the one being inconsistent with the other, elects to pursue one of those remedies. Appellant calls attention to section 726 of the Code of Civil Procedure, as found in the chapter on actions for foreclosure of mortgages, and providing that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter," and argues that, by electing to proceed in an action at law on the note alone in a court foreign to the situs of the mortgaged property, the defendant bank waived not only the right to foreclose the mortgage, but abandoned the lien itself. She therefore contends that, since the automobile was given to her by the owner thereof while the action on the note was pending in the state of Arizona, she took the property free from the lien of the mortgage, and that this is true, although such action in Arizona was thereafter dismissed so far as said note was concerned, and never proceeded to judgment.

[2] In the case of Ould v. Stoddard, 54 Cal. 613, the payee of the note, which was secured by mortgage on property in this state, first obtained a judgment upon the note against the maker, in a court of competent jurisdiction in the state of Ohio, and then prosecuted an action in this state to foreclose the mortgage. The Ohio judgment had not been paid, and an execution issued thereon had been returned wholly unsatisfied. In the foreclosure case it was decided that by electing to bring the action on the note alone in the state of Ohio the plaintiff waived the security of the mortgage. Referring to section 726, Code of Civil Procedure, the court said:

> "It is not difficult to discover the policy which dictated the enactment of this statute. The tendency of modern legislation is to prevent a multiplicity of suits, and no one doubts the wisdom of it. In order to give to this statute the force and effect which the Legislature intended it should have, we must hold that, by prosecuting an action upon the note secured by the mortgage to final judgment, the plaintiff has exhausted his remedy upon both the note and the security. To hold otherwise would be to hold that there may be two actions, where the statute declares there can be but one."

Counsel for appellant insists that the mere commencement of the action on the note in the Arizona court was a complete and irrevocable election to substitute that remedy for the remedy by foreclosure of the mortgage. Our attention is called to several decisions relied upon as supporting this proposition. These were conditional sale contracts in which, upon default in payment by the purchaser, the vendor had the right to bring an action for the purchase money, and had the alternative right to retake possession of the property. It was held that the vendor could not retake the property and also sue for the purchase price thereof. In George J. Birkel Co. v. Nast, 20 Cal. App. 651, 129 Pac. 945, the court said:

> "The legal effect of such election was, immediately upon the filing of the complaint, to transfer to and vest in defendant title."

In Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. 435, referring to a similar contract, and the same alternative remedies, the court said:

> "These remedies being inconsistent, the plaintiff could elect which he would pursue, but he could not have both."

Parke, etc., Co. v. White River L. Co., 101 Cal. 37, 35 Pac. 442, referred to the same alternative remedies, and the court said that—

> "The pursuit of one remedy necessarily excluded the other. It was not entitled both to the purchase price and the property, and an action brought to recover the purchase price, as was done in this case, is a ratification of the sale."

In each of the two cases last above cited it appeared that the alternative remedies first used by the plaintiff had been carried to judgment before the plaintiff commenced his second action. In Geo. J. Birkel Co. v. Nast, supra, the plaintiff was seeking to hold by attachment the property which by conditional sale contract had been delivered to the defendant. In none of these cases was it necessary to determine that the commencement of an action, followed by the voluntary dismissal thereof by the plaintiff without any judicial action by the court, and without any special proceeding by attachment or otherwise against the defendant's property, constituted an irrevocable election of the prior remedy. In J. I. Case Threshing Machine Co. v. Copren Bros., 187 Pac. 772, 775, referring to the doctrine of election between remedies, the Third District Court of Appeal said:

> "The cases where that principle has been successfully invoked are generally where a party, having two different and distinct remedies available to him for the enforcement of a single right or obligation, has adopted one of the remedies and through it has pressed his action to final judgment, and, finding that he has failed to adopt the course or the remedy which would have rendered the execution of his judgment the more effectual, attempts to invoke the other remedy."

In Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53, the plaintiff was the owner of a note secured by mortgage. Two days before the day when plaintiff's right of action would have been barred by the statute of limitations he filed a complaint on the note without reference to the mortgage. Four days later he filed an amended complaint which, in addition to the matter alleged in the original complaint, counted also on the mortgage. The mortgagor moved to strike from the files the amended complaint on the ground that it wholly changed the cause of action, which motion was denied. He then demurred on the ground that the right of action counted upon in the amended complaint was barred. This demurrer was overruled, and thereafter judgment of foreclosure was entered. The judgment was affirmed. The Supreme Court held:

> That "the cause of action set up in the original and that set up in the amended complaint was simply the obligation sought to be enforced—that is to say, the obligation to pay the money agreed to be paid—and that the only change that took place was in the remedy by which it was sought to enforce the obligation."

Since the cause of action was not changed, the time to which the statute of limitations ran was the time of filing the original complaint. While the doctrine of election was not discussed in that opinion, it was an implied element in the decision; for, if the mere commencement of the action as an action at law on the note constituted a complete election which barred the lien of the mortgage and the right to foreclose the same, then the mortgagee would not have been permitted to pursue his remedy by foreclosure. We are of the opinion that on the facts of the case at bar the lien of the mortgage has not been lost, and the right of foreclosure continues in existence.

[3] Respondents contend, and with this we agree, that even if by reason of its conduct in having commenced an action on the note in Arizona it would now be precluded from foreclosing the mortgage in the courts of this state, nevertheless the judgment should be affirmed because the plaintiff simply stands in the position of her donor, she having paid no consideration for the property, and that she, like her donor, is not entitled to recover possession of the automobile unless she first does equity by paying or offering to pay the note to secure which the mortgage was given. Defendant bank has possession of the automobile, which possession was peaceably obtained from the owner, and under the terms of the mortgage is entitled to such possession until the mortgage debt has been paid. In Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314, where it appeared that the mortgagee had taken possession of mortgaged premises with the consent of the mortgagor, it was held that the grantee of the mortgagor could not maintain ejectment against the mortgagee in possession without first paying the mortgage debt. The court said:

> "Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title (Booth v. Hoskins, 75 Cal. 271), or to enjoin a sale under the power given by him in the security (Grant v. Burr, 54 Cal. 298), or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity."

In Burns v. Hiatt, 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157, after making the same quotation above given from Spect v. Spect, the court says:

"It was further declared in that case that the fact that the debt is barred by the statute of limitations is immaterial in such a case, the statute barring the remedy only, and not extinguishing, or even impairing, the obligation of the debtor. As long as the obligation to pay the debt exists, it is not equitable that the mortgagor should have relief against the mortgage given to secure the same, and such relief can be given only on condition that he discharges the obligation."

No distinction can be made between the case at bar and the case of an obligation which has been barred by the statute of limitations, for in the latter case the Code provides that the lien is extinguished. Nevertheless, although the lien may be extinguished, the debt is not satisfied by mere lapse of time. So here the utmost that could be claimed by the plaintiff or her donor, even if that claim were sustained, would be that the right to foreclose the mortgage has been extinguished. The debt remains unsatisfied. This being so, the plaintiff cannot recover possession of the property without first paying the debt on account of which the mortgage was given.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

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50 Cal. App. 225

KENT v. DANZIGER et al. (Civ. 3427.)

(District Court of Appeal, Second District, Division 1, California. Nov. 30, 1920.)

Partnership ⚿101—Partner paying judgment not entitled to contribution in view of agreement.

Where copartnership agreement provided that particular partner should not be liable for debts incurred or moneys expended, such partner was not liable for contribution to a copartner who paid judgment rendered against all partners in favor of third person for services rendered the copartnership.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by J. M. Kent against J. M. Danziger and others. Judgment for plaintiff, and defendant Danziger appeals. Affirmed.

Goodwin & Morgrage, of Los Angeles, for appellant.

Anderson & Borton and F. E. Borton, all of Bakersfield, and Barnhill & Pratt, of Los Angeles, for respondent.

SHAW, J. In substance, the facts out of which this controversy arose are as follows: In the year 1910 plaintiff, defendant Danziger, and E. A. Wiltsee associated themselves under the fictitious name of Lost Hills Syndicate in a joint venture for the purpose of locating and developing certain prospective oil lands in what is known as the Lost Hills district in Kern county, Cal. It was agreed between the parties that Danziger and Wiltsee were to advance and pay all moneys required in the operations to be conducted. Kent was to contribute no money, but in consideration of devoting his time and service to the business he was to receive a share of any profits derived from the venture. The association employed W. H. Callahan as superintendent, who brought an action against the Lost Hills Syndicate, J. M. Danziger, E. A. Wiltsee, and J. M. Kent, as copartners doing business under such fictitious name, to recover for services rendered, and obtained a judgment against all of them. This judgment on appeal was affirmed, and thereafter Danziger, in consideration of the full amount thereof by him paid to Callahan, caused it to be assigned to George W. Price. An execution was issued thereon, and, as a means of enforcing contribution, a levy was made upon plaintiff's property. Thereupon plaintiff brought this action to have the execution recalled and all proceedings had and taken thereunder vacated and set aside, and the sheriff enjoined from taking any action under or pursuant to the execution against his property.

Judgment was rendered for plaintiff, from which defendant Danziger has appealed.

In the trial of the Callahan case it was made to appear that Callahan commenced work in October, 1910, and continued work until December, 1911, at an agreed compensation of $5 per day. It further appears from the judgment roll in that case, which was received in evidence in the instant case, that Kent testified to the effect that about July 6, 1911, he received a letter from Danziger wherein Danziger stated to him that he was not going to put up any more money in the venture; that he was away ahead of Wiltsee in putting up money; and that Wiltsee had stated to him that he would take care of all matters from that time on. That pursuant to this notice Kent testified that he notified Callahan that Danziger was not going to put up any more money and would not be responsible for any more bills contracted, and that he (Kent) was out when Danziger quit and would have nothing more to do with it. Other testimony to the same effect and tending to show that both Danziger and Kent severed their connection with the operations, and so notified Callahan, was introduced at the trial of the Callahan case. Notwithstanding such testimony so given by Kent, the court, upon sufficient evidence, decided adversely to the contention and gave judgment in favor

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of Callahan. Upon the trial of the instant case, Kent gave like testimony to that by him given in the Callahan case, notwithstanding which fact the trial court in effect held that Kent was not liable to Danziger for any part of the judgment obtained in the Callahan case. Under this statement of facts the position of appellant is, as we understand it, that conceding the agreement made between Danziger, Wiltsee, and Kent was that the latter should contribute no money therein, nevertheless the Lost Hills Syndicate was dissolved on July 6th, at which time Kent communicated to Callahan the fact that Danziger stated he would contribute nothing more to the expense of continuing operations, and therefore for any expense incurred subsequent to said date Kent was liable for his share thereof. It may well be questioned whether or not Danziger's letter constituted a dissolution of the syndicate. The purport thereof is that he had, in the prosecution of the work, contributed more than his share; that he would not contribute more; and that Wiltsee was to take care of all matters from then on. Apparently he contemplated a continuance of work, the expense thereof to be borne by Wiltsee. However this may be, at the trial of the Callahan case the court determined that the syndicate continued to exist during all the time that Callahan was engaged in doing the work for which he had judgment. This being true, it follows, we think, that there was no change, readjustment, or modification of the contract between Kent and his two associates with respect to his liability as a member of the syndicate and under which it was agreed that as between them Kent should not be required to contribute any money in doing the work. While Danziger concedes that Kent is not liable to contribution for Callahan's services prior to July 6th, he insists that he should contribute to the payment of that part of the judgment covered by services performed by Callahan from July 6, 1911, to some time in December following; the sole ground therefor being the alleged dissolution of the syndicate and notice to Callahan that he would not be responsible for further payments to him.

The fact that it was not dissolved, but continued up to the time when Callahan terminated his employment, was determined in the Callahan case, and, this being true, it must follow that, notwithstanding the fact that as to Callahan plaintiff, Kent, might be liable as a copartner in the venture, nevertheless his liability to Danziger and Wiltsee for any part of the compensation due Callahan for services rendered was controlled by the agreement, and since this provided that, as between themselves, Kent should not be liable for debts incurred or moneys expended in prosecuting the work, it necessarily follows that upon Danziger paying the judgment obtained by Callahan no right to contribution exists as against Kent.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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50 Cal. App. 196

ROWE v. WURSTER. (Civ. 2173.)

(District Court of Appeal, Third District, California. Nov. 27, 1920.)

1. Easements ⚿36(3)—Evidence held to sustain finding of private way by prescription.

Testimony by plaintiff, by his predecessors in title and by disinterested witnesses, that he and his predecessors had used a private right of way for more than 50 years, *held* sufficient to sustain a finding that plaintiff was the owner of the right of way and entitled to restrain its obstruction.

2. Easements ⚿10(1)—Private right of way may be acquired by prescription.

A private right of way is an interest in the land to which the easement is annexed, and may be acquired by prescription within Civ. Code, § 1007.

3. Appeal and error ⚿1171(2) — Objection that evidence does not sustain award of $10 incidental damages is trivial.

In an action to restrain obstruction of a private right of way claimed by plaintiff, where it was manifest that the principal object of the action was the establishment of plaintiff's ownership of the way, and that the claim for damages was merely incidental thereto, an award of $10 damages was merely nominal, and the judgment will not be reversed because the evidence does not sustain that award, though it did show some damage.

4. Easements ⚿61(12)—Judgment held to establish only easement over lands owned by defendant.

Where the complaint, the findings, the conclusions, and the decree did not refer to the fee or the title to the land over which the easement was claimed, and the decree merely stated that plaintiff was the owner and entitled to possession of the private right of way as described in the complaint, which description stated the easement was over the lands of defendant, the decree is not objectionable as vesting the fee to the described lands in the plaintiff.

5. Easements ⚿61(8)—Proof of right by prescription admissible under allegation of ownership of easement.

An allegation in a complaint that plaintiff is the owner of a private way therein described is sufficient to justify evidence that the easement was acquired by prescription, since a title by prescription is a legal title under Civ. Code, § 1007.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Andrew E. Rowe against George Wurster to establish an easement for a right of way. Judgment for the plaintiff, and defendant appeals. Affirmed.

Taylor & Tebbe, of Yreka, for appellant.
Collier & McNamara, of Yreka, for respondent.

HART, J. This controversy arises over an alleged private right of way. Plaintiff and defendant are the owners of adjoining ranches. Plaintiff's ranch is known as and referred to in the complaint as the Patterson ranch, J. R. Patterson being his immediate predecessor; and defendant's ranch is referred to as the Carpenter ranch, he being the successor in interest in said ranch of James Carpenter. Plaintiff claims a right of way extending from his ranch across the lands of other parties not sued herein, and across certain lands of defendant, for a distance of about 486 feet to the main public highway. Plaintiff contends that the said private right of way is appurtenant to the Patterson ranch, and has been used by the plaintiff and his predecessors for a period of more than 50 years prior to the filing of his complaint, and that the use of said way has not been interrupted, except once or twice for short intervals, until the months of September, October, and November, 1918, when defendant obstructed the way by building a gate across it and claiming the right to continue said obstruction, thereby preventing plaintiff from enjoying his said way as he was accustomed to use and enjoy it. Plaintiff seeks by his action to establish his right to said private way and to compel defendant to remove the obstruction therefrom, and also prays for damages in the sum of $500. Judgment was for plaintiff, and the damage was assessed at $10, from which judgment defendant appeals.

Two general points are advanced against the validity of the judgment, and they are that the evidence is insufficient to support the vital findings and that the judgment is against law, inasmuch as by said judgment the absolute title of the land to which the easement in question is thus attached is given to the plaintiff, thereby depriving the owner of all right to use said land.

There are nine specifications involving the claim that the evidence is insufficient to support the findings therein specifically referred to; but all of these, with the exception of the charge that the finding as to the small amount of damages assessed against the defendant is without evidential support, assail the findings that—

"The plaintiff is now and he and his predecessors in interest have been for 50 years and more last past the owners in possession and entitled to the possession of a private right of way 20 feet wide and being 10 feet on each side of the following described line," describing the same as the way is described in the complaint, "and has the right to pass and repass over the same on foot, with team, automobile and wagons," and that "defendant, on or about the months of September, October, and November, 1918, and at other times thereafter and before the filing of this action, wrongfully obstructed said way by building a gate across the same, and that said defendant does still continue to maintain said obstruction, thereby preventing plaintiff from enjoying said way."

[1] An examination of the testimony embraced in the record before us can leave absolutely no doubt in the mind of any candid person that the findings derive sufficient support from the evidence. It is not thought to be necessary to reproduce herein a detailed statement of the testimony presented by the plaintiff to support his claim that he is the owner and entitled to the possession of the right of way described in his complaint over the defendant's lands, likewise described. It is enough to say generally that there were, besides the plaintiff himself, who bought the Patterson ranch in the year 1900, from and continously since which time the way in question remained unobstructed until in the later months of the year of 1918, 14 witnesses produced by the plaintiff, some of whom had at times owned or been connected with the Patterson and Carpenter ranches for many years before the plaintiff and the defendant became the owners, respectively, of those ranches, and others of whom had lived in the neighborhood of said ranches practically all their lives, who testified that the way in question had been habitually and continuously used by the plaintiff and his predecessors in interest (Patterson and others) for upwards of 50 years down to the time the use of the way was obstructed by the defendant by the erection of a gate thereon in the year 1918. One of the witnesses (a son of Patterson, plaintiff's immediate predecessor in interest) testified that his father had continuously and uninterruptedly for many years, and until he sold the ranch to the plaintiff, used the road in question for the purpose of getting to his own place or ranch, and that no objection was ever made to the use of said road, either by the defendant or any of his predecessors. Another witness testified that, while he was the owner and in the possession of the Carpenter ranch, and before the defendant became the owner thereof, he erected a gate on the roadway, but immediately removed it because Rowe (plaintiff) objected to the maintenance of a gate on the roadway. It is also in evidence that whatever improvements were made on the road were made by the plaintiff. There is testimony, also, to the effect that there was another road leading from the Patterson ranch to a place called Edgewood,

and which road connected with the highway, but that said road passed over and through a very hilly country and could be used only by light vehicles carrying no loads of any kind, and that the road in question was the only one leading to the highway from the Patterson ranch over which heavily loaded vehicles could pass. In brief, and in a measure to recapitulate, the testimony clearly shows that the way in controversy has been continuously used for approximately 50 years, except when obstructed by the gate erected on the roadway in 1918 by the defendant, by the plaintiff and his predecessors in interest in the land to which said roadway leads from the highway, and that its use by plaintiff for the purposes of his farming business is absolutely necessary.

[2] It is well settled—indeed, so well settled as to transfer the proposition beyond the realms of controversy—that a private right of way is an interest in the land to which such easement is annexed, and may be acquired by prescription. Patchett et al. v. Pac. Coast Ry. Co., 100 Cal. 505, 509, 35 Pac. 73; Civ. Code, § 1007.

[3] As to the finding upon the question of damages sustained by the wrongful act of defendant in obstructing the highway, as already indicated, it is sufficient to state that the plaintiff testified that, while the gate erected by the defendant was maintained, he was compelled to go to an expense by reason of said obstruction which otherwise would not have accrued to him in getting to his place wood and other articles necessary for his domestic use, etc. It is true that there is no testimony disclosing precisely the actual detriment he suffered as a result of the obstruction of the roadway in question. It is obvious, however, that the main relief sought by this action was to establish in the plaintiff the right to an easement on the lands of the defendant in the form of a right of way over said lands, and that the claim for damages was only incidental and secondary to such relief. The damages awarded (and the testimony shows that the plaintiff did sustain some damage through the act of the defendant in maintaining an obstruction on the roadway) are infinitesimal in amount, particularly so when considered in the light of the proposition that the principal and more important relief sought by the plaintiff was to have his title to the right of way quieted, and are to be regarded, as certainly they are, as mere nominal damages. Therefore the maxim, de minimis non curat lex, applies to this point.

[4] The second point made by the defendant, viz., that the effect of the decree is to divest the defendant of the fee in or title to the lands over which the private way in controversy passes, is not well founded or justified.

The complaint is in two counts, in each of which it is alleged that the private right of way claimed by plaintiff is over the lands of the defendant, and the relief asked is, as seen, that the plaintiff's title to said way be determined and quieted as against any adverse claim thereto by defendant, and that defendant be enjoined from interfering with the plaintiff's right thereto. Neither the findings, nor the conclusions of law, nor the decree, anywhere refer to the fee or the title thereto, but the court merely finds, concludes as a matter of law, and adjudges that the plaintiff "is now and he and his predecessors in interest have been for 50 years immediately last past and prior to the filing of plaintiff's complaint herein, the owners in possession and entitled to the possession of a private right of way as set out and described in paragraph I of these findings," said private right of way being the one described in each count of the complaint as being over and on the lands of the defendant—in other words, over and on lands the title to which is in the defendant. We do not see how the court could have made it any clearer than it is made to appear in its findings of fact, conclusions of law, and judgment that the plaintiff was entitled only to the easement upon defendant's lands, which are with equal clearness described in the complaint as the latter's lands. In short, it is perfectly clear that all the complaint asked and all that the court has decided is that plaintiff is entitled to a private right of way on and over defendant's lands, and it is equally clear that should the plaintiff, or any other person who might succeed to his interest in his land to which the easement in controversy is annexed, ever abandon or surrender said right of way, the defendant would, under the plain terms of the decree, still have and own in the particular portion of his lands the actual use of which is essential to the enjoyment of the right of way the fee free from the burden of said easement.

[5] There is another point made by defendant and that is, in effect, that the findings and the judgment transcend the claims of the complaint, inasmuch as a prescriptive title to a right of way on and over defendant's lands is not pleaded. A conclusive answer to this proposition is to be found in the case of Myers v. Berven, 166 Cal. 484, 137 Pac. 260, wherein Mr. Justice Shaw, at page 490, sveaking of a like contention, says:

> "Appellant insists that the cross-complaint does not allege title by prescription, and hence that it is not in issue. Such particularity of pleading is not required in actions of this character. The allegation is that Berven is the owner of the way described. This is sufficient. Hesser v. Miller, 77 Cal. 193, 19 Pac. 375. This allegation may be sustained by proof of title acquired in any legal mode. A title by prescription is a legal title. Civ. Code, § 1007; Wachumna W. Co. v. Ragle, 148 Cal. 764, 84 Pac. 162."

We have discovered no legal objection to the decision herein by the court below, and the judgment is, for the reasons above given, affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

(50 Cal. App. 141)

WELLMAN v. CONROY. (Civ. 2112.)

(District Court of Appeal, Third District, California. Nov. 24, 1920. Hearing Denied by Supreme Court Jan. 20, 1921.)

1. Novation 🔑1—Acceptance of rent from assignee of lessee of personalty does not alone prove a novation.

Acceptance by lessor of personal property of rent from assignee of lessee with knowledge of the assignment does not prove a novation or a release of the lessee.

2. Novation 🔑1—Essentials to making assignment of lease of personalty operative as novation.

To make the assignment of a lease of personalty operative as a novation, there must be some evidence of agreement or contract on the part of the lessor to relieve the lessee from any liability.

3. Novation 🔑3—No consideration to support contract to release lessee of personalty.

A conversation between lessor and lessee of personalty, after lessee had assigned lease with consent of lessor, wherein lessor stated that the assignment automatically released the lessee, if considered as a promise to release the lessee from liability for rent, had no consideration to support it.

4. Bailment 🔑31(3)—Evidence sufficient to show lessor of personalty did not release lessee, who assigned the lease.

In an action against lessee of personalty to recover rent, evidence *held* to warrant a finding that lessor did not agree to release the lessee at the time the latter assigned his lease to third parties.

5. Principal and agent 🔑99—Principal bound by ostensible agent only as to one incurring liability.

A principal is bound by agent under a merely ostensible authority only when a third person has in good faith and without want of ordinary care incurred a liability or parted with value upon the faith thereof, under Civ. Code, § 2334.

6. Bailment 🔑20—Lessee of personalty not released by agreement between creditors of sublessee.

The liability of a lessee of personalty for rent was not affected by an agreement between creditors of an assignee of the lease, whereby the lessor and other creditors agreed not to bring suit, etc.; lessee not being party to such an agreement and his liability being several.

7. Sales 🔑5—Instrument held lease with option to purchase.

Instrument designated lease of personalty *held* not to constitute a sale of the personal property, but to be a contract of lease with an option on the part of the lessee to purchase.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by J. H. Wellman against M. J. Conroy. Judgment for plaintiff, and defendant appeals. Affirmed.

Davis & Rush, of Los Angeles, for appellant.

Henry K. Norton, of Los Angeles, for respondent.

BURNETT, J. The action was brought by the assignee of the lessor for the recovery of rent upon an alleged lease of personal property, and judgment was for plaintiff. The written instrument under which defendant took possession and continued for some time in the use of said property was executed December 27, 1913. On September 15, 1914, Conroy assigned all his interest in said contract and in the property to a partnership composed of George H. Forster and Elmer Stoner, who in writing agreed to "assume all liability on the said contract or lease, agreeing to perform all the terms and conditions thereof as agreed to by M. J. Conroy." Thereafter Forster and Stoner entered into possession of the property and continued to use it until April 24, 1915, when it was transferred to certain trustees for the benefit of the creditors of said Forster and Stoner. The contentions of appellant are two: First, that at the time of said assignment to the partnership the lessor released the lessee and accepted Forster and Stoner in his place, thereby creating a novation; and, second, that the so-called lease was really a contract of sale, and that by virtue of an action in the superior court brought to recover the possession of said property, plaintiff exercised an election between two inconsistent remedies and was thereby precluded from urging the claim of or to any rental.

[1-4] It is admitted by plaintiff that his assignor had knowledge of said assignment and recognized Forster and Stoner as succeeding to the interest of Conroy in the lease, but it is claimed that the evidence is sufficient to support the finding of the court that said assignor did not "release the defendant Conroy of and from any of the obligations of said contract." We are satisfied that respondent's position in this respect is entirely sound. It is not contended that any written release of any kind was ever given to Conroy or that his contract was canceled and a new one issued to Forster and Stoner as was usually done when the company intended to release the original lessee. Nei-

ther was there any transfer of the ledger account to the assignee, it remaining in the name of Conroy with this notation: "Forster & Stoner, Suc. 11—12—14." It is true that respondent admits that the lessor received certain payments from the assignee. But this circumstance in connection with said knowledge of the assignment does not prove a novation. Many decisions announce this rule of evidence. We may quote from the syllabus of Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 979, as follows:

> "A written contract of lease can only be altered by a written contract or an executed oral agreement. The mere acceptance of rent from a subtenant of the lessee in possession by the lessor, and recognizing him as a tenant, cannot have the effect to alter the contract or release the lessee from his liability for unpaid rent. The lessee cannot by an assignment of the lease rid himself from liability under its covenants. The effect of the assignment is to make the lessee a surety to the lessor for the assignee, who, as between himself and the lessor, is bound as principal, while he remains assignee to pay the rent and perform the covenants."

To make the assignment operative as a novation, there must be, of course, some evidence of an agreement or contract on the part of the lessor to relieve the lessee from any liability. The most significant circumstance upon which appellant relies in this connection is found in the testimony that Conroy asked Simpson—

> "if they would take them, take these two gentlemen, on what I owed them and release me. Mr. Simpson asked them if they were intending to buy and would make a payment. They told him, 'Yes.' Mr. Simpson told us to go right ahead; that he would accept them; that he had looked them up and they was considered good risks. He told us to go right ahead and make our transaction, and when we did to come back he would have the papers ready for us to make the assignment."

But conceding that this promise was sufficiently definite to support appellant's claim, and that adequate consideration existed for it within the rule announced in Jordan v. Scott, 38 Cal. App. 739, 177 Pac. 504, we need go no further than to say that it was positively denied by Simpson that any such conversation took place, and we must assume that Simpson told the truth. Appellant also attaches some importance to the testimony of a conversation between Conroy and one Marshall Cruse, in which the latter told the former that he was "automatically released the very minute we take these other new customers on." But this was simply an announcement of the understanding by Mr. Cruse of the effect of said assignment, and it was not a promise to release Mr. Conroy from liability. Moreover, the conversation was subsequent to said assignment, and, hence there was no consideration to support it. Jordan v. Scott, supra. Aside from the foregoing, the trial court was entirely justified in ignoring any statement or promises made by Cruse, on the ground that he had no authority to bind or to represent the lessor in the release of any claim against said lessee.

The reasons for holding that Cruse lacked such authority are fully pointed out in the brief of respondent, and, as no attempt is made by appellant to meet the argument, we dismiss this point without further consideration.

[5] Nor can it be said that application may be made of the principle of ostensible agency. From the evidence the court was not required to find that the lessor intentionally or by the want of ordinary care caused Conroy to believe that Cruse was authorized to execute a release on behalf of the company. Besides, the principal is bound by the act of an agent under a merely ostensible authority only when the third person has in good faith and without want of ordinary care incurred a liability or parted with value, upon the faith thereof. Section 2334, Civ. Code. The record does not show that Conroy, in the execution of said assignment, was influenced at all by the consideration of any release from the lessor. It is fair to say that said assignment was not made upon the faith of any such act by Cruse. It is true that he naturally wanted to be relieved from any further liability, but it does not appear that without it he would have declined to assign his interest to Forster & Stoner. Indeed, that he did not rely upon any such release, and that in fact no release was made, appears from his statement made after said assignment to Cruse, as follows:

> "I would like to have a release letting me out of this, inasmuch as you have got new parties to look for your payments."

[6] Another point is made that the Collender Company was estopped to urge this suit by reason of the creditors' agreement, to which we have referred. Therein this claim was scheduled and the agreement was signed by Cruse for the company. The creditors agreed to extend the time of payment of their claims until—

> "such time as the same can either be paid by the profits of the business conducted by trustees herein named or by a sale of the business, as provided under said assignment so made by the owners of said Montana Bar."

It may be stated that no sale of the property was had. Said agreement further provided:

> "It is further covenanted and agreed that neither or any of the creditors undersigned shall or will bring suit upon any claims herein scheduled until such time as said trusteeship is discharged or terminated."

Appellant contends that the Collender Company was bound by the terms of said agreement—

> "and while thereby it could, as it subsequently did, elect to repossess itself of the property mentioned in the agreement, it could not, in violation of the terms of said agreement bring this action upon its scheduled claim."

Respondent replies:

> "A complete answer to this is that Conroy's liability was and is several and unimpaired. The company had a right to pursue either or both avenues of recovery. Forster & Stoner were merely additional sureties on the lease."

It is apparent that Conroy's liability was not affected by this creditors' agreement. He was not a party to it, and, manifestly, he parted with nothing of value upon the faith or strength of said agreement. It was, in fact, executed for the benefit of the creditors, and they alone, if any one, could complain of this independent action brought against Conroy. It is doubtful whether said agreement could be enforced by reason of the uncertainty of its terms, but, at any rate, we cannot perceive how it can operate as an estoppel in this action against Conroy.

But it is admitted by appellant in his closing brief that his main point is that the agreements between Collender Company and Conroy constituted a conditional sale and not a lease, and much of the final brief is taken up with a discussion of this consideration.

The character of said instrument may be disclosed by the following provisions:

> "The said party of the first part [the Brunswick-Balke-Collender Company of California], being the owner of the hereinafter described personal property, has leased and does by these premises, lease and rent unto the party of the second part [M. J. Conroy], the following described personal property * * * for the term of eighteen months and no days from the date hereof, on the following terms and conditions, to wit: $2,500, payable in cash at or before the ensealment of these presents, and the further sum of $400, payable at the office of said company in Los Angeles, to be paid on the 27th day of each and every month ensuing, commencing January 27, 1914, until the full term of seventeen months shall have expired, said payments being for the rental, use and wear of said property.
>
> "The said party of the second part agrees that he will carefully use and keep in good order the said articles of merchandise hereinbefore described at No. 527 South Main street, Los Angeles, and not elsewhere, except with the written permission of the said party of the first part had and obtained.
>
> "And it is further agreed by and between the parties hereto, that whenever said party of the second part shall fail to pay said rent, or any part thereof, as it shall become due and payable, or shall fail to keep and perform any of the agreements, conditions or undertakings, in this contract contained, especially as to the place where said property shall be kept, or whenever the said the Brunswick-Balke-Collender Company of California, shall deem it necessary in order to secure itself against loss, although no breach of contract shall have been committed by said party of the second part, then, and in either of such events, the said the Brunswick-Balke-Collender Company of California, may demand, take and repossess said property with or without process of law, anything herein contained to the contrary notwithstanding.
>
> "And the party of the second part hereby agrees to pay the rent aforesaid at the several times hereinbefore set forth, and at the expiration of the term for which said merchandise is rented and released, to return and deliver the same to the said the Brunswick-Balke-Collender Company of California, in good order, reasonable wear and tear thereof excepted; it being specially agreed and understood that the title to all of said property is and shall remain vested in the said party of the first part."

Then follows a covenant that the party of the first part may keep the property insured at the expense of the second party and that the latter shall pay interest on the "rent at installments and shall pay all taxes and assessments against said property," and the concluding clauses are as follows:

> "In the event of said party complying with all the terms of this agreement, the said the Brunswick-Balke-Collender Company of California shall be required to sell and transfer said property hereinbefore described, to said party of the second part as hereinafter agreed and set forth. * * *
>
> "In consideration of one dollar and other good and valuable considerations, to us in hand paid, we hereby agree to and with M. J. Conroy, the said party of the second part to the foregoing lease, that in the event that he shall on his part, well and truly perform and fulfill all the conditions thereof, and pay, as they become due, the different installments of rent, and all other sums therein and herein agreed to be paid, that we will on the 27th day of June, 1915, provided that the said M. J. Conroy shall so desire, sell and convey the property described in said lease to the said M. J. Conroy for the sum of eight hundred and $^{95}/_{100}$ dollars, then in cash to be paid us, as hereinbefore set out and agreed upon.
>
> "It is expressly understood and agreed, however, that time shall be of the essence of this contract, and that unless all the conditions of the foregoing lease shall have been fulfilled by the said M. J. Conroy and the sum of ninety-three hundred dollars paid, as aforesaid, then this agreement of sale shall be null and void and shall not bind either party hereto."

[7] We think the language of the parties compels the conclusion that they intended a contract of lease with an option on the part of Conroy to purchase the property. Indeed, it would be difficult to select language more apt to express such intention. The

terms they used are peculiarly appropriate to instruments of hiring and leasing, as said in Harron v. Wilson, 4 Cal. App. 488, 88 Pac. 512. They referred to it as a "lease" and designated the payments as "rent." To negative any possible contention that the instrument constituted a sale, we have but to recall the aforesaid provision in reference to the right of the lessor to recover the possession of said property whenever it was deemed necessary and the express understanding "that the title to all of said property is and shall remain vested in the said party of the first part." Moreover, to clinch the matter, it is sufficient to recall the fact that the lessee did not promise to purchase the property; he did not obligate himself to pay the additional sum required to obtain the title, but, on the other hand, the lessor was "required to sell and transfer" the property to the lessee "provided that the said M. J. Conroy shall so *desire*." These expressions indicate clearly that the instrument constituted a lease, with the option on the part of the lessee to purchase by the fulfillment of all the covenants of the lease and the payment of the additional sum therein specified. Applying the fundamental principles of interpretation to the instrument, we are satisfied respondent is right in his contention. If the evidence showed clearly that the parties by their subsequent conduct had treated the instrument as constituting a sale we might follow their interpretation. But such is not the condition of the record, and without making a contract for the parties we cannot say that they intended otherwise than the plain import of their language indicates. Since, therefore, the conditions of the lease were not observed by the lessee and no attempt was ever made to exercise said option to purchase, no inconsistency existed between the action to recover the possession of the property and the other suit against Conroy for the unpaid rent.

Some decisions are cited by both parties in support of their views as to the interpretation of this instrument, but it could hardly be said that any of them is controlling herein. The principles they enunciate must, indeed, be recognized and applied, but there is some difference in the facts, which cannot be ignored.

Respondent confidently relies upon said Harron Case, supra, and Harron v. Cutting, 19 Cal. App. 780, 127 Pac. 827. The instruments in those two cases were identical and quite similar to the one before us, and it was held that each instrument constituted a lease and not a contract of sale. To the contrary appellant cites Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 162 Pac. 121; Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339; Lundy Furniture Co. v. White, 128 Cal. 170, 60 Pac. 759, 79 Am. St. Rep. 41; Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384; Muncy v. Brain, 158 Cal. 300, 110 Pac. 945; Bradley v. McDonald, 36 Cal. App. 807, 169 Pac. 427.

In the Wood Case it was not controverted that there was a sale of the piano, the whole dispute being as to the payment of the sum of $300 on said property.

The question in the Van Allen Case was whether the contract was an *absolute* or a *conditional* sale of the property. That it was one or the other could hardly be doubted in view of this covenant on the part of the vendors: "Van Allen and Boughton hereby agree to sell at the sum of seventeen hundred and fifty dollars to William M. Langton" the property described—and this promise on the part of the vendee:

> "William M. Langton hereby agrees to buy said press as above specified, and to pay therefor on receipt of press cash three hundred and fifty dollars, and the balance in payments evidenced by seven notes bearing legal interest, 7 per cent. as follows."

In Perkins v. Mettler, supra, the instrument designated the parties as vendor and vendees, and provided, "The vendor agrees to sell to the vendees, and they agree to buy from him," etc., and the only question was whether it constituted an absolute or conditional sale.

In Muncy v. Brain the contract was quite similar to the one herein, but the court said:

> "The question whether or not the transaction was, in legal effect, a lease or a conditional sale, is not necessarily involved in the determination of this appeal, and therefore we need not consider it."

It is true that in the Bradley Case, supra, this court spoke of a similar contract as follows: "This contract in effect provides for a conditional sale," etc. But it is admitted by appellant that this was dictum, the court stating that the question to be determined was whether the finding of payment was supported by the evidence.

It is apparent that these cases cited by appellant furnish no guide for the determination of this cause.

McCollough v. Home Ins. Co., 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862, cited in the opening brief, comes nearer supporting appellant's contention; but the court was justly anxious to support the claim of plaintiff, who had acted in good faith in having his home insured and who had made nearly all the payments as provided by the instrument, which the court held to constitute a conditional sale. It is to be observed, also, that the Supreme Court held that the vendee had in effect promised to purchase and pay for the premises. This, in connection with the covenant of the vendor to convey, would, of course, make the instrument a contract for the sale and purchase of the property.

After an examination of the entire record, we cannot say that the decision of the trial court was inequitable or in contravention of any principle of law.

The judgment is therefore affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

50 Cal. App. 120

MARIN ROCK CO. v. E. B. & A. L. STONE CO. (Civ. 3555.)

(District Court of Appeal, First District, Division 1. California. Nov. 24, 1920. Rehearing Denied Dec. 24, 1920. Hearing Denied by Supreme Court Jan. 20, 1921.)

Sales ⚷32—Facts held not to show a completed contract.

Where plaintiff had a road building contract with the state, requiring the state to furnish sand and gravel, and defendant proposed to plaintiff that it secure a modification whereby the sand and gravel could be obtained from defendant's quarry, and the contract was modified to permit plaintiff to so obtain such materials, but to provide that if they did not come up to the specifications or were not promptly furnished the state might revert to the original contract, defendant was under no contract to furnish the materials, though in correspondence with plaintiff and the state it had stated that it would guarantee to furnish such material if the state placed orders for all the sand and gravel required.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Marin Rock Company against E. B. and A. L. Stone Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

McNair & Stoker, of San Francisco, for appellant.

Raymond Perry, of San Francisco, for respondent.

RICHARDS, J. This is an appeal by plaintiff from a judgment in favor of defendant after an order granting the defendant's motion for nonsuit as to the first count in the plaintiff's complaint.

The action was one sounding in damages for the alleged breach of certain contracts alleged to have been entered into between the parties, and having relation to the supplying by defendant to the plaintiff of certain road-building material for the construction of certain sections of the state highway in the county of Santa Clara, contracts for which had been entered into between the plaintiff and the department of engineering of the state of California.

The facts upon which the plaintiff relied for a recovery under the first count in his complaint may be briefly stated as follows: On July 27, 1915, a written contract was entered into between the said department of engineering of the state of California and the plaintiff herein for the construction by the latter of a portion of the state highway in Santa Clara county between Los Gatos and San Jose. Under the terms of this contract the state, through its said engineering department, agreed to furnish all sand and gravel needed for the work f. o. b. on cars at railway points nearest the section of highway to be constructed. The plaintiff was to unload said material from said cars and haul it to the point of use at its own expense. The defendant was at the time operating a gravel quarry near the town of Campbell, not far from the line of the highway which the plaintiff was to construct; and, learning that plaintiff had been awarded said contract, proposed to plaintiff that it should secure a modification of its contract with the state, whereby the necessary sand and gravel for the construction of said section of highway could be obtained from the defendant's quarry at Campbell. The advantage to be gained by the plaintiff from such modification of its contract with the state was such as would result from the elimination of the expense to it of the unloading of freight cars; and the advantage to be derived by the state would be that it would be relieved from the payment of the freight charges of shipping the material by railroad to the points nearest its place of use. The defendant suggested that the state would probably agree to turn over to the plaintiff such sums as it would otherwise be obliged to pay for such freight charges. The plaintiff was apparently agreeable to the plan as outlined by the defendant, and thereupon took the matter up with the state officials by letter, stating that it was willing to have its contract changed so as to provide for the delivery of said material at the defendant's bunkers at Campbell if the state would allow the plaintiff, in addition to its contract price, the amount of the freight charges which the state would otherwise have to pay. The state officials consented to this modification, and thereupon a supplemental contract was entered into between the state and the plaintiff on August 31, 1915. This contract, after reciting the fact of the existence of the earlier agreement between the parties, set forth in full the letter from the plaintiff to the state highway commission, embodying the suggested modifications thereof, and then proceeded with the agreement that the original contract should be modified in accordance with the plaintiff's proposal. It then contained the following clause:

"However, it is mutually agreed that in the event the above sand and gravel does not come up to the specifications of said contract No. 146, or if said materials are not promptly furnished or delivered, or if said parties of the second part abandon or default in the performance of said contract No. 146, that the party of the first part [the state] may declare this supplemental agreement null and void, and revert to the terms of the original contract No. 146."

This supplemental agreement having been executed, the defendant herein proceeded to furnish sand and gravel at its Campbell bunkers, and the plaintiff proceeded to haul the same to the state highway where the work was being done. This continued for but a short time when, by reason of breakdowns at the defendant's Campbell plant, and also by reason of the fact that the gravel furnished by it was below the standard required by the contract between the plaintiff and the state, its engineering department refused to accept further deliveries from the defendant, and proceeded to furnish material to the plaintiff from the sources and by means of the railway cars as provided in the original contract. Thereupon the plaintiff commenced this action against the defendant, and in the first count of its complaint alleged that it had been damaged by the defendant's failure to carry out the terms of its suggestion and proposal to the plaintiff which had led to the modification of the latter's contract with the state. The items of damage which the plaintiff specified under this count in its complaint were those arising from the excess of cost to it of unloading the material from the railroad cars and hauling it to the place of its use, over the cost to which it would have been put if the material had been obtained at the Campbell bunkers, and also the loss to it of a sum equal to that which would have been paid as freight by the state had its contract with the stae not been modified, and which under its modified contract the plaintiff would have been entitled to receive.

The defendant in its answer resisted these claims through the averment that no contractual relation existed between the plaintiff and the defendant, and that no such relation existed between the defendant and the state as would have required the latter to purchase material for the road construction in question from the defendant, and hence that there was no basis upon which the plaintiff's claim of damages could be predicated.

Upon the trial of the cause the foregoing facts appeared; and it further appeared that there was some correspondence between the plaintiff and the defendant, and also between the plaintiff and the officials of the state highway commission, the purport of which was that the defendant was desirous of procuring from the state orders for the supply of all sand and gravel required in the construction of said section of the highway; and in case it procured such orders was willing to guarantee to the plaintiff that it would furnish the required sand and gravel from its Campbell quarries; or, if these from any cause should fail, from its gravel pits at Coyote. The plaintiff appears to have relied largely upon the defendant's so-called guaranties in this correspondence for its recovery. At the close of the plaintiff's case a motion for nonsuit was made by the defendants upon the ground that no such contractual relations existed between the parties as could give rise to the plaintiff's claim of a guaranty and of its breach, and hence that no liability on the part of the defendant had been shown. The court granted the said motion for a nonsuit, and from the judgment thereupon entered in the defendant's favor the plaintiff has prosecuted this appeal.

We are satisfied from an examination of the record that the trial court committed no error in granting the defendant's motion for nonsuit. Whatever contracts there were in relation to the supplying by the defendant of material for the construction of the section of the highway in question were those existing between the plaintiff and the state, by the terms of which the latter, if it saw fit to do so, might order such building material from the defendant herein. Such orders, however, were entirely dependent upon whether or not the state officials were satisfied with the quality of the defendant's said material and with its delivery of the same. There was no agreement between the plaintiff and the state, or between the defendant and the state, by which the state was bound to order, or the plaintiff bound to receive, any such material from the defendant other than that which the state saw fit to order; nor was there any existing agreement between the parties by the terms of which the defendant had agreed to guarantee anything. Upon this subject there had apparently been no meeting of minds between the plaintiff and the defendant and the state, since by the very terms of the defendant's correspondence it at best only offered to guarantee that it would furnish such material provided the state placed its orders for all of the sand and gravel required in the construction of said section of the state highway. The state, however, on its part entered into no such arrangement with the defendant as would require it to continue giving orders to the defendant for such material after its first supply thereof had proven unsatisfactory. It was for these reasons that the trial court held—and we think held correctly—that there was no such arrangement between the parties to this action as could form the basis of the claim of damages which the plaintiff asserted in the first count of its complaint. The order for nonsuit was therefore properly granted, and the judgment based thereon should therefore be affirmed. It is so ordered.

We concur: WASTE, P. J.; BEASLY, Justice pro tem.

50 Cal. App. 209

MARIN ROCK CO. v. E. B. & A. L. STONE CO. (Civ. 3607.)

(District Court of Appeal, First District, Division 1. California. Nov. 29, 1920.
Rehearing Denied Dec. 29, 1920.)

1. Sales ⚷32—Correspondence held to create contract to furnish materials needed in building road.

Correspondence between defendant and plaintiff, who had a contract with the county for construction of a road, *held* to constitute a contract by defendant to furnish all of the rock and sand needed for the work.

2. Sales ⚷172—Buyer held not to have broken contract by obtaining materials from third persons because of seller's delay.

Where defendant contracted to furnish plaintiff all the rock and sand needed in the construction of a highway, and, after repeated attempts to obtain delivery without delay, and after the county officials had threatened to take over the work, plaintiff ordered materials from third persons, whereupon defendant refused to make further deliveries, the contract was broken by defendant, and not by plaintiff.

3. Sales ⚷418(3)—Measure of damages for seller's refusal to deliver stated.

Under Civ. Code, §§ 3308, 3354, the measure of damages for breach of a contract to furnish all the rock and sand needed in the construction of a highway was the excess of the cost of the material in the nearest market over the contract price.

4. Sales ⚷417—Evidence held to support recovery for excess of price paid by buyer over contract price on seller's breach.

In an action for breach of a contract to furnish all the rock and sand needed in the construction of a highway, evidence that before placing its order plaintiff consulted firms engaged in supplying such materials, and was quoted the price it was required to pay, supported a recovery for the excess above the contract price.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Marin Rock Company against E. B. and A. L. Stone Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Raymond Perry, of San Francisco, for appellant.

McNair & Stoker, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendant corporation from a judgment awarding plaintiff the sum of $598.35 as damages for breach of contract.

From the pleadings it appears that plaintiff entered into a contract with the county of Santa Clara for the construction of a county highway between the towns of Sunnyvale and Cupertino in said county. It is alleged in the complaint that defendant thereafter agreed with plaintiff to sell and deliver to it for a stipulated price all the crushed rock and sand required by plaintiff to perform its contract with the county; that defendant delivered to plaintiff a portion of such rock and sand, but failed and neglected, notwithstanding the demand of plaintiff, to furnish 1,945 tons thereof necessary to the completion of the work; that the plaintiff on account of such default was compelled to and did purchase said amount of rock and sand elsewhere, and paid therefor the sum of $499.31 in excess of the price at which defendant had agreed to sell and deliver the same to plaintiff; that because of said default of defendant plaintiff was damaged in the sum named, with interest thereon. By its answer defendant denied the allegations of the complaint, and, further answering, set up a separate defense, the substance of which is that it merely gave plaintiff a quotation of prices for the material to be furnished from one of its plants known as the Campbell plant, and that under this offer of quoted prices plaintiff purchased from defendant a large number of cars of sand and gravel. It further alleged that because of an objection made by a deputy county inspector to the Campbell material, defendant substituted a more expensive kind from another of its plants, known as the Coyote plant, at no greater cost to plaintiff, and at a great loss to defendant, and that when plaintiff began to construct another section of the highway which called for the Coyote grade of rock, plaintiff, without notice to or demand on defendant, purchased 17 cars of material from a competitor, in consequence of which defendant refused to further deal with plaintiff, whereupon plaintiff purchased 22 additional cars of material elsewhere. The number of tons referred to in the complaint consisted of these two trainload lots.

The trial court, Hon. John Hunt presiding, found that the parties had entered into the contract as alleged by plaintiffs, and that defendant refused to deliver the 1,945 tons of material, notwithstanding plaintiff's demand, and rendered judgment in the sum above named.

Appellant relies for a reversal upon two grounds: First, that there was no contract between the parties; second, that even if a contract existed, plaintiff was the one who breached it, and therefore defendant was relieved of liability thereon.

[1] There is no merit in either contention. The record discloses that at about the time plaintiff received the contract from the county it applied to the defendant for quotations on rock and sand, and that thereupon oral negotiations and written communications

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

were had between the parties, which culminated in a contract in part oral and in part written. The written correspondence is somewhat voluminous, and a full recital thereof would unduly lengthen this decision. In substance, this correspondence confirms certain oral negotiations, and reveals the fact that plaintiff ordered from defendant all the rock and gravel necessary for the work. The first writing had between the parties was a letter from defendant to plaintiff which contained assurances that defendant's rock was first class in character. Then follow a series of letters dealing with prices, shipments, and other details covering the manner and time of payment, the mode and place of measuring the rock, the appointment of an umpire in the event of a dispute, and the payment of freight charges, all of which conclusively show that the parties intended to and did enter into a contract for all the rock and sand necessary to complete plaintiff's contract with the county. One of these letters, written by defendant's sales manager, evidences that a conference was had between the representatives of the parties in relation to the contract, and it concludes with the following language:

> "We wish to thank you for the order which you requested us to enter to-day for the material you will require for this work."

Plaintiff, being dissatisfied with certain paragraphs contained in this letter, wrote to defendant for an explanation thereof, and in reply thereto defendant answered with what it denominated a substitute letter, which contained a confirmation of certain conversations relative to all the points and details covering prices, shipments, and other matters heretofore mentioned. Defendant concludes this letter as follows:

> "If there is anything stated * * * not in accordance with our understanding * * * kindly advise us."

No further suggestions being made by plaintiff, defendant thereafter commenced to and did supply all the rock and sand that entered into the construction of the highway according to the terms of the agreement had between the parties except the last 1,945 tons used, the excess cost of which forms the basis of this action.

In addition to these facts and circumstances the oral evidence in the case with reference to the breach of the contract confirms and supports the conclusion of the trial court that a contract existed for the entire work.

[2] In urging its second ground for reversal, appellant assumes the existence of such a contract, but attempts to justify its breach upon the ground that plaintiff went into the open market and purchased material without first giving defendant an opportunity to supply it. The evidence upon this subject, while conflicting, fully supports the finding that defendant committed the breach. It appears therefrom that plaintiff made every effort to get the material from defendant. Its engineer in charge of the work testified that the county officials were complaining of the slow progress being made with the work, and that he spoke to defendant's superintendent daily concerning the matter, and that he made numerous trips to defendant's plant to endeavor to have it make deliveries faster, and had even supplied a man at plaintiff's expense to visit defendant's plant for such purpose, but without avail. It is also in evidence that plaintiff had advised defendant by letter of the delays, and had requested permission to order from other parties. The situation not having been remedied, a county supervisor and the engineer of the work made a final threat to take the work over, whereupon plaintiff ordered 17 carloads of material from Niles, in consequence of which A. L. Stone, vice president of defendant corporation, refused to make further deliveries.

We do not deem further discussion of the evidence necessary. It is sufficient to say that upon both of the questions here presented there was abundant testimony to sustain the finding of the existence of the contract, and also the further finding that plaintiff gave defendant every opportunity to supply the material before purchasing elsewhere.

[3, 4] Further complaint is made as to the amount of damages allowed. The measure of damage was the excess of the cost of the material in the nearest market over the contract price. Fairchild, etc., Co. v. Southern, etc., Co., 158 Cal. 264, 110 Pac. 951; sections 3308, 3354, Civ. Code. It is in evidence that before placing the order plaintiff consulted firms engaged in supplying the material involved, and was quoted the excess amount plaintiff was required to pay. There is therefore no merit in this objection.

For the reasons given, the judgment is affirmed.

We concur: RICHARDS, J.; WOOD, Justice pro tem.

50 Cal. App. 233

WENDT et al. v. SMITH. (Civ. 3481.)

(District Court of Appeal, First District, Division 2, California. Dec. 1, 1920. Hearing Denied by Supreme Court Jan. 27, 1921.)

1. Landlord and tenant 🔑331(2) — Ousted tenant cannot recover both share of crops and value of services.

A tenant under a lease giving him a share of the crops, who was ousted by his landlord before the crops were harvested, cannot recover as damages both the value of his share of the crops less the cost of producing them, and the value of the services he performed before he was ousted.

2. Trial 🔑311—Cost of producing crop must be proved, though jury were farmers.

In an action for damages for ouster of a tenant entitled to a share of the crop, where the measure of damages was the value of such share less the cost of producing the crop, the tenant cannot recover without proving the cost of producing the crops, even though the majority of the jurymen were farmers familiar with such work, since their experience could not enable them to judge the amount of labor necessary to produce that particular crop, nor was their experience a matter of record.

3. Landlord and tenant 🔑331(2) — Amount earned by tenants after ouster not set off against share of crops.

A landlord who ousted his tenants is not entitled to have credited, against their recovery for the value of their share of the crop less the cost of producing it, the amount earned by the tenants after their ouster.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by H. H. Wendt and others against W. R. Smith. Judgment for plaintiffs, and defendant appeals. Reversed.

Conkling & Brown, of El Centro, for appellant.

Henry G. Bodkin and Jos. P. Sproul, both of Los Angeles, for respondents.

NOURSE, J. This is an appeal by the defendant from a judgment for $3,990 upon a verdict of a jury. The action was brought for damages for the breach of a contract for a lease of land. The contract provided for the leasing to plaintiffs for one year of 220 acres of land in the county of Imperial. Plaintiffs agreed to pay, as rent therefor, an undivided one-half of all crops raised on the premises; it being understood that cotton, corn, and alfalfa should be planted. The defendant agreed to furnish all seed, stock, tools, implements, wagons, water, and materials necessary for the planting, maintaining, and harvesting of all crops; also to furnish all feed for stock used on the premises out of his half of the alfalfa produced. The plaintiffs agreed to furnish all labor necessary to the planting, irrigating, and harvesting of all crops and the labor necessary to maintain all ditches, borders, gates, checks, and fences on the premises, and to farm the land in proper manner. The defendant agreed to furnish any new material necessary for the maintenance of the ditches, fences, etc. It was also provided that the defendant had the right at all times to enter and view the premises and the improvements thereon and, in the event the lessees failed to properly care for the crops, the lessor should have the right to take charge of the farming operations himself and care for the crops and deduct the expense thereby incurred out of the share of the crops belonging to the plaintiffs.

Plaintiffs alleged that they went into possession of the property during the month of December, 1917, under this lease and performed all the covenants and agreements by them to be performed, and that on and after March 19, 1918, the defendant refused to allow them to work upon the premises and compelled them to leave the premises, threatening their lives if they remained. They then asked as damages the value of one-half of the crops grown on the premises during the year, which they alleged amounted to $8,000; and also that they be awarded the value of their labor performed during the four months of their occupancy of the premises, which consisted of plowing, irrigating, maintaining borders, gates, checks, fences, etc. This labor was alleged to be worth $500, making a total of $8,500 damages prayed for.

Defendant denied that he refused to permit plaintiffs to proceed with their work on the premises or that he ordered them to quit the same or threatened their lives, and alleged that by reason of the incompetence of plaintiffs and their inexperience in farming they were unable to carry out the terms of the contract; that by reason of the unskillful handling they endangered the alfalfa crop on the land and defendant was obliged to enter upon the premises and assist plaintiffs in saving said crop from being flooded while plaintiffs were irrigating the land; that upon his protest and remonstrance with reference to this incident plaintiffs voluntarily abandoned the premises. Defendant also denied that plaintiffs had suffered any damage. The case was tried before a jury, resulting in a verdict for plaintiffs.

Appellant objects to the instructions of the court with reference to the question of damages, and also contends that the evidence is insufficient to prove any damage whatsoever and that the verdict of the jury is therefore entirely unsupported by the evidence.

[1] The court instructed the jury that, if the respondents were entitled to recover, the measure of damage should be one-half of the

value of the crops which they could have grown upon the ranch during the year, less the cost of raising, cutting, and harvesting the same. In addition to this the jury was instructed that, if the respondents were entitled to damages, they were also entitled to judgment for the value of the labor of plowing, irrigating, maintaining gates, etc., performed by them upon the land in connection with the farming of the same during the period of their occupancy. Obviously this was error. By the terms of the lease respondents were entitled to one-half of the crops, and in return therefor were to furnish all the labor necessary to produce and harvest them. They cannot recover as damages for a breach of the contract both the value of the crops which they were to receive and also the value of the labor which they were to give in payment therefor.

The jury acted upon these instructions, and its verdict was for $3,490 in damages and $500 for labor. Respondents meet this objection to the instruction by a suggestion that, in the event this court should determine that judgment for both these items is improper, a modification of the judgment be ordered to the extent of the $500 allowed for labor. This would be a proper course if the verdict was otherwise proper. But the appellant's objection as to the insufficiency of the evidence is well taken. The record before us is lacking in evidence upon important facts which should properly enter into an estimate of damages in an action of this nature.

[2] It is claimed by appellant and tacitly admitted by respondents that there is no evidence of the probable cost of raising and harvesting the crops upon the land. Respondents seek to overcome this defect in the evidence by the argument that the jury was composed of ranchers from the vicinity who were probably aware of the cost of producing these products. But vital evidence may not be supplied in this irregular and uncertain manner. The only testimony on this subject is the indefinite statement of the appellant that he did not know the amount of expense incurred by those who completed the respondents' work in raising and harvesting the crop of 1918, but he knew there was some expense incurred in connection therewith. Evidence upon this subject should have been before the jury, as, under the lease, respondents were entitled to one-half the crops less the labor expended. The case is not controlled by Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625. There the jury was permitted to determine from its own knowledge the value of services rendered by a day laborer. But evidence had been offered showing the character of the services rendered and the time of performance. The reasonable value of the services was fixed upon the basis of the usual and customary wage paid for like services. Whatever may be said as to the soundness of the rule of that case, it does not apply here. Respondents were to be charged with the cost of raising and harvesting three different kinds of crops—alfalfa, corn, and cotton. In addition to this, they were to be charged with the cost of maintaining ditches, fences, borders, etc., and to do all necessary irrigating. No evidence was offered touching upon any of these subjects. Furthermore, it is not sufficient for counsel to say that all the jurors were farmers of experience and hence had independent knowledge of these costs. Their experience does not appear of record.

[3] Appellant further contends that he should have been given credit for any amount which the respondents earned at other work from the time of the breach until the expiration of the life of the contract. This contention is not well founded. Under the instructions of the trial court and the holding of this court, respondents will be charged with the full and complete cost of doing everything they undertook to do under their contract. This will include the work done by them and the allowance to appellant for the work that was necessary to be done from the time of the breach. The lease did not require that respondents should personally labor upon the land. It was not, therefore, a contract for personal services. This being true, appellant would have no further claim upon their time or services, and their earnings, if any, would not be involved in a consideration of the damages resulting to them from a breach of his contract.

The measure of damage in the present case is the simple and usual one in cases of a breach of contract of this nature. It is one-half of the proceeds of the crops which the respondents would have received out of the contract, less the amount they would necessarily have expended under the contract to produce and harvest all the crops.

The judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

50 Cal. App. 251

DAVIS v. MACKAY. (Civ. 3434.)

(District Court of Appeal, Second District, Division 1, California. Dec. 2, 1920.)

1. Appeal and error ⚷1011(1) — Finding on conflicting evidence not disturbed.

Finding based on conflicting evidence will not be disturbed on appeal.

2. Attorney and client ⚷81—No implied authority to employ detective.

An attorney of record, merely by virtue of his employment and in absence of express authority so to do, has no power to bind his client upon a contract for employment of a detective, and, even if the attorney did have such implied power, the engagement could not extend beyond what would be a reasonable compensation for the employment.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by E. P. Davis against Carrie Kunz Mackay. Judgment for defendant, and plaintiff appeals. Affirmed.

Lynn Helm, of Los Angeles, for appellant.

G. P. Nevitt, of Phœnix, Ariz., and Geo. L. Greer, of Los Angeles, for respondent.

SHAW, J. Plaintiff, as assignee of Bert H. Franklin, sued to recover a sum of money alleged to be due from defendant for services rendered as a detective.

Judgment went for defendant, from which plaintiff appeals.

As appears from the findings, the action was based upon a written contract dated November 1, 1918, executed between Bert H. Franklin of the first part and the persons whose names are signed thereto as parties of the second part, who at the time were attorneys for defendant in an action then pending in the superior court of Maricopa county, Ariz., wherein defendant was the proponent for probate of the will of her deceased husband and as to which will a contest had been entered by a brother of deceased. The contract is as follows:

"This agreement made and entered into this 1st day of November, 1918, by and between Bert H. Franklin, of Los Angeles, Cal., party of the first part, and Joseph P. Lacey and Townsend, Stockton & Drake, attorneys for Carrie Kunz Mackay, of Phœnix, Ariz., parties of the second part, witnesseth:

"That whereas Carrie Kunz Mackay has filed for probate an instrument alleged to be the last will of her husband, Angus R. Mackay, and

"Whereas a contest has been filed by one Edward Mackay alleging himself to be a brother of Angus R. Mackay, deceased, and

"Whereas Carrie Kunz Mackay and Joseph P. Lacey and Townsend, Stockton & Drake of her counsel, deemed it wise to secure the services of party of the first part in preparation of proponent's case and in preparation for the trial of the issues raised by the contest, and

"Whereas party of the first part has rendered valuable services to Carrie Kunz Mackay and has been continuously devoting his entire time and attention to the aforesaid work since October 11, 1918, and has employed certain assistants who have rendered valuable service, same having been done with the consent and approval of parties of the second part;

"Now, therefore, in consideration of the premises recited and such services as party of the first part may render to Carrie Kunz Mackay, it is agreed that party of the first part shall receive as full compensation for his services aforesaid the sum of fifteen dollars each day and his expenses and the expenses and salary of his assistants employed with the knowledge, consent and approval of the aforenamed counsel for party of the second part, and if the instrument filed and sought to be probated, is admitted to probate, said party of the first part shall receive for his services and the services of his assistants, the additional sum of five thousand dollars ($5,000.00) and one hundred dollars ($100.00) per day for each day he works with the knowledge and consent of the aforenamed attorneys for Carrie Kunz Mackay. It is agreed that the fifteen dollars per day and expenses and the salary and expenses of the said assistants of party of the first part shall be paid when and as rendered and incurred in cash. The balance of compensation, if said instrument is admitted to probate, shall be paid only when the administration of the estate is in condition to make possible a sufficient distribution so to do. In event of settlement $2,500.00 and $100.00 per day in addition to the fifteen dollars per day and expenses and the salary and expenses of assistants shall be paid.

"It is agreed that the total sum due party of the first part for his fifteen dollars per day and his expenses and for the salary of his assistants and their expenses to and including this date is $1,157.87 and party of the first part hereby acknowledges receipt of the sum of $650.00 on account thereof. Bert H. Franklin, Party of the First Part. Joseph P. Lacey, Party of the Second Part. Townsend, Stockton & Drake, by Fred Blair Townsend, by A. Henderson Stockton, by Earl F. Drake, Parties of the Second Part."

In addition to the findings that the contest of said will was settled, that Franklin, between October 11, 1918, and November 1st following, satisfactory to said attorneys, performed 21 days' service in which he laid out for expenses and his salary and that of assistants, $842.87, and that no part of the amount set forth in said agreement, other than $650, had been paid, not by defendant, however, but by Joseph P. Lacey, one of her attorneys, it was further found:

"That the defendant never authorized her attorneys to enter into the aforesaid agreement with the said Bert H. Franklin." "That the defendant never ratified said agreement after it was so entered into by her said attorneys after she had knowledge of the same." "That said Bert H. Franklin did not work in the serv-

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ice of said defendant excepting by and under the authority and direction of her attorneys." "* * * That the services so rendered by said Bert H. Franklin was not rendered at the special instance or request of the defendant. That the said Bert H. Franklin was not employed by the defendant to investigate and secure evidence for said defendant in the preparation of said defendant's case, or for the trial of the issues raised by the contest of a certain will offered for probate and alleged to be the last will of her husband, Angus R. Mackay, deceased, pending in the superior court of the county of Maricopa, state of Arizona, but was only employed as aforesaid by her attorneys of record as more fully appears from said contract heretofore set out." "That the defendant did not promise to pay the said Bert H. Franklin if a settlemement was made of said contest, the sum of $2,500.00 and $115.00 per day, or any other sum, for each day he worked thereon, or for any other time, or at all, either with the knowledge and consent of the attorneys of said defendant, or otherwise, nor did the defendant promise to pay his expenses and the salary and expenses of his assistants."

And as a conclusion of law the court found that plaintiff was not entitled to recover judgment against the defendant, and not entitled to have anything by reason of his complaint.

The contention of appellant is: First, that the findings made by the court in favor of defendant are not supported by the evidence; second, that the contract was made and entered into by her attorneys of record and that in so doing, and conceding an absence of express authority, they were acting within the scope of their powers as agents of and for and in behalf of defendant in making the contract with Franklin as a detective—both of which contentions are controverted by respondent, who, as a further defense, insists that the contract must be deemed void as against public policy.

[1, 2] The most that can be said as to the first contention, based upon the asserted insufficiency of evidence to support the findings made adversely to plaintiff, is that the testimony touching the question was conflicting. While that of Mr. Stockton, one of defendant's attorneys, called as a witness on behalf of plaintiff, was to the effect that when Mr. Lacey suggested to defendant that it was necessary to employ Franklin as a detective to assist in securing evidence and preparing the case, she replied, in substance, "Do whatever is necessary," the testimony of defendant is equally strong as tending to prove that she never employed nor authorized her attorneys to employ Franklin or any other detective, and never at any time said anything to them which could be construed as authorizing them as her agents to execute such contract for her and on her behalf. Moreover, the character of the contract under which the attorneys rendered the service is inconsistent with any express authorization given.

The chief contention of appellant is that defendant's attorneys, in the absence of express authority to make the contract, acted within the scope of their powers in the making of the same. In support of this contention appellant relies largely on the case of Kast v. Miller & Lux, 159 Cal. 724, 115 Pac. 932. In that case it appears that certain persons were being prosecuted for the alleged larceny of stock belonging to Miller & Lux, which corporation retained Judge Ostrander to assist the district attorney in the prosecution of the charges. As attorney, he employed a detective to gather evidence in behalf of the prosecution, and in an action brought by the detective to recover for services rendered he had judgment, which on appeal was affirmed, not, however, upon the ground of Ostrander's implied authority, but for the reason that the evidence adduced at the trial disclosed that he was in express terms authorized to employ the detective. Not only was it made to appear that the business agent of the corporation was present when Judge Ostrander engaged the detective, but he thereafter made payments of money to him for the services rendered. It thus appears that, since the decision in that case was not based upon the fact, as claimed, that an attorney, by virtue of his employment as such and in the absence of express authority, may employ a detective and make a contract with him for the payment of a specific sum of money, and thus bind his client therefor, it furnishes no support for appellant's contention. In Northern Pacific Ry. Co. v. Clarke, 106 Fed. 794, 45 C. C. A. 635, the court says:

> "It is elementary law that an attorney in a particular case has no general authority, by virtue of his retainer, to employ other counsel, either by way of substitution or as assistant or associate counsel, at the expense of his client."

To the same effect are Lathrop v. Hallett, 20 Colo. App. 207, 77 Pac. 1095; Young v. Crawford, 23 Mo. App. 432; Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899.

If an attorney of record has no implied authority to employ an associate counsel at the expense of his client in the litigation in which he is engaged, it must, we think, follow that he is equally without such implied authority to employ a detective at the expense of his client to assist him in securing evidence and preparing his case for trial.

In this case the services of the detective covered a period of some 21 days, for which, under the contract, if plaintiff is liable, he is entitled to recover from her $5,107, in addition to the $650 theretofore paid him by defendant's attorney, Joseph P. Lacey. Clearly the act of the attorneys in making the contract for the payment of such a large sum of money by their client cannot be deemed within the well-recognized rule that an attorney, by virtue of his retainer, may in behalf of his client incur the usual and necessary expense for the orderly conduct of the litigation. Such contracts for the employment of detectives are not only unusual, but as a rule wholly unnecessary.

We have no hesitancy in saying that, in our opinion, an attorney of record, merely by virtue of his employment and in the absence of express authority so to do, has no power to bind his client upon a contract for the employment of a detective such as here involved. Even were it conceded that the employment of a detective was within the scope of such implied power of an attorney, the engagement should not extend beyond what would be reasonable compensation for the employment. People v. Board of Supervisors, 35 App. Div. 239, 54 N. Y. Supp. 782.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(49 Cal. App. 756)

ALCIATTI et al. v. ORIGLIA. (Civ. 3540.)

(District Court of Appeal, First District, Division 1, California. Nov. 9, 1920. Hearing Denied by Supreme Court Jan. 6, 1921.)

1. Frauds, statute of 🔑84—Contract for sale of personalty void because not in writing.

A contract for the sale of wine of value in excess of $200 was void under Civ. Code, §§ 1624, 1739, where it was not in writing and there was no note or memorandum in writing subscribed by the seller or agent; purchasers never having received or accepted any part of the wine and having paid no part of the purchase price.

2. Frauds, statute of 🔑95(1)—Acceptance of money by agent held not part payment under statute.

Acceptance of a check by an agent for sale of wine was not the payment of part of the purchase price of the wine under Civ. Code, §§ 1624 and 1739, where such agent was not authorized to do anything more than find a purchaser for the wine at a certain price on terms to be determined by the seller, and the seller returned the check to the purchaser.

3. Brokers 🔑51—Minds of seller and buyer must be brought together.

Where broker was to sell wine at a certain price on terms acceptable to principal, his right to a commission did not accrue until the minds of the principal and intending buyers were brought together on the terms on which the sale was to be made.

On Hearing in Supreme Court.

4. Brokers 🔑86(1) — Evidence held insufficient to show broker's right to commission.

In an action by assignee of a broker to recover commission for obtaining purchasers for wine, evidence *held* insufficient to sustain a conclusion that any right of the broker to a commission under the terms of the contract had accrued, notwithstanding an acknowledgment by the owner of the wine that the broker had earned it.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Secondo Alciatti and others, copartners, doing business under firm name and style of the New Piemonte Wine Company, against Antonia Origlia. Judgment for plaintiffs, and the defendant appeals. Reversed in the District Court of Appeal, and hearing denied in Supreme Court.

William H. Johnson, of San Jose, for appellant.

Albert Picard, of San Francisco, for respondents.

WASTE, P. J. The plaintiffs brought this action to recover for the alleged breach of a contract to sell a quantity of wine, and for the commission claimed to be due for the sale of the same. They recovered a general judgment based upon both counts, and the defendant appeals.

The defendant, a wine grower, signed and delivered to U. Grossini a paper reading as follows:

"Morgan Hill, Cal., Dec. 2, 1918.

"I have this day agree to allow U. Grossini, wine broker, to sell my wine of about 35,000 gallons of red wine, for the price of 50 cents per gallon f. o. b. station Morgan Hill, Cal., this option to run 10 day from date; also white wine of about 4,000 gallons, 2½c commission.

"[Signed] Antonia Origlia."

At the same time she gave Grossini samples of the wine, which he submitted to several parties, including the plaintiffs. The samples were satisfactory, and the plaintiffs prepared a form of contract, in duplicate, for the defendant to sign, which they gave to Grossini together with a check for $1,000, payable to Mrs. Origlia, as a deposit on the purchase price. The agreement, as prepared by the plaintiffs, specified that the defendant agreed to and did sell to plaintiffs 32,000 to 33,000 gallons of red wine, and 3,800 gallons of white wine, as per "samples furnished by A. Grossini, broker, and the price is fixed at 50c a gallon f. o. b. Morgan Hill, Cal." the plaintiffs agreeing "to pay for the wine bought, as soon as same is delivered," deducting from the total the deposit of $1,000, and to accomplish the withdrawal of the wine from the defendant's winery not later than the middle of March next succeeding.

Grossini did not enter into any contract on the part of his principal, or in her name. He told the plaintiffs that it was "necessary to get her signature," and sent the proposed agreement and check for the deposit to the defendant by mail, with a letter in which he stated that he hoped that it "will be satisfactory." She returned them to him four or five days later, with a letter in which she stated that, while she was willing to sell at the price stated, it was not convenient for her to keep the wine until March and insure it until that time; that she needed money and desired the purchaser to pay for the wine at once. She accordingly refused to execute the contract. A representative of the plaintiffs and Grossini visited the defendant, and attempted to come to some agreement with her for the purchase of the wine upon terms which would be satisfactory. The defendant demanded cash in advance upon making the sale, and refused to sell upon any other terms. The plaintiffs, after demanding that the defendant fulfill an alleged sale to them, took an assignment from Grossini of his claim for commissions for making the sale, and brought this action with the result already noted.

[1, 2] In support of their claim for damages for breach of the alleged contract of sale, the plaintiffs, who are the respondents here, take the position that a sale was actually made by Mrs. Origlia to them, and that it was accomplished by and through Grossini. In both of these contentions the respondents are mistaken. The value of the wine was many times in excess of $200, and no agreement for the sale, or any note or memorandum thereof, was in writing, or subscribed by Mrs. Origlia, or by Grossini, assuming that he was appellant's agent for that purpose. The respondents never received or accepted any part of the thing sold, and they paid no part of the purchase price. Consequently the purported sale was void. Civ. Code, §§ 1624 and 1739. The respondents argue that part of the purchase price for the wine was paid. That is not so. Neither Mrs. Origlia nor Grossini regarded the latter's agency as authorizing him to do anything more than find a purchaser for the wine at the price fixed by the writing, on terms to be determined by Mrs. Origlia. The evidence established that fact very clearly. Grossini's action in sending the contemplated agreement for the sale of the wine to Mrs. Orgilia for her execution, and her rejection of the offer upon the ground that the terms were not satisfactory, are in accord with such understanding. During the subsequent negotiations the appellant wrote Grossini that she had given him an option of 10 days within which to sell her wine, "reserving the condition that when you have found a buyer you would have come up and established the terms." The conduct of all the parties to the transaction indicates that the whole matter of the sale of the wine rested in treaty with Mrs. Origlia, and that she never accepted the proffered terms. The mere fact, therefore, that Grossini took from the respondents the check for $1,000 and sent it on to Mrs. Origlia, who promptly returned it, did not constitute a payment of a part of the purchase price under the circumstances established by the evidence. The finding of the trial court, that the plaintiffs and defendant entered into a contract for the sale of the wine is therefore unsupported, and the judgment must be reversed.

[3] In anticipation of another trial of the case, we deem it expedient to consider the other point made by the appellant. The lower court found that the defendant was indebted to Grossini in the sum of $450 for services rendered in procuring the sale of certain wine. This finding can only be responsive to the claim that Grossini earned that sum in bringing the parties together in the manner already shown. Unless the finding rests upon certain statements made by the appellant during the negotiations between the parties, it has no support in the evidence. The duty assumed by Grossini in the matter was to bring the minds of Mrs. Origlia and the intending buyers of the wine to an agreement for a sale and the price and terms on which it was to be made. Until this was done his right to a commission did not accrue. Ayres v. Thomas, 116 Cal. 140, 144, 47 Pac. 1013; Shanklin v. Hall, 100 Cal. 26, 29, 34 Pac. 636; Zeimer v. Antisell, 75 Cal. 509, 512, 17 Pac. 642. Grossini did not accomplish that end. There is evidence in the record to the effect, however, that while the parties were endeavoring to reach an agreement as to the terms of payment for the wine, Mrs. Origlia acknowledged that Grossini had earned his commission, and that she would pay it, but that she would not sell at that time. If that declaration is to be construed as an acknowledgment that Grossini had completed his part in the transaction, the appellant became liable to pay Grossini the stipulated sum for his services in the matter (Ayres v. Thomas, supra), and the court's finding has meritorious support in the testimony. Our observation in this particular is called forth by the fact that appellant appears to be an Italian and the translation of her words into English, without further explanation of the conversation, may not have carried her exact meaning. On a retrial the matter should be more explicitly examined into.

The judgment is reversed.

We concur: RICHARDS, J.; BEASLY, Justice pro tem.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a rehearing in this court after decision by the District Court of Appeal of the First Appel late District, Division 1, is denied.

[4] In denying the application we deem it proper to say that we are entirely satisfied with the conclusion of the District Court of Appeal, as substantially expressed in the

opinion, to the effect that there was not sufficient evidence to sustain a conclusion that the right of Grossini to a commission under the terms of the contract had accrued; in other words, the evidence was not sufficient to support a conclusion that he had accomplished the thing which under the terms of the agreement would have entitled him to a commission. An acknowledgment by Mrs. Origlia that he had earned his commission would, of course, be entitled to consideration as evidence in connection with the other evidence in determining the question of fact, but in this case, in view of the other uncontroverted facts and circumstances, such acknowledgment, even if made, is of little or no importance.

All concur.

50 Cal. App. 6

HULLINGER v. BIG SESPE OIL CO.

(Civ. 3212, L. A. 5698.)

(District Court of Appeal, Second District, Division 2, California. Nov. 13, 1920. Hearing Denied by Supreme Court Jan. 11, 1921.)

1. Fraud ⚷31—Person induced to contract by fraud may either rescind or affirm and sue for damages.

One induced by fraud to contract may rescind, restoring to the other party what he has received under the contract, as provided by Civ. Code, § 1691; or he may elect to stand upon the contract, retaining all the benefits thereof, and recover whatever damages he may have sustained by reason of the fraud; but, if the contract be executory, and defrauded party chooses to affirm and sue for damages, he must assume all the burdens imposed upon him by the agreement, in which event, if the damage be greater than the balance due under the agreement, such balance must be deducted from any award of damages made in the action.

On Hearing in Supreme Court.

2. Fraud ⚷25—Damages recoverable without proving willingness and ability to perform contract.

It is not necessary for a plaintiff in an action for damages on a contract on discovery of fraud, whereby the contract is affirmed, to allege or prove his willingness and ability to perform the contract according to its terms.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by H. C. Hullinger against the Big Sespe Oil Company. Judgment for plaintiff, and defendant appealed. Reversed in District Court of Appeals, and hearing denied in Supreme Court.

E. D. Martindale, of Los Angeles, and John H. Miller, of San Francisco, for appellant.

Edwin A. Meserve and Harry W. Hanson, both of Los Angeles, for respondent.

WELLER, J. Defendant appeals from a judgment entered in the superior court in favor of the plaintiff for the sum of $5,600, damages for fraud and deceit practiced by the defendant in a transaction concerning a lease on certain oil lands in Ventura county.

It is alleged in the complaint that, for the purpose of inducing plaintiff to enter into a lease on the premises, defendant falsely represented to plaintiff that it was the owner in fee simple of the property, upon which there was an oil well capable of producing 50 barrels of oil per day, that all of the leased land was proven oil territory, and that there was located on the property a standard oil rig, boiler and engine, in good condition, with a complete outfit of tools and 1,600 feet of casing. Before the execution of the lease defendant showed the plaintiff certain land upon which there was a drilled well, and stated that it was the land proposed to be leased and that the well was capable of producing 50 barrels per day. It was impossible to examine or test the well prior to the making of the lease, by reason of it being full of water, but defendant agreed to pump out the water, cement the well, and demonstrate its capacity. Plaintiff relied upon these representations, and entered into the lease, paying the sum of $2,000 down, and agreeing to pay the further sum of $13,000 in installments thereafter. As a further consideration for the execution of the lease, defendant agreed to deliver to plaintiff 10,000 barrels of oil within six months from August 18, 1909, to be repaid out of the first product of wells to be sunk on the leased property. This oil was not delivered in accordance with the agreement, and the court assessed the damages therefor at $3,000.

Defendant was not in fact the owner of the land covered by the lease, but had only a mining claim, which had been located prior to the discovery or development of oil, or any effort to do so. The premises covered by the lease signed by the parties had no drilling rig, boiler, engine, or drilling tools, and there was not located thereon a producing oil well; nor was the well shown to plaintiff before the execution of the lease a producing well, but, in fact, proved to be a water well only.

The court found that, although the defendant represented to plaintiff that the well so shown was on the land described in the lease, and that it was capable of producing 50 barrels of oil per day, and that both representations were untrue, nevertheless defendant believed the representations to be true. The court further found that, because of defendant's failure and refusal to deliver a lease covering property owned by it in fee simple, in which was located an oil well of 50 barrels daily production, and because the lease did not embrace the standard rig, boiler, and engine in good condition, drilling tools and casing, plaintiff was damaged in the further sum of $2,600.

After the discovery by plaintiff of the falsity of the representations regarding the capacity of the well and the condition of the title to the property, negotiations were commenced looking toward a settlement of the differences without success. Following this, defendant notified plaintiff that its board of directors had passed a resolution withdrawing all propositions with relation to the leasing of the property, and requested plaintiff to return the leases, which had been submitted for his consideration. Plaintiff did not comply with the request, but instead instituted this action for damages, with the result noted.

Appellant contends that, as plaintiff neither alleged nor proved performance, or offer to perform, or rescission on his part, he cannot recover.

[1] It is well settled that one who has been induced by fraud to enter into a contract has a choice of remedies. He may rescind the contract, restoring to the other party what he has received under the contract, as provided by section 1691 of the Civil Code, or he may elect to stand upon the contract, retaining all the benefits thereof, and recover whatever damages he may have sustained by reason of the fraud. Westerfield v. N. Y. Life Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667. If the contract be executory, and the defrauded party choose to affirm and pursue his remedy of suing for damages, he must be prepared to assume all the burdens imposed upon him by the agreement. He must stand ready and willing to pay the full consideration called for by the contract, in which event, if the damage be greater than the balance due under the agreement, such balance must be deducted from any award of damages made in the action. However, as a condition precedent to this right of recoupment, the plaintiff must allege and prove that he is willing and able to perform the contract according to its terms. Hines v. Brode, 168 Cal. 507, 143 Pac. 729.

The complaint in the instant case sounds in damages alone. There is no allegation of rescission after discovery of the fraud; nor is it averred that plaintiff has offered or is willing to carry out the conditions of the contract on his part to be performed. From the findings in this case we are unable to determine if the court, in rendering its judgment, took into consideration the fact that under the contract there was due from plaintiff the sum of $13,000 in unpaid installments. It is somewhat significant that the amount allowed as damages for failure to deliver a fee-simple title is the equivalent of the amount paid by plaintiff at the time of the execution of the lease contract, with interest thereon; and it may well be inferred that it was the intention of the court to compel the defendant to restore the amount it had received on the purchase price of the lease, without any rescission by the plaintiff on discovery of the fraud. This inference is fortified by the circumstances that there is no testimony in the record before us upon which to base a finding that the sum so assessed was the actual damage sustained, except so far as the amount agreed to be paid might be considered as evidence of the value of the property had it been as represented.

Plaintiff seeks to excuse performance or offer to perform on the theory that the failure of defendant to comply wtih its contract obviated the necessity of compliance on his part while defendant was in default, citing sections 1439 and 1440 of the Civil Code as authority for his position. These sections deal with the reciprocal duties of the parties to a contract, and each must fulfill or offer to perform every obligation imposed upon him before he can demand or require performance from the other, except where such other party has given notice that he will not comply with his part of the contract. Thus, before plaintiff can maintain an action based upon his contract, he must allege and prove that he has fulfilled all the obligations thereof, or is able and willing to do so, or that the defendant has notified him that it will not be bound by the contract. None of these necessary allegations appears in the complaint herein. It proceeds, apparently, upon the theory that, because he had complied wtih his obligation up to the time of the discovery of the fraud, plaintiff could immediately proceed to recover his damages, without further compliance or offer to perform. This he cannot do, under the rule enunciated in Hines v. Brode, supra, which was decided after this action was commenced.

For the reasons stated, the judgment must be reversed; and it is so ordered.

We concur: FINLAYSON, P. J.; THOMAS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2] We do not approve those portions of the opinion which declare that it is essential for a plaintiff in an action for damages on the contract, whereby the contract is affirmed, to allege or prove his willingness and ability to perform the contract according to its terms. The law as to the amount that may be recovered in such an action and what must be set off against any damage proved is sufficiently declared in Hines v. Brode, 168 Cal. 507, 143 Pac. 729.

The statements referred to are not essential to the decision of the District Court of Appeal.

The application for a hearing in this court after judgment in the District Court of Appeal of the Second Appellate District, Division 2, is denied.

All concur.

50 Cal. App. 43

HUNT, County Treasurer, v. EMPIRE SECURITIES CO. et al. (Civ. 3228.)

(District Court of Appeal, Second District, Division 2, California. Nov. 18, 1920.)

Highways ⚷113(1)—Lien claimants cannot sequester county funds payable to contractor.

Code Civ. Proc. § 1184, does not apply to contracts for the improvement of streets or highways, so that a stop notice, given pursuant to that section, does not sequester funds payable under such a contract in the hands of the person charged with their disbursement, as would occur in the case of a private contract or a contract for the construction of a public building.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Interpleader by John N. Hunt, as County Treasurer of the County of Los Angeles, against the Empire Securities Company and Robert Beyrle and others, to determine the ownership of certain bonds. From a judgment ordering the sale of the bonds to satisfy the claims of defendants Beyrle and others, the Empire Securities Company appeals. Reversed.

Donald Barker and George W. Crouch, both of Los Angeles, for appellant.

A. J. Hill, Co. Counsel, of Los Angeles, for respondents.

Edward T. Bishop, Deputy Co. Counsel, of Los Angeles, for plaintiff and respondent Hunt.

Scarborough & Bowen, of Los Angeles, for defendant, cross-complainant, and respondent Beyrle.

Jensen & Jensen, of Los Angeles, for respondent Los Angeles Rock & Gravel Co.

W. E. Evans, of Los Angeles, for respondent City of Glendale.

W. T. Casey and Wm. J. Hanlon, both of Los Angeles, for respondent Donegan.

Albert J. Sherer and Clarence J. Walker, both of Los Angeles, for Pacific Rock & Gravel Co.

R. L. Horton, of Los Angeles, for respondent Tropico-Glendale Land Co.

Walton J. Wood and Leland J. Allen, both of Los Angeles, for respondent Rasich & Allen.

WELLER, J. This action of interpleader was instituted by the county treasurer of Los Angeles county to compel the defendants to litigate among themselves their claims to certain bonds held by him in his official capacity and representing the contract price of road work done by George L. Carroll, as contractor, under the provisions of the Road District Improvement Act of 1907 (Stats. 1907, p. 806).

The controversy here arises between the Empire Securities Company (assignee of Carroll, the contractor) and various parties who furnished materials and labor in the performance of the contracts with the county, hereinafter designated as lien claimants. These lien claimants base their rights to payment from the funds in the custody of the county treasurer upon the fact that they served stop notices on the proper officers, in accordance with the provisions of section 1184, Code of Civil Procedure, and thereby effected an equitable garnishment of such portion of the contract price as might be necessary to satisfy their demands. This contention was sustained by the superior court, and the Empire Securities Company appeals from the judgment ordering the bonds sold and the proceeds of such sale applied first to the liquidation of the amount found due the lien claimants, subordinating the claim of appellant to the payment of their demands.

No complaint is made as to the validity or regularity of any of the claims, and the sole question to be determined is, Which of the parties is entitled to priority?

The facts in the case under consideration are identical in all material respects with those set forth in the decision of our Supreme Court in Slayden v. O'Dea, 189 Pac. 1066, in which it is held that section 1184 of the Code of Civil Procedure does not apply to contracts for the improvement of streets or highways, and that therefore a stop notice, given pursuant to that section, under such a contract, does not have the effect of sequestering the funds in the hands of the person who is charged with their disbursement, as would occur in the case of a contract between private parties or for the construction of a public building. The rule thus enunciated is applicable to the instant case, and it follows that the superior court erred in adjudging the rights of the lien claimants to be paramount to appellant's claim to the bonds held by the county treasurer.

Judgment reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

50 Cal. App. 55

FONG SING et al. v. O'DELL et al.
(Civ. 2189.)

(District Court of Appeal, Third District, California. Nov. 19, 1920.)

1. Partnership 🔑244 — Surviving partners must liquidate affairs on death of one partner.

Under Code Civ. Proc. § 1585, where there is more than one surviving partner on death of a partner, those who are left must individually proceed to liquidate the affairs of the partnership, and deliver the residue to the parties entitled thereto, including the administrator or executor of the deceased partner.

2. Partnership 🔑245(1)—Surviving partners have cause of action against deceased partner's administrator taking possession of partnership property.

Surviving members of a partnership, being entitled to the possession of the partnership property under Code Civ. Proc. § 1585, have a cause of action against a deceased partner's administrator, who takes possession of some of the property and refuses to deliver it to the survivors.

3. Partnership 🔑258(1)—Surviving partners' action against deceased partner's administrator who has taken possession is in claim and delivery.

An action by surviving partners against a deceased partner's administrator, who has taken possession of partnership property and refuses to deliver it to the survivors, is in claim and delivery, and not in equity for an accounting.

4. Judgment 🔑249 — Form unimportant, if facts justifying relief are stated.

The form of the action is unimportant if sufficient facts are stated to justify any relief.

5. Replevin 🔑61—Failure to allege demand cured by showing that it would be unavailing.

In a suit by surviving partners against a deceased partner's administrator to recover partnership property of which he had taken possession, failure to allege demand for its delivery was cured by showing that such demand would be unavailing, especially where it alleged a demand for an accounting and an omission and refusal to account.

6. Partnership 🔑258(7)—Complaint by surviving partners against deceased partner's administrator held to state cause of action for possession.

In a suit by surviving partners against a deceased partner's administrator, a complaint, alleging the partnership, the death of one partner, the appointment of the administrator, the partnership's ownership of described property, that the administrator had taken possession of a designated part of such property and claimed it and denied the right of the firm and asserted title therein, and also showing that a demand would be unavailing, stated a cause of action for possession of the property.

7. Partnership 🔑258(7)—Complaint in action by surviving partners against others who were claiming title held good.

In a suit by some of the surviving members of a partnership against others, a complaint, alleging as to each defendant that he had taken into his possession and retained described property of the firm and claimed it as his own, and denied the right of the firm and of the partners therein, and refused to account therefor, stated a cause of action for an accounting.

8. Pleading 🔑64(2)—Complaint by surviving partner against others and deceased partner's administrator for accounting and distribution not multifarious.

In a suit by surviving partners against a deceased partner's administrator and other surviving partners, a complaint, alleging that the administrator and each of the defendant partners had taken possession of partnership property, claiming it as his own and denying the title of the partnership, and had refused to account therefor, was not multifarious, as the purpose of the action was single, to subject all of the property of the partnership to an accounting, that the debts might be paid and the residue distributed.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action for an accounting by Fong Sing and others against Harvey O'Dell, as administrator, and others. From a judgment for defendants on demurrer, plaintiffs appeal. Reversed with directions.

Joseph F. O'Malley and C. C. Wing, both of San Francisco, for appellants.

Tam & Hawkins, Nutter, Hancock & Rutherford, and Von Detten, Henry & Goodrum, all of Stockton, for respondents.

BURNETT, J. The action was brought for an accounting based upon an alleged partnership, of which plaintiffs, the decedent and the individual defendants were members. Separate demurrers were interposed by the administrator and the other defendants, which were sustained, and, the plaintiffs declining to amend, judgment passed, from which the appeal has been taken. The rights and duties of a surviving partner are clearly set forth in the Code of Civil Procedure and the decisions of the courts. In section 1585 of said Code it is provided that—

> "When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business. * * * The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the court, or a judge thereof, may, whenever it

appears necessary, order the surviving partner to render an account, * * * and the executor or administrator may maintain against him any action which the decedent could have maintained."

In Tomkins v. Weeks, 26 Cal. 51, it is said:

> "The administrator had no authority to intermeddle at all with the partnership affairs, except so far as he was entitled to call upon the surviving partner to proceed to close up the partnership affairs and account to him for the share of the surplus belonging to the estate."

In Cooley v. Miller & Lux, 168 Cal. 120, 142 Pac. 83, we find this statement of the law:

> "Neither the executor nor the heirs have any right of possession of the partnership property until the surviving partner has proceeded to its liquidation and has delivered it over to them. The executor or administrator has only the right to demand and enforce settlement and payment and delivery over of such part thereof as may remain after final settlement by the surviving partner of the partnership affairs. The surviving partner is the only legal representative of the partnership, at least as between him and the heirs and legal representatives of the deceased member."

[1] Of course, the principle is the same where there is more than one surviving partner. Those who are left must individually proceed to liquidate the affairs of the partnership and deliver the residue over to the parties entitled thereto, including the administrator or executor, as the case might be.

[2, 3] The survivors herein being entitled to the possession of the property of the partnership, it would, of course, follow that they would have a cause of action against the administrator of the estate of one of the partners, who had taken possession for the estate of some of the property and refused to deliver it over to said survivors. Quite clearly, though, the action would be in claim and delivery, and not in equity for an accounting. Plaintiffs apparently proceeded upon the theory that they could compel the administrator to participate in the liquidation and settlement of the partnership affairs, and hence the peculiar form of the action. Plaintiffs seem to think that Raisch v. Warren, 18 Cal. App. 655, 124 Pac. 95, justifies their view of the proper procedure. In that case, however, the point was not made that an action against the administrator of a deceased partner for an accounting could not be maintained. Indeed, the action was for an injunction, and the only point relied upon was that plaintiff was not in a position to bring the suit because he had not reduced the claim to a judgment.

[4] But, of course, the peculiar form of the action is unimportant if sufficient facts be stated to justify any relief. As declared by the Supreme Court in the recent case of Zellner v. Wassman, 193 Pac. 84:

> "It is not essential that a complaint state a cause of action for the relief which plaintiff seeks, provided the facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled."

[5, 6] In the complaint herein are alleged the existence of the partnership, the death of one of the partners, the appointment of his administrator, the ownership by said partnership at the time of said death of certain personal property, described therein, that said administrator had taken into his possession a part of said property, it being designated in the complaint, and that said defendant has claimed, and still claims, the property of his intestate, "and has denied and still denies the right of said firm and the said partners therein and has asserted and still asserts title therein." The only possible omission that could be urged is the failure to allege specifically a demand for the delivery of the property, but this is cured by the showing that such demand would be unavailing. Besides, we find the averment that, before the commencement of the action "plaintiffs demanded of defendants an accounting of the partnership transactions and affairs; that said defendants then and there refused and still refuse, omitted and still omit, to render such accounting." It cannot be doubted, therefore, that the complaint states a cause of action against said administrator for the possession of said personal property.

[7] But a more difficult question is injected into the case by the fact that another cause of action against the other two defendants for the recovery of other personal property is joined in the complaint, indeed in the same count, with said administrator. The allegations as to each are similar, and it is sufficient to exhibit the following:

> "That the defendant Phillip Storey, prior to the commencement of this action, took into his possession, and still retains personal property belonging to and owned by said copartnership [describing it]; that said defendant has claimed and still claims the said property as his own, and has denied and still denies the right of said firm and of said partners therein, and has asserted and still asserts title thereto adverse to said partners and to said firm, and has refused and still refuses to account therefor to said parties."

It is also alleged:

> "That defendants Phillip Storey and Bing Kee refuse to join as parties plaintiff, and for that reason, and for the further reason that they refuse, and each of them refuses, to render an accounting of partnership transactions had by them, and each of them, they are joined as parties defendant."

In 30 Cyc. 445, the governing principle as to the relation of the partners to the partnership property is stated as follows:

> "As firm property is not owned by the partners in severalty, but belongs to the partnership, it follows that neither partner is entitled to exclusive possession of the firm estate, or of any item of property composing it. If a partner wrongfully asserts such exclusive possession, the other partners may obtain relief in equity, but they cannot maintain a purely possessory action at common law."

Among the cases cited to support the text are Stone v. Fouse, 3 Cal. 292; Nugent v. Locke, 4 Cal. 318; Pico v. Cuyas, 47 Cal. 174.

Respondents have not pointed out any particular in which said allegations against Storey and Kee fall short of stating a cause of action for an accounting. We perceive nothing lacking in that respect. Indeed, whether regarded as in equity, or at law for recovery of the specific part of the partnership property held by them, the complaint states a cause of action against said Storey and Kee. We may add that, in our opinion, since it appears that two of the surviving partners are making adverse claims to a part of the partnership property, it would not be altogether unreasonable to hold that the plaintiffs are entitled to the possession of said property for the purpose of settling the partnership affairs and distributing the residue to those entitled thereto. In other words, having repudiated the ownership of the partnership, they are hardly in a position to claim the privilege of possession as partners. By their own conduct they have placed themselves in the attitude of strangers, and probably should be so treated. At any rate, we are satisfied a cause of action is stated against them.

[8] The question remains whether there has been a misjoinder of causes of action or of defendants. If the action were against surviving partners only who claimed an adverse interest in separate portions of the partnership property, there could be no doubt that it would not be open to the objection of multifariousness. The same result would follow if each of the defendants made claim to the same property belonging to the partnership. The problem is somewhat complicated by the fact, however, that the adverse claim is to separate portions, and the action against the administrator is, strictly speaking, in law, and against the other defendants, in equity. But, after all, the purpose of the action is single, to subject all the property of the partnership to an accounting, that the debts may be paid and the residue distributed to the plaintiffs and the defendants according to their respective interests. It is a case for the application of the principle stated in Storey, Eq. Pl., paragraphs 533 and 534, as follows:

> "Where there is a common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least, if the subjects are such as may without inconvenience be joined, may be united in one and the same suit; and, further that where the interests of the plaintiffs are the same, although the defendants may not have a coextensive common interest, but their interest may be derived under different instruments, if the general object of the bill will be promoted by their being united in a single suit, the court will not hesitate to sustain the bill against all of them."

In Dimmock v. Bixby, 20 Pick. (Mass.) 368, it is held that—

> "Where one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights," the bill of complaint is not multifarious.

In Wade v. Rusher, 17 N. Y. Super. Ct. 537, it was held that—

> "Where suit is brought by one of two partners against the other, to obtain an accounting and payment of a balance justly due from the defendant to the plaintiff, and to set aside as fraudulent a release from liability as such partner executed by the plaintiff to the defendant, a third person who has fraudulently and without consideration obtained from the defendant portions of the partnership property may also be made a party, in order to subject the property so held by him to the payment of any balance due from the defendant to the plaintiff."

The governing principle was said to be that the cause of action was single, namely, the right to an accounting and an application of the partnership property to the payment of the sum due from the defendant.

In Wilson v. Castro, 31 Cal. 421, it was held that a bill in equity to enforce a trust, averring:

> "That plaintiffs' grantors inherited a tract of land as heirs at law of their brother, who received a grant of the same from the government of Mexico, and died intestate, and that two of the defendants afterwards received patents for distinct parcels of the same, and that several other defendants claim the title to separate and distinct parcels of the same derived from the patentees, and that the defendants hold the legal title to the several distinct parcels in trust for the plaintiffs, * * * is not multifarious."

In the course of the discussion the court said:

> "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all parties interested in the subject of the suit, so as to make the performance of the decree of the court perfectly safe to those compelled to obey it, and to prevent further litigation. For this purpose all persons materially interested, either legally or beneficially, in the subject-matter of the suit, ought generally to be made parties thereto, either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all."

In Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478, the subject received careful consideration by this court. Therein it was held that, since the principal relief sought was the establishment of the existence of the partnership and for an accounting, the prayer for an injunction and the appointment of a receiver was only in aid of the main relief sought, and that there was no misjoinder of causes of action.

In Bremner v. Leavitt, 109 Cal. 130, 41 Pac. 859, we have this general statement of the controlling principle in such cases:

> "In an action for an accounting between partners, all matters relating to and growing out of the partnership relation of the parties, and for which an accounting is sought, however varied they may be in their nature, taken together constitute but a single cause of action, and may properly be embraced in a single count in the complaint."

The case at bar differs somewhat in its facts from any of the foregoing citations, but we think it presents a similar situation. The technical terminology being ignored, the case is simply one, after the dissolution of a partnership, against several parties who are in possession of some of the partnership property and claiming the same, to have it determined that said property belongs to said partnership and to subject it to the payment of the partnership debts, and to have the residue distributed to those entitled to it. Necessarily we assume that the facts are as stated in the complaint. It may be that after issue joined it would be advisable and proper to try separately the issues that may be raised by the different parties, but we think the defendants should be put to their answer.

We may state that respondents devote nearly their entire argument to the proposition that the complaint does not state a cause of action, and this is all that is said upon the point of misjoinder:

> "We respectfully submit that the amended complaint therefore states no facts giving the plaintiff any grounds for relief against the defendant O'Dell as administrator, and that his demurrer was therefore properly sustained, and that the demurrer of the defendant Storey was also properly sustained upon the ground that he has been improperly joined with defendant O'Dell, with whom he is in no wise united so far as the subject of the action is concerned."

We think they are mistaken, and the judgment is reversed, with direction to the lower court to overrule the demurrers and permit defendants to answer.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

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50 Cal. App. 180

KOPPERUD v. COOKSON et al. (Civ. 2133.)

(District Court of Appeal, Third District, California. Nov. 26, 1920.)

1. Bills and notes ⟜525—Evidence held to prove purchase of note in good faith.

Holder *held* to have acquired a note as indorsee in good faith within Civ. Code, §§ 3137, 3140, as amended by St. 1917, p. 1541, making defense of no consideration unavailable against an indorsee in due course who has acquired a note in good faith.

2. Appeal and error ⟜1010(1)—Findings warranted by evidence not disturbed.

Findings warranted by the evidence will not be disturbed.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by A. H. Kopperud against S. T. Cookson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Geo. F. McNoble, W. Goodwin Williams, J. Le Roy Johnson, and M. P. Shaughnessy, all of Stockton, for appellants.

Ostrander & Carey, of Oakland, for respondent.

BURNETT, J. The action was brought by the indorsee of a promissory note given in consideration of the sale of a certain stallion. The defense is that there was a failure of consideration by reason of the false and fraudulent representations made by the seller as to the age, soundness, and procreative ability of the horse, and that—

> "A pretended indorsement or assignment of said note was made by the said Norm W. Thompson (the payee) to plaintiff, but said indorsement or assignemnt was fraudulent and void; that plaintiff, at the time said note was indorsed and assigned to him, knew that the same was without consideration and void, and knew that the said stallion was unsound and diseased in body, and was worthless to said defendants, and said plaintiff did then and there conspire with said Norm W. Thompson to cheat and defraud the said defendants by having said note indorsed by said Norm W. Thompson to said plaintiff for the purpose of preventing the said defendants from making their defense of want of consideration when suit should be brought upon said note."

It may be that the defendants were "stung," as one of the witnesses expressed it; it is quite probable, indeed, that Thompson perpetrated a fraud in inducing the purchasers to rely upon his representations as to the character of the horse.

But be that as it may, there can be no serious doubt that the judgment of the trial

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⟜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes court must be upheld upon the other ground that plaintiff was "an indorsee in due course," in other words, that he "in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor," acquired the note duly indorsed to him. Section 3123, Civ. Code. The learned trial judge gave to this question careful consideration, as is apparent from his opinion filed in the case. He points out that at the time of the transaction the "Uniform Negotiable Instrument Law" had not become operative, but that no substantial change was effected thereby as far as this question is concerned, and that the case is governed by the principles announced in sections 3137 and 3140 of the Civil Code as amended by the Legislature of 1917 (St. 1917, p. 1541). He proceeds:

> "That the plaintiff acquired the note in question in due course is admitted. That he acquired it in good faith is denied, and the basis of denial is placed upon the circumstances that he purchased the note at a 10 per cent. discount, and made no inquiry of the makers of the note as to the consideration and the circumstances leading up to its execution by them."

He declares that if plaintiff had made such inquiry he probably would not have discovered any fact indicating the invalidity of the note, but at most that the defendants had paid for the horse more than he was worth, but that it was worth more than the note which he was about to buy. Thereupon follows this:

> "But the law relating to negotiable instruments does not necessitate any such action on the part of the intending purchaser of such paper. If he knows of any circumstances affecting the instrument, then he is chargeable therewith, and if anything occurs in the course of the negotiation with the persons with whom he is dealing, or if anything appears upon the face of the instrument which would arouse the suspicion of a reasonable person as to the infirmity of the note, then his failure to make inquiry to ascertain the truth concerning the instrument would amount to bad faith.
>
> "It may be here stated that the court has found nothing in the testimony indicating that at the time of the purchase of the note anything occurred or anything appeared which would have caused a reasonable person, in the situation of the plaintiff, to question the validity of the instrument, or that it was not executed for a good and sufficient consideration.
>
> "It is urged that the purchase of the note at a 10 per cent. discount was of itself sufficient to cast a cloud upon the transaction, and also the fact that the transaction took place between 80 and 100 miles distant from the place where the note was executed. The apparent reason for Thompson's presence in the city of Oakland to visit his brother-in-law, who was an employee of the plaintiff, answers any objection that may be made as to the transaction occurring in Oakland rather than in Manteca. So far as the plaintiff was concerned, Thompson was there for a legitimate and valid reason. His presence under such circumstances would not call for inquiry or arouse any suspicions. That Thompson was taking notes from farmers where he had sold different stallions is also true. That the different notes ran over a considerable period of time, and thus deprived Thompson of the use of ready money, appears also to be a fact. And, considering that the note in controversy had something over a year to run, and that the use of 90 per cent. of its face value would mean more to Thompson, if paid then, than the full amount of the note obtained after a delay of more than a year, the court cannot very well come to the conclusion that a 10 per cent. reduction was at all out of the ordinary, or such as to raise an inference that the plaintiff knew he was buying, or ought to have known that he was buying, a tainted instrument."

The trial judge then called attention to the distinguishing features of the several cases upon which appellant relies, and, after citing Eames v. Crosier, 101 Cal. 260, 35 Pac. 873, Blochman Commercial & Savings Bank v. Moretti, 177 Cal. 256, 170 Pac. 419, Citizens' Bank v. Stewart, 22 Cal. App. 91, 133 Pac. 337, as enunciating the rule to be applied in such instances, he concluded:

> "From what has been said, the conclusion is unavoidable that, so far as the plaintiff is concerned, it must be held that he is a purchaser in good faith, that the note was taken in the ordinary and usual course of business a year or more before its maturity, without notice of any defenses, and that an adequate consideration was paid therefor, and is entitled to judgment in his favor, irrespective of any fraudulent practices on the part of Thompson in its procurement."

[1, 2] It seems unnecessary to add anything to what was stated by the trial judge. Even if we concede that the evidence might support a finding that plaintiff was not a purchaser in good faith, it cannot be gainsaid that the court was amply warranted in reaching a contrary conclusion. The trial judge was in a position to gauge properly the testimony of the plaintiff, and it would be presumptuous in us to say that he was misled.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem; HART, J.

50 Cal. App. 241

LEACHMAN v. CAGE et al. (Civ. 3290.)

(District Court of Appeal, Second District, Division 1, California. Dec. 2, 1920.)

1. Judgment ⚿892—Satisfaction held not conclusive as against claim that payment was on account only.

A writing entitled "Satisfaction and Release of Judgment against Defendant E. S. F.," in the body of which it was stated that $500 had been paid by E. S. F., and acknowledging "full satisfaction of the judgment rendered in the above-entitled action * * * and the clerk of said court is hereby authorized and directed to enter in the proper records full satisfaction of said judgment," *held* not conclusive as against a claim by the judgment creditor that the $500 was only paid on account of the judgment and not in full satisfaction thereof.

2. Judgment ⚿898(4)—Satisfaction of judgment must be pleaded by defendants in action to renew.

Where judgment was rendered against three defendants on note, and, upon payment of part of the amount thereof by one defendant, a satisfaction in full was filed with the clerk, and the judgment creditor later brought action to renew the judgment as to the other two defendants, it was necessary that defendants in the second action plead such satisfaction and secure findings and judgment thereon, if they wished to rely on it or a satisfaction in full.

3. Judgment ⚿138(1)—Defendant relieved from default only by satisfying condition required by statute.

After a default has been entered against a defendant, he can only be relieved therefrom by satisfying a condition required under Code Civ. Proc. § 473.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Alonzo Leachman against John M. Cage, Hattie L. Mohrenstecher, as executrix of the estate of George Mohrenstecher, deceased, and others. From an order vacating a default judgment for plaintiff against the executrix and dismissing action, plaintiff appeals. Reversed.

Goodspeed & Pendell, of Los Angeles, for appellant.

Lewis Cruickshank and Vincent B. Vaughan, both of Los Angeles, for respondent.

JAMES, J. Plaintiff takes this appeal from an order made by the trial court vacating a default entry and judgment entered thereon against defendant Mohrenstecher, executrix. An appeal is also taken from an order made dismissing the action.

[1-3] The facts are these: Respondent's testator, one Finney, and three other persons, were the makers of a promissory note of which the plaintiff was the holder. Judgment was entered on that note against all of the defendants and in favor of the plaintiff on the 15th day of July, 1914. Thereafter, on the 11th day of August, 1919, Finney, one of the makers, paid to the plaintiff $500 and plaintiff executed a writing which was entitled "Satisfaction and Release of Judgment against Defendant E. S. Finney," and in the body of which it was stated that, $500 having been paid by Finney, Leachman acknowledged "full satisfaction of the judgment rendered in the above-entitled action, * * * and the clerk of said court is hereby authorized and directed to enter in the proper records full satisfaction of said judgment." At that time a sum considerably in excess of the $500 mentioned was due to the plaintiff under the judgment. Thereafter the plaintiff brought action to renew the judgment as to the respondent and the other makers of the note except Finney, and default was duly entered against respondent for not appearing and answering the complaint. Thereafter respondent moved the court to set aside the judgment on the ground that the judgment in suit had been fully satisfied, and referred to the records and files in the former action, which included the written satisfaction of judgment hereinbefore referred to. No ground of excusable neglect, such as is permitted to be made under section 473, Code of Civil Procedure, was urged; respondent taking the bald position that she was entitled to the relief sought upon referring to the court for inspection the written satisfaction of judgment as filed in the first action. As we have noted, the court not only granted this motion, but entered an order upon the application of respondent, dismissing the suit. Plaintiff, in his complaint in the action to renew the judgment, set out fully the facts as to the amount due and as to the amount paid by Finney, referring to the latter as a payment on account only. We think that the complaint tendered an issue as to the nonpayment in full of the judgment, and that the written satisfaction as filed was not conclusive as to that issue. Furthermore, assuming that the written satisfaction would have such effect, it was necessary to plead the same in the second action and secure findings and judgment thereon. Deland v. Hiett, 27 Cal. 611, 87 Am. Dec. 102. Assuming the correctness of this position, it would necessarily follow that after default had been entered against respondent she could only be relieved therefrom by satisfying a condition required under section 473, Code of Civil Procedure. This her counsel admits she did not do. The order vacating the default and judgment should not have been granted.

The order and judgment of dismissal are reversed.

We concur: CONREY, P. J.; SHAW, J.

49 Cal. App. 764

COMMERCIAL NAT. BANK OF LOS ANGELES v. ROBERTS et al. (Civ. 3460.)

(District Court of Appeal, First District, Division 2, California. Nov. 10, 1920.)

1. Fraudulent conveyances 🔑87(1) — Cancellation of pre-existing indebtedness is valuable consideration.

Cancellation of pre-existing indebtedness is a valuable consideration for a conveyance.

2. Fraudulent conveyances 🔑113(1) — Deed held not void as a prohibited secret parol trust to convey.

Where in consideration of cancellation of pre-existing indebtedness to wife husband conveyed land to his wife's sister, and the sister took with the resulting trust for the wife, the deed was not void as a prohibited secret parol trust to convey, for the cancellation of pre-existing indebtedness was a valuable consideration, and if the grantor had paid the debt to his wife, and she had paid the money for the conveyance, it would not be open to attack under Civ. Code, § 853; the law not requiring the mere act of passing the same money backward and forward under section 3532.

3. Fraudulent conveyances 🔑299(1) — Evidence held to prove execution of deed prior to creditors' attachment.

In a suit to set aside a deed as fraudulent as to creditors, evidence *held* to warrant a finding that the deed was executed before the date of the creditors' attachment.

4. Fraudulent conveyances 🔑300(5) — Evidence held sufficient to warrant finding that pre-existing indebtedness was canceled.

In an action to set aside deed made by a husband to his wife's sister, who took the land in trust for the wife, evidence *held* to warrant finding that there was a cancellation of a pre-existing indebtedness due the wife.

5. Fraudulent conveyances 🔑300(5) — Evidence held sufficient to establish adequacy of consideration.

Where a conveyance by a husband to his wife's sister for the latter's benefit was attacked as fraudulent, evidence *held* sufficient to establish the adequacy of the consideration, which was the cancellation of a pre-existing debt.

6. Appeal and error 🔑941—Question of adequacy of consideration calls for exercise of judicial discretion.

The question of the adequacy of the consideration for an alleged fraudulent conveyance calls for the exercise of judicial discretion, and, to warrant interference with such discretion, the disparity between the ascertained value of the lands and the price paid must be so clear as to shock the moral sense at first glance.

7. Appeal and error 🔑931(1) — All presumptions are in favor of the action of the trial court.

Every reasonable presumption must be indulged in favor of the action of the trial court, and this is true where the determination of the trial court on the question of adequacy of an alleged fraudulent conveyance is attacked.

8. Attachment 🔑180 — Judgment 🔑788(1) —Unrecorded conveyance passes title as against subsequent attachment or judgment.

A deed executed and delivered, though not recorded, passes title against a subsequent attachment or judgment even when procured by creditor of the grantor.

9. Fraudulent conveyances 🔑115(1) — Preferential deed not void.

Mere false statements by a debtor to his creditor do not warrant the vacation of a preferential deed made to another creditor; for, under Civ. Code, § 3442, a debtor may prefer one creditor to another in a case where the bankruptcy statutes do not apply.

10. Fraudulent conveyances 🔑271(3)—Proof of grantor's fraudulent intent casts the burden of proof on the grantee.

Proof that the grantor had a fraudulent intent in making the conveyance casts the burden of proof on the grantee to show a valuable consideration, and, when this burden is sustained, the burden of proof again shifts to one attacking the conveyance to show that the grantee had knowledge of the grantor's fraudulent intent.

11. Fraudulent conveyances 🔑74(2)—Inadequacy of consideration is circumstance tending to show participation in fraud.

Mere inadequacy of consideration is not of itself fraudulent, but is only a circumstance tending to show knowledge of fraud or participation in it.

12. Appeal and error 🔑842(3)—Question of fraudulent intent one of fact.

Under Civ. Code, § 3442, the question of fraudulent intent of the grantor and grantee in case of a conveyance attacked as in fraud of creditors is one of fact, and the determination of the trial court is binding on the appellate court.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Action by the Commercial National Bank of Los Angeles against C. S. Roberts and others. From a judgment for defendants, plaintiff appeals. Affirmed.

James, Smith & McCarthy, of Los Angeles, for appellant.

Daley & Byrne, of San Bernardino, for respondents.

BRITTAIN, J. The plaintiff sued to have certain conveyances set aside as fraudulent and appeals from the judgment against it. The real basis of the attack is that the evidence does not support the findings of fact. Interwoven with the argument upon this question the appellant makes certain contentions regarding the law. It will tend to clarity to dispose of these contentions in the first instance. Three deeds through which Roberts' title to the land in controversy became vested in his wife, the respondent Mida Roberts, are attacked, and a sheriff's deed under execution against Roberts is relied upon by the appellant, which maintains that, apart from any question of fraud, each of the three deeds is void, and that the sheriff's deed gave to the appellant legal title.

[1, 2] The first deed in the series is in the ordinary form of grant, for an expressed consideration of $10, from Roberts to a Mrs. Buechner, a sister of Mrs. Roberts. The trial court found that the real consideration for the conveyance was a pre-existing debt of Roberts to his wife, and that the conveyance was made to Mrs. Buechner, who paid no part of the consideration, with a resulting trust for Mrs. Roberts. The appellant contends that, apart from any question of fraud, or lack of consideration, or nonexistence of the debt, the deed is void as a prohibited secret parol trust to convey. Cases are cited announcing the familiar rule that to support such a resulting trust the consideration for the conveyance must have been paid by the beneficial owner. Assuming for the present purpose the existence of the debt from Roberts to his wife, there could be no contention such as the appellant makes if Roberts had paid the amount of the debt in money to his wife and immediately she had paid him the same money as the consideration for his conveyance to Mrs. Buechner. Civ. Code, § 853. The law does not require so idle an act as the mere passing back and forth of the same coin. Civ. Code, § 3532. Cancellation of a pre-existing indebtedness is a valuable consideration for a conveyance. Schulter v. Harvey, 65 Cal. 158, 3 Pac. 659; Riley v. Martinelli, 97 Cal. 582, 32 Pac. 579, 21 L. R. A. 33, 33 Am. St. Rep. 209. If the transaction was untainted by fraud the entire title of Roberts was divested by the conveyance of the legal title to Mrs. Buechner, subject to the resulting trust for Mrs. Roberts.

Still assuming that the transaction was not fraudulent, after Roberts divested himself of title, neither he nor the appellant, claiming under a subsequent execution sale, is at all interested in what became of the title, or whether or not subsequent transfers were valid or fraudulent; therefore no consideration need be given to the appellant's contentions concerning the subsequent deeds from Mrs. Buechner to Roberts' sister, Mrs. Brillhart, and from her to Mrs. Roberts. On the other hand, if the first deed was fraudulent, the subsequent deeds are similarly tainted and fall with it, and in that event it is unnecessary to consider the particular attacks of the appellant directed to them. If the entire title passed from Roberts under the first deed, the judgment must be affirmed; if no title passed from Roberts because the first deed was fraudulent, the judgment must be reversed. The only bearing transactions subsequent to that deed could possibly have upon the case is that they might tend to show fraud or guilty knowledge connected with the original transaction. The final contention of the appellant that, because its sheriff's deed was recorded before the date of the last deed in the series, legal title vested in Mrs. Roberts under that deed, subject to the appellant's right, is wholly groundless. If by the first deed Roberts' title was divested, the appellant acquired nothing by the sheriff's deed, and its recordation added no new right.

The only other matter to be considered is the attack on the sufficiency of the evidence. The first deed was dated November 20, 1914. The appellant, in its brief, says:

> "If the deed was actually executed on the day of its date, and if there was a valuable and adequate consideration for it, and if there was no fraudulent intent, the deed vested title in Buechner and wiped out our attachment."

The attachment was levied after the date of the deed, judgment followed against Roberts on his debt to the appellant in the attachment suit, and sale of his interest, if any, to the appellant was under execution levied on that judgment.

Section 3442 of the Civil Code, in so far as it relates to the matters under discussion, provides that the question of fraudulent intent is one of fact, and not of law; nor can any transfer be adjudged fraudulent solely on the ground that it was not made for a valuable consideration, provided that any transfer made voluntarily or without a valuable consideration by a party while insolvent, or in contemplation of insolvency, shall be fraudulent and void as to existing creditors. From the quoted statement in the appellant's brief, if the evidence meets four requirements, the judgment must be affirmed. The four points are: (1) Execution on November 20, 1914; (2) a valuable consideration; (3) adequate in amount; and (4) lack of fraudulent intent. Taken as a whole the evidence is such that a finding in favor of the appellant on any of these facts, except perhaps the first, would have been sustained, but it does not follow that the present findings must be reversed. Bandle v. Commercial National Bank of Los Angeles, 178 Cal. 546, 174 Pac. 44.

[3] On the question of execution of the deed on its date there is ample evidence. The notarial certificate showed acknowledgment on November 20, 1914, and in addition to the positive testimony of Roberts, his wife, and Mrs. Buechner, the subscribing witness and the notary testified they were present at a dinner at Roberts' house when the deed was delivered. As against this it is argued that certain suspicious circumstances were of such a character as should have prompted the trial court to reject this testimony of these five witnesses. This court, not having seen the witnesses, cannot,

in the face of the record, brand them as perjurers.

[4] On the question of a valuable consideration, Roberts and his wife testified she had caused certain land owned by her subject to a mortgage to be transferred to him, and that the mortgage was foreclosed; also that she had from time to time advanced to him certain money during a period of about two years; that they had figured up the amount of the debt and agreed that it amounted to about $2,000, to cancel which the deed was made. This evidence was sufficient to establish the existence of the debt, and as a matter of law the cancellation of such a debt constitutes a valuable consideration. Schulter v. Harvey, supra; Riley v. Martinelli, 97 Cal. 582, 32 Pac. 579, 21 L. R. A. 33, 33 Am. St. Rep. 209; Ross v. Sedgwick, 69 Cal. 250, 10 Pac. 400; Sanderson v. Broadwell, 82 Cal. 133, 23 Pac. 36; Hart v. Mead, 84 Cal. 244, 24 Pac. 118; Greenwalt v. Mueller, 126 Cal. 639, 59 Pac. 137; Fowles v. National Bank, 167 Cal. 664, 140 Pac. 271.

[5] On the question of adequacy of the consideration there was evidence that the property, which was a ranch where Roberts and his wife maintained their home, was worth about $5,000, and that it was subject to a mortgage to a third person to secure a debt of about $2,500. Roberts testified that his debt to his wife was about $1,800. She testified it was $2,000 or somewhat more. The appellant argues from certain evidentiary matters that the debt could not have been more than $500, but from the facts on which the appellant relies it may have been considerably more. The appellant assumes the ranch to have been worth more than $5,000, but this assumption does not rest upon any conclusive evidence. If the ranch were worth $7,500, subject to the mortgage of $2,500, and there had been no debt from Roberts to his wife, either might have defeated the appellant's judgment by a declaration of a homestead. The trial court found there was a debt and it was canceled. Upon the evidence of value of $5,000, subject to a mortgage of $2,500, the court was justified in considering the equity of the holder of the legal title as worth considerably less than the difference in the two amounts.

[6, 7] Under these circumstances the determination of just what is an adequate consideration for a transfer calls for the exercise of judicial discretion, and on appeal every reasonable presumption must be indulged in favor of the action of the trial court. It has often been said, to warrant interference with the discretion vested in the trial court, the disparity between the ascertained value of the thing sold and the price paid must be so clear and so great as at first glance to shock the moral sense. No such condition appears under the facts in evidence and to which reference has been made.

[8] On the question of fraud, in addition to the claimed inadequacy of the consideration for the transfer, there are many circumstances tending to support the view of the appellant, but these were all matters of fact, confided to the determination of the trial court. Roberts testified that he had no fraudulent intent. That he told numerous untruths to the officers of the appellant bank, and concealed from them the facts concerning the execution of the deed to his wife, is beyond question. The deed had not then been recorded. A deed executed and delivered, though not recorded, passes title against a subsequent attachment or judgment, even when procured by a creditor of the grantor. Hoag v. Howard, 55 Cal. 564; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Morrow v. Graves, 77 Cal. 218, 19 Pac. 489; Ward v. Watterman, 85 Cal. 507, 24 Pac. 930; Bank of Ukiah v. Petaluma, etc., Bank, 100 Cal. 590, 35 Pac. 170; National Bank v. Western Pacific Ry., 157 Cal. 576, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391.

[9] Mere false statements by a debtor to his creditor are not sufficient to warrant a court in setting aside a preferential deed to another creditor in satisfaction of his debt. A debtor may prefer one creditor to another in a case where the bankruptcy statutes do not apply. Civ. Code, § 3442; Sanderson v. Broadwell, supra; Heath v. Wilson, 139 Cal. 362, 73 Pac. 182.

> "It is a well-settled rule that, where a plaintiff attacks a conveyance as in fraud of his rights, it is incumbent upon him first to show the fraudulent intent of the vendor. The burden then shifts to the purchaser to show valuable consideration, and, this shown, the burden again shifts to the plaintiff, who must show the vendee's knowledge of the fraudulent intent of the grantor." Hart v. Church, 126 Cal. 471, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195.

[10] Assuming that Roberts' false statements to the bank officials showed a fraudulent intent on his part, under the rule the burden shifted to Mrs. Roberts to show a valuable consideration. This burden she sustained under the findings to which reference has been made. The burden then again shifted to the appellant to show guilty knowledge on her part of Roberts' fraudulent intent, and the argument upon this subject rests largely upon the claim of inadequacy of consideration.

[11, 12] Inadequacy of consideration is not of itself fraudulent. It is only a circumstance tending to show knowledge of fraud or participation in it. Knowledge and intent remain questions of fact on which the appellate court is bound by the determination of the trial court. Civ. Code, § 3442; McFadden v. Mitchell, 54 Cal. 628; Sukeforth v. Lord, 87 Cal. 400, 25 Pac. 497; Rossen v. Villanueva et al., 175 Cal. 632, 166 Pac. 1004. Mrs. Roberts testified that she had no knowledge that her husband was indebted to the

appellant, and that at the time of the conveyance she believed him to be a man of ample means. The most that can be said in favor of the contentions of the appellant in regard to the sufficiency of the evidence to support the findings is that it was conflicting. There is nothing else in the record or briefs requiring consideration.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(50 Cal. App. 102)

FRIEND & TERRY LUMBER CO. v. DEVINE et al. (Civ. 2063.)

(District Court of Appeal, Third District, California. Nov. 22, 1920. Hearing Denied by Supreme Court Jan. 20, 1921.)

1. Appeal and error ⚷931(9)—Where findings waived every legitimate conclusion resolved in support of judgment.

Where findings are waived, every legitimate conclusion which can be drawn from the evidence must be resolved in support of the judgment.

2. Husband and wife ⚷23 — Except as his agent in fact, wife cannot bind husband except for necessities.

Unless the wife is acting as her husband's agent, she has no authority to make any contract in his name, or to dispose of his property, save and except purchases for necessaries, when not supplied by him.

3. Principal and agent ⚷153 — One receives principal's property from agent at his peril.

While a person who knowingly receives money or property of a principal from an agent in payment of the latter's debt does so at his peril, if the agent acted without authority, the principal may recover.

4. Husband and wife ⚷23—Husband held not entitled to hold creditor on account of wife's misappropriation.

In an action by a lumber company against a husband and wife both of whom made purchases, where it appeared that the husband allowed the wife to collect his funds and pay bills, *held* that, though the wife wrongfully applied the husband's funds in payment of her own bill, the husband could not hold the lumber company; the evidence warranting a finding that he made the wife his agent, and that the lumber company acted in good faith.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Friend & Terry Lumber Company against James H. Devine and another. From a judgment for plaintiff, the named defendant appeals. Affirmed.

See, also, 188 Pac. 1007.

C. E. McLaughlin and S. R. Hart, both of Sacramento, for appellant.

Irving D. Gibson, of Sacramento and Stanley Pedder, of Coalinga, for respondent.

PLUMMER, Justice pro tem. Respondent recovered judgment against the appellant in the trial court for the sum of $421.45, on account of lumber sold and delivered by the respondent to the appellant.

By the statement of counsel for appellant at the opening of the case in the trial court, it appeared that the only issue presented for determination was whether the appellant should have credit for the sum of $208.34 on account of lumber alleged to have been furnished by respondent to one J. E. Reeves, the son of appellant's wife by a former marriage, and charged to the account of appellant's wife.

It appears that the respondent sold and delivered lumber used in repairing a certain building owned by appellant, also lumber for the repair of a building belonging to Mrs. Devine, the wife of appellant, and also sold and delivered some lumber to Mr. Reeves, this latter lumber going over to a place called Broderick, the cost thereof being charged to the account of Mrs. Devine. Mr. and Mrs. Devine owned separate property, and also had separate accounts with the lumber company. Mrs. Devine, the appellant's wife, appears to have collected all rents, and otherwise received money from appellant or his property, and paid all bills. It also appears that at the time of making payments the appellant's wife would designate the respective accounts to which the payments should be applied. It does not appear how much money was collected by Mrs. Devine, or whether any of the moneys used by her in making payments, either on her account or the account of her husband with the lumber company, came from her separate property. The transactions referred to continued over a considerable period of time. Monthly statements were rendered by the lumber company to the defendants, to which no objection appears to have been made until a short time before the institution of this action. The accuracy of plaintiff's ledger sheet, showing an indebtedness on the part of appellant to the respondent in the sum of $421.45, appears to be unquestioned. There is nothing in the record from which the inference can be drawn that the respondent had any knowledge of the source, or sources, from which the money came used by Mrs. Devine in making payments. The record is also silent as to whether the respondent had any knowledge of whether Mrs. Devine was authorized to direct the application that should be made of the respective payments. The money paid by Mrs. Devine was applied to the accounts as she di-

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

rected, and her account, which at one time amounted to $367, was all paid and discharged, save and except the sum of $23.25, for which judgment was had against her.

[1] Findings were waived, and hence every legitimate conclusion which can be drawn from the evidence must be resolved in favor of the support of the judgment. The evidence of the witnesses Reeves and Mrs. Devine is so uncertain that no conclusion could really be drawn as to the value of the lumber delivered to Reeves at Broderick and charged to her account, but from the testimony of the witness Shepard, an officer of the plaintiff corporation, it would appear that the value of the lumber delivered to Reeves and charged to the account of Mrs. Devine was about the sum of $128.59. But whatever the value of the lumber delivered to Reeves and charged to the account of Mrs. Devine may have been, there is plenty of evidence, if believed by the trial court to show that Mrs. Devine ordered the amount thereof charged to her account. There is also testimony to show that Mrs. Devine collected all the rents from whatever source they came, attended to all payments made to the lumber company, directed the application to be made of such payments; that statements of account were rendered from time to time by the lumber company to appellant, and also to Mrs. Devine, showing the status of their respective accounts. There is also sufficient testimony to lead the trial court to the conclusion that the appellant authorized his wife to make collections and attend to all payments, his own testimony being that he thought he had given his wife plenty of money to pay "any bill." There is no testimony, however, which shows that the appellant specifically directed the application of any payment to be applied to the account of Mrs. Devine. Such authorization, if any, could only be inferred from the course of the dealing of the parties herein, and the manner in which the business was transacted. The ledger sheet exhibiting the account of Mrs. Devine shows that she purchased lumber to the value of $367, of which sum only the value of the lumber sent to her son is disputed by her. At the time of the institution of suit all of this account had been paid except the sum of $23.25, as heretofore stated. The money for the payment of all of Mrs. Devine's account apparently came from the same sources, and that Mrs. Devine had authority to apply the money to the payment of her account, save and except the portion thereof representing the value of the lumber delivered to her son, appears not to have been questioned in the trial court. The accounts furnished the defendants show the amount of lumber purchased. The appellant intrusted the collection of rents and making of payments wholly to his wife, who directed their application.

It is now urged that the payments made by Mrs. Devine on her own account were unauthorized, and that the appellant is entitled to have the amount of such payments credited as an offset on the plaintiff's claim against him, upon which this suit is based.

[2] Appellant relies for reversal on the following cases to wit: Baker v. Witten, 1 Okl. 160, 30 Pac. 491; Puget Sound Lumber Co. v. Krug, 89 Cal. 243, 26 Pac. 902; National Fire Insurance Co. v. Wagley (Tex. Civ. App.) 68 S. W. 819; and Nilson v. Sarment, 153 Cal. 531, 96 Pac. 315, 126 Am. St. Rep. 91. The holding of these cases is substantially that, unless the wife is acting as her husband's agent, she has no authority to make any contract in his name, or to dispose of his property, save and except purchases for necessaries when not supplied by him. In the Witten Case, the wife had employed a physician to care for a man wounded by her son, the issue of a former marriage. The husband was held not liable. In the Lumber Company Case, lumber had been purchased by the husband which went into the repair of property belonging to the wife. While the same rule is announced in that case, the Supreme Court held that there was sufficient evidence upon which the lower court might have concluded that the husband was authorized to make the purchase. In the Sarment Case, the court held that the husband was not estopped to assert the community character of certain property by reason of any statement made by the wife. To the same effect was the ruling in the Wagley Case.

[3] It is not sought, however, in this case to charge the husband with liability on account of contracts made by his wife. The authorities cited by appellant undoubtedly state the law, but the application of the principles involved is different in the questions now presented for our consideration. The evidence is sufficient to justify the trial court in the conclusion that the appellant owed the respondent the amount of the judgment rendered against him on his own account. This account was not created by any act of his wife. Had this been true, the cases cited would be decisive in appellant's favor. It is alleged wrong application of money furnished the wife, bearing no earmarks of ownership, that is really in question.

In 21 Ruling Case Law, page 913, we find this answer to that question:

> "A person who knowingly receives the money or property of a principal from an agent in payment of the latter's debt does so at his peril; and, if the agent acted without authority, the principal on proof of these facts is entitled to recover. Story states the rule as follows: 'A person dealing with a factor or broker is bound to know that by law a factor or broker, although a general agent, is not clothed with authority to pledge, deposit, or transfer the property of his principal for his own debt; and, if he receives such a deposit or pledge, the title

is invalid, and the property may be reclaimed by the principal. However, in order to make one liable by reason of participation in misuse of money for the principal by an agent, upon the ground that it was used to pay the private debt of the agent, it is necessary to show, not only that the party sought to be charged was aware that the money belonged to the principal, but also that he was aware that the debt paid by it was in fact a private debt of the agent, or such a debt that payment thereof could not lawfully be made out of such money.' "

2 C. J. § 578, states the rule in this language:

> "Where, in violation of his duty, an agent, makes a payment or appropriation of his principal's money to a third person, the principal may recover of the third person the money so misapplied, unless the third person is a bona fide holder for value and without notice."

A number of cases are there cited to the effect that knowledge is necessary on the part of the third party in order to charge him with liability.

In Perry v. Oerman (63 W. Va. 566, 60 S. E. 604, 15 L. R. A. [N. S.] 310) 129 Am. St. Rep. 1020, the court states the law in this manner:

> "To make one liable by reason of participation in misuse of money of the principal by an agent, upon the ground that it was used to pay the private debt of the agent, it is necessary to show, not only that the party sought to be charged was aware that the money belonged to the principal, but also that he was aware that the debt paid by it was in fact a private debt of the agent, or such a debt that payment thereof could not lawfully be made out of such money."

The Supreme Court of New York, in Newhall v. Wyatt, 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. Rep. 712, holds substantially the same, and uses this language:

> "The payment of money to a creditor who receives it in discharge of an existing debt innocently and without knowledge, or means of knowledge, that the debtor had no rightful ownership in the funds received, is good and effectual, and does not subject the creditor to a recovery by the true owner of such funds."

In Porter v. Roseman, 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222, 6 Ann. Cas. 718, a contrary rule appears to have been adopted. It is there held that if an agent applies money of his principal to the payment of the agent's debt, the creditor receiving such money acquires no title thereto, though, when receiving it, he does not know it is not the money of his debtor.

An examination of the cases upon which this rule is based would lead to the conclusion that the circumstances surrounding the several cases were sufficient to put the creditor upon inquiry or notice.

[4] In several of the cases having to do with the conversion of personal property which can be readily identified, general language has been used which would cover the misapplication of money; but where the distinction has been clearly drawn, the weight of authority supports the rule announced in Ruling Case Law, in Corpus Juris, and by the Supreme Court of the state of New York.

The testimony of the appellant clearly shows that Mrs. Devine was acting with his knowledge and permission in collecting the rents and paying the bills, and is sufficient to show that the wife was acting as appellant's agent in this capacity, and whether there is sufficient evidence to justify a conclusion by the trial court that Mrs. Devine was authorized to make the specific application of the moneys collected by her to the payment of her own account, which included the items for lumber delivered to her son, is immaterial. There being no evidence to show that the respondent acted in other than a bona fide manner when it received payments and applied the same to the account of Mrs. Devine as directed by her, we must, under the authority of the cases heretofore cited, hold that the appellant is not entitled to have such payments now credited on his account with respondent.

The judgment of the trial court is hereby affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

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50 Cal. App. 173

ARSENIO v. SMITH. (Civ. 2191.)

(District Court of Appeal, Third District, California. Nov. 26, 1920. Rehearing Denied Dec. 25, 1920.)

1. Evidence 🔑466—Admissible to show written contract supplanted by another.

Although oral evidence is not admissible to vary the terms of a written contract, it is admissible to show that such contract has been mutually abandoned and supplanted by a new and different agreement.

2. Appeal and error 🔑1170(3)—Cause not reversed for defect in pleading not prejudicial.

Where an answer in an action to recover for hay sold was defective in not specifically averring rejection of the hay and mutual abandonment of the written contract, yet such could be deduced from its allegations and the case was tried upon that theory, substantial justice being done, the case will not be reversed for such defect, in view of Code Civ. Proc. § 475, prohibiting reversal for nonprejudicial error.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by F. S. Arsenio against Frank V. Smith. Judgment for defendant, and plaintiff appeals. Affirmed.

K. Van Zante, of Hanford, for appellant.
J. L. C. Irwin, of Hanford, for respondent.

PREWETT, Presiding Justice pro tem. The appellant sues the respondent to recover $2,037 claimed as a balance due upon a sale of 223 tons of hay at an agreed price of $18 per ton. It is averred and admitted that the hay was delivered to respondent. The respondent in his answer, among other things, admits and avers:

> "That said plaintiff agreed that said hay would be well baled and cured and in good merchantable condition when delivered to defendant. That thereafter * * * the said plaintiff did deliver to the defendant 223 tons of barley and alfalfa hay at El Rico Station, in Kings county, Cal., but that a great portion of said hay was damaged and not in good merchantable condition, and that thereupon the said plaintiff and defendant agreed that said defendant should sell said hay at the best price that he could obtain for the same, and that the said defendant would pay to the plaintiff for said hay the amount that he, the defendant, received for said hay, less $2 per ton, which said plaintiff then and there agreed to pay to the defendant as a commission for handling and selling said hay."

There is no claim that the defendant has failed to live up to the terms of this oral contract.

[1, 2] The answer is somewhat defective in not specifically averring a rejection of the hay by the respondent and of the mutual abandonment thereupon of the written contract. However, the appellant makes no point as to the sufficiency of the answer. Furthermore, it may reasonably be deduced from its allegations that the hay was rejected by the respondent, and that thereupon the parties mutually abandoned the written contract and entered into the oral one. The case throughout was clearly tried upon this theory, and the findings set out all the facts with skillful detail. But even if the answer were slightly defective, the case should not be reversed therefor. Section 475, Code Civ. Proc.

It is not controverted that the hay was damaged and that the respondent immediately notified the appellant thereof. The court found that the parties thereupon mutually abandoned the original contract and entered into the oral contract set out in the answer. The evidence abundantly sustains the findings and judgment. The evidence shows that the appellant himself actually sold some of this hay to third parties.

The appellant makes the point that oral evidence is not admissible to vary the terms of a written contract. This contention is thus far sound, but there was no attempt to vary the terms of a written contract. The contract was mutually abandoned, and upon its abandonment it ceased any longer to be a contract between the parties. Thereupon the parties entered into a new contract and proceeded at once to carry it into execution.

The appellant was entitled to rescind the original contract, but after it had been mutually abandoned there remained nothing to rescind. The position of the lower court is fully sustained by the Supreme Court in the case of Guidery v. Green, 95 Cal. 634, 30 Pac. 787, wherein the court says:

> "The evidence offered did not purport to vary or contradict the terms of the written instrument set forth in the complaint, nor did it have the effect of adding any new term to that agreement. Its purpose was to show that that agreement had been canceled by mutual consent, and had no longer any operative effect. Such evidence is as admissible as is oral testimony that the terms of a written agreement have been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. In either case the object and effect of such evidence is not to change any of the terms of the contract, but to show that the contract has no longer any existence, and therefore cannot be made the basis of an action."

As we construe the written contract offered in evidence, it constitutes an agreement to sell, with a warranty that the property would measure up to a given standard. Notwithstanding some minor defects in the answer, we believe, upon an examination of the whole case, including the evidence, that substantial justice has been done, and that no adequate reason exists for sending the case back for a new trial.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

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50 Cal. App. 213

WATERFORD IRR. DIST. v. TURLOCK IRR. DIST. et al. (Civ. 2195.)

(District Court of Appeal, Third District, California. Nov. 29, 1920.)

1. **Tenancy in common 🔑41—One tenant cannot create easement against cotenant.**

One joint owner or tenant in common cannot create an easement in the common estate against his cotenant.

2. **Tenancy in common 🔑43—One tenant cannot sell the common property.**

A tenant in common has the right to dispose of his own undivided share, but he cannot sell the whole property, or any portion thereof, and bind his co-owners by such sale.

3. **Tenancy in common 🔑50—One tenant can license another to use property as he might use it.**

One tenant in common may, either by lease or license, confer upon another person the right to occupy and use the property as fully as the lessor or licensor himself might have used or occupied it.

4. Waters and water courses 🔑228½, New, vol. 10A Key-No Series—Licensee of joint owner of the diversion dam can require other owner to adjust gates without extra compensation.

Where two irrigation districts jointly constructed and owned a diversion dam, and one of them licensed a third district to transport water through its canal, the licensee can compel the other joint owner of the dam to make the necessary adjustments to its gates, which controlled the flow of water, so as to send the additional flow into the other owner's canal, since that is a burden which the other owner could have imposed if it had desired to divert the additional flow.

5. Waters and water courses 🔑140—Policy requires water to be used, though it imposes reasonable inconveniences on prior users.

It is the policy of the state that all its water resources be applied to beneficial use, and to that end a subsequent appropriator may make use thereof, though in doing so some inconvenience or expense, not exceeding a reasonable amount, is thereby imposed upon prior users.

6. Eminent domain 🔑126(3)—Compensation for right to divert water at dam is value of use of dam.

In proceedings under Code Civ. Proc. § 1240, subd. 5, authorizing condemnation by an irrigation district under certain conditions of property appropriated to a public use by another irrigation district, to condemn the right to use a dam of another irrigation district for diversion of water, the measure of compensation would be the use value of the dam, since only the use of the dam was taken.

Appeal from Superior Court, Stanislaus County; G. W. Nicol, Judge.

Action by the Waterford Irrigation District against the Turlock Irrigation District and others to restrain defendants from interfering with a certain water flow claimed by plaintiff. From a judgment granting the injunction, defendants appeal. Affirmed.

P. H. Griffen, of Modesto, for appellants.

Dennett & Zion, of Modesto, for respondent.

HART, J. This is an appeal by appellants from a judgment in favor of the plaintiff enjoining the defendants from interfering with the flow of 60 second feet of water from the Tuolumne river into the canal of the Modesto irrigation district and to restrain them from interfering in any way with the diversion of said water by plaintiff, the said 60 second feet of water having been acquired by the plaintiff from the Sierra & San Francisco Power Company, a corporation, under a contract dated January 14, 1919.

The respondent has incorporated into its brief the written opinion of the Hon. G. W. Nicol, sitting as a judge in the trial in the county of Stanislaus, in deciding the case. Said opinion contains an accurate statement in substance of the general facts as they were, upon what we regard as sufficient evidence, found by the court and also a statement and a correct application of the principles of law pertinent to the issues as made by the pleadings and developed by the evidence. We, therefore, approve and adopt said opinion as part of the opinion herein of this court. The opinion referred to is as follows:

"The facts material to the question involved in this case may be briefly stated as follows: The plaintiff and the Turlock irrigation district are both irrigation districts organized and existing under and by virtue of the California Irrigation District Act. The defendant Turlock irrigation district and the Modesto irrigation district are the owners as tenants in common of a certain dam across the Tuolumne river a short distance above the town of La Grange, and commonly called the La Grange dam.

"This dam was constructed by these two districts under a contract between them of date August 9, 1890. The dam was constructed at their join expense, and is jointly owned by them in common. The Turlock district contains about 176,510 acres of land and the Modesto district 81,183 acres. The water to irrigate these lands is diverted by means of this dam into the canals of the districts. The Turlock canal is on the south side of the river and the Modesto canal is on the north side, and each of the said districts is the exclusive owner of its own canal, diverting water from the said dam.

"It appears from the evidence that until the water in the river falls to about 500 second feet the Modesto outlet, owing to its situation, controls the flow, but after the water falls below five hundred second feet the Turlock gates then control the flow of the water.

"The plaintiff, the Waterford irrigation district, in order to irrigate the lands contained within its boundaries, diverts the water from the Tuolumne river at the said La Grange dam, through the canal of the Modesto irrigation district. The plaintiff has acquired the right to divert the natural flow of said river water for the purposes of irrigation. This right is based upon an appropriation made in 1913, and is subsequent to and subject to the rights of the Modesto and Turlock irrigation districts.

"In 1916, the plaintiff and the Modesto irrigation district entered into a contract by which the plaintiff paid to the Modesto district $254,000, and in consideration thereof the Modesto district agreed to enlarge its diverting canal, from the La Grange dam to certain points specified in the agreement, so that the canal would carry at least 250 second feet of water for plaintiff in addition to the water required by the Modesto irrigation district, and by this agreement the said Modesto irrigation district agrees to carry through its said canal to the said Waterford irrigation district the water that it is entitled to, not exceeding 250 cubic feet per second. In pursuance of this agreement the Modesto district did enlarge its canal, and did carry the waters to plaintiff, as therein provided.

"As before stated, the rights that the plaintiff acquired by appropriation are subsequent and subject to the prior rights of the Turlock and Modesto irrigation districts. During the season of 1919, the Modesto district carried and delivered to the plaintiff water, until in the month of June, when the natural flow of the river fell to such a point that it was not sufficient to supply the claims of the Modesto and Turlock districts, and they were taking all the water then flowing in the river.

"The Sierra & San Francisco Power Company is the owner of a certain water right and diverting system commonly known as the La Grange water right and system, by which there is diverted from the Tuolumne river, at a point known as Indian bar, 66 cubic feet of water per second. This point of diversion is 13 or 14 miles above the La Grange dam, and the right to this 66 second feet is prior in time to any of the water rights of the said irrigation districts.

"In January, 1919, the plaintiff purchased from the Sierra & San Francisco Power Company the right to all of said water for the period of six months, commencing on the 1st day of May and extending to the 31st day of October in each year, less the amount of water that the company is now furnishing to the town of La Grange, and for certain other purposes, which excepted amounts of water shall not exceed in the aggregate 6 cubic feet per second. Under the contract with the Sierra & San Francisco Power Company the period during which the six months' use of the said water shall run is variable, and may, at the option of the Waterford irrigation district, begin on April 1st, or the 15th day of April, or the 15th day of May, or the last day of June of any year; said period of use to continue for six consecutive months from the date of commencement as designated.

"In accordance with the agreement, the Sierra & San Francisco Power Company was, in June, 1919, notified to turn into the Tuolumne river for the plaintiff 60 second feet of water, and plaintiff also notified the Turlock and Modesto districts thereof. The Turlock district immediately notified the plaintiff and the Modesto district that it would not permit the water to be delivered to the Waterford irrigation district through, or by means of, the La Grange dam without compensation being first paid to the Turlock irrigation district. Upon receiving this notice the plaintiff commenced this action to restrain the Turlock district from interfering with the flow of the said 60 second feet of water into the Modesto canal for the use of plaintiff.

[1-3] As before stated, the La Grange dam was built by the Modesto and Turlock districts, and is owned and held by them as tenants in common. The law is well settled that one joint owner or tenant in common cannot create an easement in the common estate against his cotenant. Pfeiffer v. Regents of University, 74 Cal. 156, 15 Pac. 622. In Southern Inv. Co. v. Postal Telegraph-Cable Co., 156 N. C. 259, 72 S. E. 361, Ann. Cas. 1913A, 224, it was held that when a telegraph company and a railroad company having become tenants in common for a period of years of poles along the railroad right of way for the purpose of a telegraph system, to serve both the public and the railroad, the telegraph company could not, in the absence of specific provision in their contract conferring the power, and without permission of its cotenant, the railroad company, give a telephone company the right to place wires thereon for telephone purposes; that the telegraph company had no right to grant to another, in furtherance of a disconnected and separate business, the privilege of affixing two telephone wires to these poles, and of imposing this additional burden upon the owners. Palmer v. Palmer, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653, Charleston, etc., R. R. Co. v. Leech, 33 S. C. 175, 11 S. E. 631, 26 Am. St. Rep. 667. A tenant in common of property has the right to dispose of its own undivided share, but such owner cannot sell the whole property, nor any portion thereof, except his own; and if he undertakes to dispose of any larger interest his co-owners are not bound thereby. Tuttle v. Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652. One tenant in common may, by either lease or license, confer upon another person the right to occupy and use the property of the cotenancy as fully as such lessor or licensor himself might have used or occupied it, if such lease or license had not been granted. Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 598, 28 Pac. 45.

[4] "The contract between the Waterford and Modesto irrigation districts gives to the plaintiff a right to the use of the Modesto canal for the purpose of conveying water as therein provided, and this grant of a right to the use of said canal to convey water necessarily carries with it a right to the use of the La Grange dam, as the said dam is but an incident to the canal in the diversion of water from the Tuolumne river. This contract in no manner attempts to grant to the Waterford irrigation district any right or privilege to use the dam for any other purpose than that to which it had theretofore been used by its owners. This contract does not interfere with the full use of the dam by the Turlock irrigation district, nor does it place upon it any additional burden.

"The fact that the plaintiff diverts this 60 second feet of water at the La Grange dam, and conveys the same through the Modesto canal, and that, owing to the low state of the water in the river during the end of the dry season, the Turlock district has to adjust its gates, so as to allow this water to enter the Modesto canal, casts no more of a burden on the Turlock irrigation district than would have been cast upon it if the plaintiff had no contract with the Modesto district, but diverted its waters below the dam. Assuming that the plaintiff had no agreement with the Modesto district, and had its own separate independent canal, which diverted the water from the river, below the La Grange dam, then the Turlock irrigation district would be required to adjust its gates, so as to allow this 60 second feet of water to flow down the stream to the plaintiff, and in my opinion the fact that the plaintiff, under a contract, is using the Modesto canal to carry this water, does not render the case any different from what it would be if the plaintiff's point of diversion was below the La Grange dam. Or suppose that the Modesto irrigation district had purchased this water from the Sierra & San Francisco Power Company, instead of the plaintiff, and suppose that there was no contract between the Modesto and Turlock districts as to their respective interests in any after-acquired water rights, could it be claimed that the Modesto irrigation district would not in that case be entitled to have the gates of the Turlock district so adjusted as to allow this water to flow into the Modesto canal? That it would be entitled to have the gates so adjusted I think there can be no question, and equally clear to my mind is the right of the grantee to have this water flow into the said Modesto canal."

There is nothing to be added to what is said in the above opinion of the learned trial judge. It disposes of the points in the case correctly. The reasoning by which the conclusion is reached is sound. These further observations, however, may, with no impropriety, be suggested: That it does not appear from the evidence that the water rights of the Turlock district have been or will be interfered with or in the least impaired by the arrangement entered into between the Waterford and the Modesto districts. Indeed, there is no claim made by the appellant that such a result has followed, or will ensue from the use of the Modesto district's canal to carry the plaintiff's 60 second feet of water to it. To the contrary, the written notice to the Waterford district and the Modesto district, protesting against the carrying out of the agreement between the two last-named districts, is based entirely upon the proposition that the Turlock district is entitled to be compensated for the use of the La Grange dam by the plaintiff, stating that it objects to the use of the dam for the purpose of diverting the water of plaintiff, and so delivering said water to it, unless satisfactory arrangements for compensation therefor to the defendant were made. Moreover, the record discloses that, if any burden growing out of the agreement between the plaintiff and the Modesto district has at all been imposed upon the Turlock, it is a "burden" which merely involves a little extra inconvenience and some extra expense due to the necessity for a more frequent regulation or adjustment of the radial gates whereby the water is diverted into the Turlock's canal. But as to this there appears to be such a conflict in the testimony as to render immune from successful attack the court's finding that no such burden is added to the Turlock district by the act of the Modesto district in allowing the 60 second feet of water belonging to the plaintiff to flow to the latter through the Modesto canal. But, after all, the fact is, as the court below has found, and as is shown in the written opinion, there is nothing in the agreement between the plaintiff and the Modesto district which authorizes a greater use of the La Grange dam than that to which the Modesto could itself have put it. It is not denied but that the Modesto district, under the terms of the agreement whereby it and the Turlock district became joint owners or owners in common of the La Grange dam, might have enlarged its own canal for its own individual purposes, and thus have put said dam to a greater or more extensive use for its own purposes than it in the first instance had done or had occasion to do. If the Modesto district could do this, then why may it not transfer the right to do the same thing as to others? See Freeman on Cotenancy and Partition, §§ 251, 253, and Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 598, 28 Pac. 45, wherein an affirmative answer to the question may be found. If, therefore, it be true that the Turlock district has suffered some inconvenience and extra expense from the arrangement between the plaintiff and the Modesto district, it is only the inconvenience and the extra expense which are incident to the contract between itself and the Modesto district. As the court below said, in deciding the case, no such added burden is placed upon the Turlock district because of the agreement between the plaintiff and the Modesto district as that the full and convenient use of the dam by the Turlock district is in the slightest degree interfered with. Of course, the Modesto district could transfer no more than its interest or moiety in the cotenancy, nor, as has been already stated herein, would the transfer or grant of the easement or right to use the dam stand if by reason thereof there was a substantial or material interference with or impairment of the rights of the Turlock district in the cotenancy.

[5, 6] It may further be added that the policy of the state with respect to the waters flowing in nonnavigable streams, or even in navigable streams where the use of the waters thereof for purposes other than for navigation may be had without material interference with the navigability of such streams, is that such waters shall be so utilized as to produce the greatest amount of good to the industries of the state that they are capable of. It is, of course, an obvious proposition that the development of the state's resources—its agricultural, horticultural, stock-raising, power and other like industries—depends largely upon the fullest use of the water supply of the state. As an essential corollary of this proposition, it is against the policy of the state to permit any waste by an appropriator of the waters flowing in the rivers, creeks, and sloughs. Every person owning a water right must use it for a beneficial purpose, and where there are two or more owners of water rights in the same stream, the one must so use his right as not to interfere materially with that of the other, the matter of superiority of right in one by reason of priority of appropriation being, of course, considered. In other words, one of two owners of water right in the same stream will not be permitted so to use his right as to prevent the other from using his,

for in such case there would in practical effect be a waste of the waters of the stream, and this it is against the policy of this state to allow. The mere inconvenience, or even the matter of extra expense, within limits which are not unreasonable, to which a prior user may be subjected, will not avail to prevent a subsequent appropriator from utilizing his right. There must be a substantial, as distinguished from a mere technical or abstract, damage to the right of the prior appropriator by the exercise by the subsequent appropriator of his right to entitle the former to relief against any attempt of the latter to utilize his right. And the Legislature, doubtless, having this proposition in view, and also to the end that there shall be no waste of the waters of the public streams of the state by reason of any impracticability or perhaps any impossibility of using such waters by two or more appropriators where each attempts to use the same independently of each other, has provided for the condemnation by an irrigation district, subject to certain specified conditions or qualifications, of property appropriated to a public use by another irrigation district. Code Civ. Proc. § 1240, subd. 5. If, it may also be observed, this case were determinable by the principles governing in cases in which the power of eminent domain is invoked, it is clear that upon the evidence presented here, and much less upon the findings, the defendants would not be entitled to more than nominal damages, or perhaps such damages only as might justly compensate them for the taking of the use of the dam, there being no taking of the property or the dam itself or severance, and the measure of damages in condemnation being the value of the property and the detriment suffered from severance of the property taken from that not taken. Code Civ. Proc. § 1248; Salt Lake City v. East Jordan Irr. Co., 40 Utah, 126, 121 Pac. 592. Of course, these latter observations are not strictly germane or necessary to the decision herein, but they are suggested for the purpose only of emphasizing the proposition, above stated, that in a case of this kind, where one of several tenants in common of property necessary to be employed to further the exercise of several water rights separately owned by such tenants grants or transfers to a third party the right to use such property for the purpose of facilitating the use of water to which he is entitled from the same stream, the other tenant must show that he has by reason of the arrangement between his cotenant and such third party, suffered more than a mere trifling inconvenience and expense to warrant the nullification of the arrangement or agreement so made, and that the proposition so stated harmonizes with the policy of the state that none of the waters of its streams, available for the purposes of a beneficial use, shall be wasted or not used, but shall be employed to the fullest extent, and in no way impinges upon the rule that one joint tenant or tenant in common may not burden the tenancy with an easement or servitude of any kind.

For the reasons stated in the written opinion of the trial judge, the judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

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50 Cal. App. 243

QUINN v. RIKE et al. (Civ. 3624.)

(District Court of Appeal, First District, Division 1, California. Dec. 2, 1920.)

1. Bills and notes 🔑294—Intent to become liable as indorser expressed in transfer.

Defendant payee of a note negotiable in form, but nonnegotiable because secured by deed of trust to a trust company, transferred it for valuable consideration, the transfer being by writing on the back reading that for value received it transferred and assigned to plaintiff all its right, title, and interest in and to the within note, together with all rights under the deed of trust securing it, so far as it related to the note, and waived presentment, demand, and notice of protest. *Held*, that defendant's intent to become liable as indorser was clearly expressed.

2. Appeal and error 🔑1052(8)—Admission of evidence without effect on judgment harmless.

Error in the admission of evidence was harmless where with or without it no other judgment could have been rendered than that which was rendered in fact.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by J. E. Quinn against N. C. Rike and the Ceres Land Company. From judgment for plaintiff, defendants appeal. Affirmed.

Walter E. Burke, of Los Angeles, for appellants.

Charles J. Kelly and D. A. Stuart, both of Los Angeles, for respondent.

KERRIGAN, J. This action was brought against defendant Rike as a maker and the defendant Ceres Land Company as indorser upon a promissory note.

There is no dispute as to the facts: In January, 1916, the defendant N. C. Rike executed and delivered to her codefendant, Ceres Land Company, a promissory note, negotiable in form, in the sum of $2,000. For the purpose of securing payment of the same she made and executed a deed of trust to a certain title insurance and trust company.

The note was therefore nonnegotiable. Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 Pac. 265. At the time of the execution of the note here sued upon the land and premises described in the deed of trust was subject to a prior incumbrance of $11,000. Thereafter, and before the maturity of the note here involved, the Ceres Land Company, for a valuable consideration, transferred the note to plaintiff, J. E. Quinn, which was evidenced by a writing on the back thereof, in the following language:

> "Los Angeles, Cal., March 15, 1918.
>
> "For value received I hereby transfer and assign to J. E. Quinn all my right, title, and interest in and to the within note, together with all rights accrued to or to accrue under the deed of trust securing the same so far as the same relates to this note, and hereby waive presentment, demand, and notice of protest.
>
> "Ceres Land Company,
> "By G. C. Harbolt, President."

Subsequent to this transfer the first incumbrance upon the premises described in the deed of trust was foreclosed, and by reason thereof the security of the note here involved became valueless. Plaintiff thereupon brought this action and recovered judgment against the Ceres Land Company as an indorser, and this is an appeal from such judgment.

Defendant company contended at the trial, and does here, that the indorsement by it was one without recourse upon which no liability as indorser attached. We are cited to the case of Hammond Lumber Co. v. Kearsley, 36 Cal. App. 431, 172 Pac. 404, as supporting this position. It was there held in substance that, in view of section 3118 of the Civil Code, the assignment by the payee of a promissory note of all his interest in the note is a qualified indorsement, and upon the maker's default such payee is not liable as an indorser. The facts there involved, however, differ materially from those of the instant case. There the indorsement did not contain any words indicating a contingent liability. By the use of the words in the assignment, or their equivalent, excusing presentment, demand, and notice, there is an implied intent to become liable as an indorser (First Nat. Bank v. Falkenhan, 94 Cal. 141, 145, 29 Pac. 866); and where such intent appears the liability of indorser follows (7 Cyc. [1st Ed.] pp. 826, 827).

Appellant contends, however, that as demand, presentment and notice of protest is not necessary to bind the indorser of a nonnegotiable instrument, such words must be treated as immaterial and surplusage. This could not be done without making a new contract for the parties, an act we have no power to do.

[1] We conclude, therefore, that notwithstanding the apparent assignment by defendant company of all its interest in the note, its intent to become liable as an indorser is clearly expressed by the use of the language employed. See Haber v. Brown, 101 Cal. 445, 35 Pac. 1035.

Appellant complains of prejudicial admission of evidence by the trial court.

[2] There was offered by the plaintiff and received by the court in evidence testimony showing that plaintiff was reluctant to acquire the note on account of the superior lien with which the property given as security therefor was burdened, and only did so upon the assurance by the president of the defendant company that it was good by reason of the defendant's indorsement. This evidence was admitted for the reason that in the opinion of the trial court there was an ambiguity and uncertainty concerning the indorsement upon which parol testimony was admissible to explain. A discussion of this question is unnecessary, for, even assuming that its admission constituted error, it was harmless, for with or without it no other judgment could have been rendered. The assignment speaks for itself.

For the reasons given, the judgment is affirmed.

We concur: RICHARDS, J.; SEAWELL, Justice pro tem.

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49 Cal. App. 775

MURDOCK v. MURDOCK. (Civ. 2116.)

(District Court of Appeal, Third District, California. Nov. 12, 1920.)

1. Gifts 🔑41—May be rescinded by court of equity for fraud.

A gift under Civ. Code, § 1146, like any other transaction purporting to involve the conveyance of property or the fixing of contractual obligations between parties, may be set aside by a court of equity upon a sufficient showing that it was procured through or by means of the fraud of the donee, notwithstanding section 1148, providing that a gift inter vivos is not revocable.

2. Husband and wife 🔑52—Gift of money will be set aside in equity where obtained through fraud.

Where wife in consideration of love and affection transferred to her husband a half interest in money owing her solely by reason of the husband's false representation that he had always been and would always be true to her, a court of equity will set aside such transfer or gift under Civ. Code, §§ 1572, 1667, 1708, 1709, 2224, 3523, in view of section 158.

3. Husband and wife 🔑52—Gifts set aside in equity, where donee has been untrue.

Even where there have been no false representations or promises by a spouse that marital obligations have always been and would always be faithfully kept, property which has been given to such spouse by the other spouse will be restored to the donor upon discovery by the latter that the donee has been before or after the gift guilty of maintaining meretricious relations with a third party.

4. Husband and wife ⚷52—No laches in waiting month after notice of fraud before action to set aside gift.

Wife, who filed complaint to set aside a gift to her husband by reason of infidelity a trifle over a month after her discovery of the misconduct of the husband, was not guilty of laches.

5. Appeal and error ⚷173(10)—Question of laches not considered on appeal where not alleged in answer.

Where answer did not plead laches as a defense to maintenance of an action and such question was not reviewed by the trial court, it cannot for the first time be raised on appeal, under Code Civ. Proc. § 434.

6. Appeal and error ⚷907(3)—All presumptions to be indulged favorably to judgment on appeal supported by judgment roll only.

In considering an appeal supported by the judgment roll only, all presumptions and intendments are to be indulged favorably to and in support of the judgment, and it must be presumed that there was evidence sufficient to support the findings or the verdict, and that whatever might have properly occurred at the trial to cure defects of the complaint in any vital particular did actually occur.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Edith de Barros Murdock against Fletcher W. Murdock. Judgment for plaintiff, and defendant appeals. Affirmed.

Meserve & Meserve and Ingall W. Bull, all of Los Angeles, for appellant.

H. T. Morrow, of Los Angeles, for respondent.

HART, J. This is an appeal from a decree in favor of the plaintiff rescinding and setting aside, on the grounds of misrepresentation and fraud, a certain instrument in writing executed by the plaintiff to the defendant, and is upon the judgment roll alone.

The complaint is of considerable length, but it will subserve the purpose of this decision to present the averments herein in substance. It may here properly be stated that the court's findings are in all vital particuars in strict accord with the allegations of the complaint, and therefore, while we shall state the facts herein as they are set out in the complaint, it will be understood that such statement will embrace substantially the facts as they were found by the court.

The plaintiff and the defendant are, and at all times mentioned in the complaint were, husband and wife. On or about the 16th day of July, 1916, and for a long time prior thereto, the plaintiff was the sole owner, in her separate right, of approximately 160 contos, Brazilian currency, which is equal approximately to $37,500 in the coin of the United States of America, the same being then and thereafter on deposit with and held by Queiros-Barros & Co., a copartnership, at 63 Travessa, Caiuby, Santos, Brazil, subject to the order of plaintiff and any other person or persons claiming under her. On or about the said 16th day of July, 1916, the plaintiff executed and delivered to the defendant an instrument in writing of which the following is a copy:

"Whereas, the concern known as Queiros-Barros & Company, and whose principal office and place of business is at 63 Travessa, Caiuby, Santos, Brazil, is indebted to me in the sum of approximately one hundred and sixty (160) contos, Brazilian currency, and whereas, it is my desire and intention to assign, transfer, set over and give to my said husband one-half of the amount or debt due me as aforesaid, whatever such amount may be: Now, therefore, in consideration of the love and affection which I bear my said husband, Fletcher W. Murdock, and of one dollar ($1.00) and of other good and valuable consideration, the receipt whereof is hereby acknowledged, I hereby sell, assign, transfer and give to my said husband, Fletcher W. Murdock, an undivided one-half of all my right, title and interest in and to the debt or amount so due and owing to me from the concern known as Queiros-Barros & Company, hereinabove mentioned, to be held, owned and enjoyed by him as his separate property. In witness whereof, I have hereunto affixed my hand and seal this 17th day of July, 1916."

At the time that the foregoing instrument was executed, the plaintiff also executed a writing whereby she appointed the defendant her attorney in fact, with power, among other things, to collect and receive moneys from said fund, or the whole thereof, of approximately 160 contos.

The complaint alleges that the plaintiff was, on or about the said 16th day of July, 1916, preparing to depart and "had arranged to make, and was about to depart from this country, without the company of defendant, upon a voyage and trip to Brazil to visit her parents in the latter country," and that it was at that time and with the knowledge of such contemplated departure of plaintiff that the defendant earnestly and persistently solicited and requested the plaintiff to execute each of the above-mentioned instruments in writing, in consideration of the love and affection of plaintiff for defendant, etc., and upon the repeated representation and protestation of the defendant to the plaintiff that he was, had always been, during their married life, and would always in the future continue to be, during their married life, a true, faithful, loyal, and loving husband to the plaintiff; and upon the further representation by defendant to plaintiff that he had never had, previously to said 16th day of July, 1916, nor would he in the future, sustain, during their married life, sexual relations with any other woman than the plaintiff, but would, as he always had, remain "an honest, true, loving, loyal and faithful husband" to plaintiff.

It is alleged that defendant, at the time he made said representations and promises, upon the faith of which the plaintiff was induced to execute the writings above mentioned, knew that the said representations, statements, and promises so made to plaintiff were and each of them was false and untrue, and were made with the purpose and intent to defraud plaintiff and to induce her to assign to defendant one-half of the money referred to in the complaint and the instrument above quoted herein; that plaintiff, at the time said representations and promises were made and at the time she executed the instruments referred to above, did not know that the same were false and untrue, and would not have executed said instruments or assigned to defendant any portion of her said money had she not believed and relied on each and all said statements, representations, and promises; that defendant, "on or about said July 16, 1916, was 45 years of age and was an experienced and able man of wide and varied business ability, and at said time last mentioned plaintiff was of the age of 28 years and wholly inexperienced in business affairs and at said time last mentioned, and for a long time prior thereto, plaintiff relied upon and trusted, and had great confidence in and affection for, the defendant, and plaintiff had acted, and did act, at and under his guidance and direction in the conduct of her affairs, all of which things at all of said times defendant well knew; that by reason of each of the aforesaid false representations and statements and promises of defendant and her said trust, confidence, and belief in him as aforesaid, and not otherwise, plaintiff executed said instrument of assignment and power of attorney hereinabove alleged."

It is charged that, on divers occasions prior to the 16th day of July, 1916, to wit, in the month of December, 1913, and while the relation of husband and wife subsisted between plaintiff and defendant, the latter, without the knowledge or consent of the former, at certain stated places, had and sustained meretricious relations with a woman other than the plaintiff, and committed acts of adultery with said woman; that in the months of August and September, 1917, the defendant on several occasions committed acts of adultery with a certain named woman (other than plaintiff) whose name it is not necessary to disclose herein; that plaintiff had no knowledge or information of the acts of adultery by defendant above referred to at the time she executed the instrument above mentioned, "nor did she prior to November 5, 1917, have any knowledge or information concerning said adultery, or any adultery, on the part of defendant, or of any acts or act of sexual intercourse by said defendant with any person other than plaintiff during the married life of plaintiff and defendant; that immediately upon plaintiff learning, on said November 5, 1917, that defendant had committed adultery as aforesaid, plaintiff separated herself from defendant and never thereafter lived with, nor is she now living with, defendant as his wife, or otherwise, and that on November 9, 1917, plaintiff herein brought suit for divorce against said defendant upon the ground of adultery, which action is now pending in the superior court in and for Los Angeles county."

The complaint further alleges that plaintiff has always conducted herself as a "true, faithful, loyal, and loving wife to the defendant in every respect." It is alleged that plaintiff first became aware of her right to rescind the instrument purporting to assign to defendant one-half of the money therein described and of the right to revoke the power of attorney referred to above on the 12th day of December, 1917, and, accordingly, on the 18th day of December, 1917, caused to be served upon defendant personally her notice of rescission of said purported assignment and of her revocation of the said power of attorney.

The complaint also contains some allegations to the effect that defendant had drawn certain sums of the money assigned to him by plaintiff as above indicated, and that he had invested some of said money in a certain sail boat, and the court finds that these allegations are true. The court also finds that no consideration, other than that of love and affection, passed from defendant to plaintiff for the assignment in question.

The defendant did not demur to the complaint, but filed an answer denying and admitting certain of the allegations thereof and setting up some matters in the nature of an affirmative defense.

While the appellant suggests and urges distinctively four different points upon which he claims to be entitled to a reversal of the judgment, three of said points are in effect the same, so that there are in fact but two points to be considered, and they are these: (1) That a gift inter vivos, being a voluntary transaction and without consideration and irrevocable, is not subject to rescission or to be vitiated upon the ground that it was induced by the misrepresentation or fraud of the donee, or for any reason; (2) assuming that the transaction is one which may be, for sufficient legal or equitable reasons, rescinded and set aside, the complaint fails to disclose that the plaintiff was not guilty of inexcusable laches in proceeding to cause said transaction to be set aside or rescinded, inasmuch as it is not made to appear in the complaint why the discovery of the alleged misrepresentations or the falsity of the defendant's statements and misrepresentations could not sooner have been made; "nor," proceeds appellant's brief, "does it appear that, by the exercise of reasonable diligence, discovery could not sooner have been made, or knowledge of the falsity thereof obtained by the plaintiff."

The respondent first makes the point that the assignment in controversy did not involve a gift within the meaning of section 1146 of the Civil Code. The argument is that, since a gift is defined by said section to be "a transfer of personal property, made voluntarily and without consideration," any consideration, whether good or valuable, which supports a transfer of personal property, takes from such transfer one of the essential characteristics of a gift as it is defined by the section named; that the transfer in question was ostensibly supported by the consideration of love and affection—a good as legally distinguished from a valuable consideration—and that therefore the assignment in controversy cannot in a legal sense be denominated or held to be a gift. It is to be conceded that there seems to be much force in this position, but it is not necessary to consider the point herein, since, upon another view the judgment, we are persuaded, must be affirmed.

[1] 1. Assuming that the transfer in question was a gift within the contemplation of section 1146 of the Civil Code, we nevertheless think it is clear that such a transfer may, like any other transaction purporting to involve the conveyance of property or the fixing of contractual obligations between parties, be rescinded and set aside by a court of equity upon a sufficient showing that it was procured through or by means of the fraud of the donee.

The position of the appellant is, as we have shown, that, since a gift inter vivos is not revocable (Civ. Code, § 1148), such a transfer of personal property cannot under any conceivable circumstances be revoked either by the act of the donor himself or through the force of the remedial power of a court of equity, at the instance of the latter or that of any other person. As supporting this hypothesis, he cites, among others, the case of Stewart v. Whittemore, 3 Cal. App. 213, wherein it is said on page 217, 84 Pac. 841, 843:

> "When a man of sane mind desired to, and does, by gift dispose of that which is his own to a dear friend or relative, fully knowing his own mind, the court should uphold the disposition so made. The gift made by deceased was by a transfer and delivery of the money, made voluntarily and without consideration. It passed the title to the money, and was not revocable. Civ. Code, §§ 1146-1148."

The above language very clearly declares the obvious meaning of sections 1146 and 1148 of the Civil Code. There never could be any doubt that where one, possessed of a sound and disposing mind, transfers by gift or voluntarily, and without consideration, personal property to another, the title to the property so transferred as effectually vests in the donee as if it had been transferred for an adequate valuable consideration. What is really meant, though, by section 1148 in its declaration that a gift inter vivos, or a gift other than a donatio causa mortis, cannot be revoked by the giver is that, when a gift of personal property is once made, the title thereto immediately passes to the donee and that such title cannot be divested, disturbed or menaced capriciously or at the mere whim of the donor. If the rule were otherwise, it is not inconceivable that innocent third parties, acquiring the title of the donee to property so transferred, might be subjected to irremedial wrong and injury, and it is the policy of the law to protect and preserve the integrity of titles to property honestly and in good faith acquired. But, while this is all true, the Code section last referred to does not mean that a gift may not be set aside if it transpires that it was brought about and consummated through misrepresentations and fraud.

[2] Upon its face, the transfer in question is perfectly valid; but, as seen, the complaint alleges and the court finds that it was superinduced by the false representations of the donor to the donee, and that no consideration whatsoever passed to the donee from the donor for the transfer. And, as also shown, the complaint further alleges and the court further finds that but for the fraud and false representations practiced upon and made to the plaintiff by the defendant the former would not have executed the transfer or made the gift. If these facts be true (and on this appeal from the judgment on the judgment roll alone the findings must be presumed to be sufficiently supported by the evidence), then upon what theory or for what possible reason may it reasonably be contended or justly declared that a court of equity is powerless to interpose the force of its remedial power to the end that the plaintiff may have restored to her, as far as it is now practicable to do so, the rights of which she has been wrongfully deprived? If, in other words, A., having been the recipient of some kindness, voluntarily conferred, of sufficient importance or magnitude to prompt him to reward voluntarily the author of the kindness with a gift of property of value, is, by the fraud or misrepresentations of B., made to believe that the latter was his benefactor in the particular matter, and so gives B. a large sum of money or other valuable personal property, is it conceivable that A., on discovering the fraud, or that it was another and not B. who performed the

kindness, is wholly without a remedy to right the wrong? Independently of any consideration of the inherent remedial attributes of a court of equity with respect to fraudulent and unconscionable transactions, whereby parties are wrongfully deprived of vested rights, our own law, as declared in sections 1708, 1709, 3523, 1667 and, particularly applicable to such cases as this, section 2224, answers the questions so propounded.

The reading of the sections above named will readily demonstrate that the legislative policy of the state is to provide a remedy for every legal wrong, by whomsoever or upon or against whomsoever committed; and that either a husband or a wife between whom a transaction respecting property is had may avail himself or herself of the remedy thus provided where the one has wrongfully deprived the other of property is clearly emphasized by the terms of section 158 of the Civil Code, which, after declaring that transactions or engagements respecting property may be entered into by a husband or wife with the other, or with any other person, provides that where such transactions or engagements are between themselves they are subject "to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." There could be no language more plainly declaring that whatever may be the precise nature of the transaction between a husband and wife respecting property—whether it involved a conveyance or a gift inter vivos of property by one to the other—such transaction must be consummated in the utmost good faith and free from the taint of fraud or from the elements of mistake or undue influence, otherwise it will be set aside. Indeed, the relation of husband and wife is, in the strictest sense, a confidential one, and hence the uniform rule is that transactions between the spouses whereby one obtains property from the other are to be closely or scrutinizingly scanned, lest there may have been in the transaction some unfair or unconscionable advantage taken by reason of the relation existing between them. There can be found no just ground for a divergence of views upon these propositions, and that they apply as well to transactions involving gifts inter vivos as to other transactions between parties is not only sound in principle, as we have above tried to show, but is sustained by the text-writers and the cases.

In his work on Contracts (9th Ed.) vol. 2, p. 768, Judge Parsons says:

> "We have had repeated occasion to remark that fraud avoids every contract, and annuls every transaction."

Again, at page 782, same volume, the same author declares:

> "The fraudulent party cannot himself aver his fraud and claim as his right any advantage resulting from it. To permit him to do so would be to contradict the plainest principles of law. No man can be permitted to found any rights upon his own wrong."

In Smith on Personal Property, § 84, the rule is thus stated:

> "When a gift is fully executed it is irrevocable as to the parties and their legal representatives, *except for fraud, force, undue influence, or mental incapacity on the part of the donor.*" (Italics ours.)

Similarly, the rule is stated in Thornton on Gifts and Advancements, wherein it is declared in section 440 that—

> "A gift procured or brought about by fraud or undue influence is void. The fraud or illegal influence that will avoid a gift need not be sufficient to set aside a will procured in the same way."

The same author, section 113, again says:

> "If a gift is brought about by fraud or undue influence, as has been elsewhere discussed, it may be revoked by the donor or his personal representative or heirs, according to the descent of the property given."
>
> "When a gift is perfect by delivery and acceptance," says Chancellor Kent, in his Commentaries, page 440, "it is then irrevocable, unless it be prejudicial to creditors, or the donor was under a legal incapacity, or was circumvented by fraud."

In Brison v. Brison, 75 Cal. 525, 529, 17 Pac. 689, 691 (7 Am. St. Rep. 189), it is said:

> "While it is not impossible that a gift between persons in such [confidential] relations may be valid, yet * * * all such transactions are constructively fraudulent, and are only to be upheld upon a showing of special circumstances" —citing Hatch v. Hatch, 9 Ves. 296.

See, also, Soberanes v. Soberanes, 97 Cal. 140, 145, 31 Pac. 910.

The case of Evans v. Evans, 118 Ga. 890, 45 S. E. 612, 98 Am. St. Rep. 180, closely resembles the present case in the facts. There the wife, while carrying on adulterous relations with another party, induced her husband to transfer his property to her as a gift. In an action to set the gift aside, the husband prevailed, and on appeal the court said:

> "There seems to be no doubt that a gift made under such circumstances will be revoked at the instance of the husband on discovery of the wife's criminal conduct. * * * And for her to induce her husband to convey the property to her after she had been guilty of adultery, or in contemplation of subsequent adultery with Thrash, was such a fraud upon the husband as to entitle him to revocation of the gift on discovery of her conduct."

In Meldrum v. Meldrum, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65, the wife, having previously fixed upon a determination to desert and abandon her husband, prevailed upon him to give her their home, and, upon the gift being made, she ordered him from the premises. The husband sued to annul the gift on the ground of the fraud of the wife in the procurement of the premises, and was victorious at the trial. On appeal, the judgment restoring the property to the husband was sustained, the court, inter alia, saying:

> "She was false to her marital vows, and by fraud procured an unjust advantage of her husband. From such a fraud courts of equity will grant relief, either by setting aside the conveyance or by converting the offending party into a trustee of the property for the benefit of the party defrauded."

In Thomas v. Thomas, 27 Okl. 784, 109 Pac. 825, 113 Pac. 1058, 35 L. R. A. (N. S.) 124, 133, Ann. Cas. 1912C, 713, the husband gave certain property to his wife, in the absence of solicitation by her, but while she was sustaining sexual relations with another man, of which relations the husband was ignorant at the time he made the gift. On discovering the illicit relation between his wife and the other party, the husband instituted suit to set aside the gift and was awarded judgment, from which an appeal was unavailingly taken. In affirming the judgment, the court said:

> "In the wife's adultery the entire foundation and consideration for the gift is swept away and leaves its support void—indeed in this case the consideration was gone, the right to care, affection, confidence, or even tolerance, every basic consideration, had been destroyed and had no existence when the gift was made. These things failing, the gift failed."

[3] But there is no necessity for further multiplying authorities upon a proposition so well settled. There is, in fact, no divergence of views between counsel as to the soundness of the principles above considered in their application to proper cases. The question on which there is any controversy simply is whether gifts inter vivos come within their operation, and as to this it seems to us that the Code sections and the authorities above referred to conclusively answer the question in the affirmative. Indeed, from the authorities briefly reviewed herein, the proposition is clearly deducible (and upon principle the proposition as involving a sound legal rule would appear to be unimpeachable) that, even where there have been no false representations or promises by one of the spouses that the marital obligations have always been and would always be faithfully kept, property which has been given by one to the other will be restored to the donor upon discovery by the latter that the donee has been before or after the gift guilty of maintaining meretricious relations with a third party. In other words, the very act of unfaithfulness to the marriage vows in the particular characterizing this case itself furnishes a sufficient legal ground for vitiating the gift. In the case at bar, however, the element of actual fraud enters. The complaint and the findings and presumptively the evidence show that the defendant was by approximately twenty years the senior of the plaintiff; that he was and presumably still is a man of business experience and keen intelligence; that (inferentially, at least, from the nature of the representations and promises she exacted from her husband as a condition, if not a consideration, for the gift) she was jealous of possible attentions by him to other women, and, having been made to believe by him that he had always been and would always be during their married life true and faithful to his marital obligations, and reinforced by his persistent solicitations that she make the transfer at a time when she was contemplating a then early departure for Brazil, unaccompanied by him, she was thus moved to make the gift but that the representations he made to her of his conduct as a husband previous to the making of the gift were untrue and his promises of future faithfulness broken. Thus we have a case where a party commits acts with intent to deceive another party, or to induce the latter "to enter into the contract" (Civ. Code, § 1572), or, in the language of subdivision 4 of said section, a case where a promise has been made without any intention of performing it.

[4] 2. It must be held that under the circumstances of this case, the complaint shows that the plaintiff, in the matter of rescinding the instruments in question, and in bringing her suit to annul and set aside the gift, acted with reasonable diligence, or, to state the proposition in negative fashion, was not guilty of laches.

The complaint in this case was filed December 19, 1917, a trifle over a month after plaintiff's discovery of the misconduct of the defendant, and, while we think the plaintiff should have directly alleged therein the time at which she first discovered the betrayal by the defendant of his marriage vows and obligations, we are still of the opinion that, in the absence of a demurrer either upon general or special grounds, the complaint sufficiently discloses that she first acquired knowledge of the defendant's alleged duplicity on the 5th day of November, 1917. That pleading, it will be noted, declares that plaintiff had no knowledge or information concerning the adulterous acts therein charged against the defendant prior to the 5th day of November, 1917, and that she thereupon and immediately separated from defendant, and since has not lived with defendant as his wife; that on November 9, 1917, she instituted suit for divorce from defendant, and on the 12th day of December, 1917, having then for the first time been advised of her legal right to rescind the gift, notified defendant of such rescission. From all these averments it appears clearly enough that discovery of the alleged unfaithfulness of the defendant was made by plaintiff for the first time on the 5th day of November, 1917. Obviously, the only way discovery can be made of the existence of a fact or thing is by acquiring information or knowledge of the existence of such fact or thing, and if, where it is declared, as here, that knowledge or information has not been acquired of the existence of a fact or thing before a certain specified date, the conclusion ineluctably following from such declaration is that the knowledge or information of the existence of such fact or thing was acquired on the day thus specifically named.

To the argument that the complaint fails to disclose the requisite promptitude on the part of plaintiff in asserting her right to a rescission because it does not show why she could not, by the exercise of reasonable diligence, have sooner discovered the alleged treachery of the defendant to his representations and promises, the learned counsel for the plaintiff, in his brief, makes a sufficient reply as follows:

> "A husband is presumed to be faithful and loyal—to act lawfully, not unlawfully. A wife is not encouraged or required by the law to doubt his loyalty or to be diligent in searching for possible pretexts for such doubt. The relation is confidential. She does not deal with her husband as with a stranger, but as one she can presumably trust."

[5, 6] There are, however, other answers to the complaint that plaintiff's pleading is defective in that therein she fails to relieve herself of the imputation of laches in proceeding to have restored to her the rights of which she was wrongfully deprived by the defendant, viz.: 1. The answer does not plead laches as a defense to the maintenance of the action, and that question was therefore not reviewed by the trial court, "and hence should not, for the first time be raised here. Indeed, objection to the rescission on that ground, since not pleaded, is deemed waived," citing Code of Civil Procedure, § 434 (Tracy v. Smith & Mizener, 175 Cal. 161, 165 Pac. 535). 2. "In considering an appeal supported by the judgment roll only, all presumptions and intendments are to be indulged favorably to and in support of the judgment. It must, in other words, be presumed that there was evidence sufficient to support the findings or the verdict, and that whatever might have properly occurred at the trial to cure the defects of the complaint in any vital particular did actually occur." Myers v. Canepa, 37 Cal. App. 556, 561, 174 Pac. 903, 905.

The only real objection which could be urged against the complaint here in the particulars referred to is that of uncertainty, and as to such ground of objection to a pleading, even when raised by demurrer, the following cases are instructive: Rooney v. Gray Bros., 145 Cal. 753, 758, 79 Pac. 523; Dennis v. Crocker-Huffman, etc., Co., 6 Cal. App. 58, 61, 91 Pac. 425.

The judgment appears to be just, and legally impregnable, and it is therefore affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

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50 Cal. App. 228

PEOPLE v. AVILA. (Cr. 732.)

(District Court of Appeal, Second District, Division 1, California. Nov. 30, 1920.)

1. Criminal law ⚷1152(1)—Appointment of interpreter for witness discretionary with court.

Under Code Civ. Proc. § 1884, it is made the duty of the court to appoint an interpreter in those cases only where the witness does not understand or speak the English language, the question being one in each case for the judicial discretion of the trial court, so that its ruling will not be disturbed unless abuse of discretion is clearly shown.

2. Criminal law ⚷642—Ruling denying interpreter to witness abuse of discretion.

In a prosecution for statutory rape, where to corroborate the 13 year old victim's testimony her aunt was called as a witness, and such aunt during her examination repeatedly asked for an interpreter, stating she did not understand the questions asked her in English, as an examination of her answers shows, the trial court abused its discretion in denying an interpreter to the witness.

3. Criminal law ⚷419, 420(4)—Rape ⚷48 (2)—Testimony that prosecutrix made complaint and mentioned name of defendant inadmissible.

In a prosecution for statutory rape on a 13 year old girl, testimony of prosecutrix's aunt that her niece had made complaint to her, in particular mentioning defendant's name as the guilty party, *held* inadmissible as hearsay, being admissible only to the extent of the fact of complaint having been made.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Alexander Avila was convicted of statutory rape, and he appeals. Reversed.

Frank E. Dominguez and William Thomas Helms, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

SHAW, J. Defendant appeals from a judgment of imprisonment pronounced upon his conviction of the crime of statutory rape.

[1, 2] The victim of the crime was a 13 year old girl, who testified to the act of intercourse. For the purpose of corroborating her testimony, an aunt, Mary Foster, was called as a witness on behalf of the state. This witness, during her examination, repeatedly asked that she be accorded an interpreter, stating that she did not understand the questions asked her in the English language, which request was by the court denied until the latter part of the cross-examination, when it called an interpreter. Under section 1884, Code of Civil Procedure, it is made the duty of the court to appoint an interpreter in those cases only where the witness does not understand or speak the English language. In each case the question is one for the judicial determination of the trial court. Its ruling thereon will not be disturbed unless the record clearly shows an abuse of discretion. People v. Young, 108 Cal. 8, 41 Pac. 281; People v. Morine, 138 Cal. 626, 72 Pac. 166. In the instant case, not only did the witness repeatedly state that she did not understand the language in which the questions were asked, but an examination of the answers made by her to questions propounded shows that as to many of them she did not understand or comprehend their meaning. Considering the character of the offense with which defendant was charged and the fact that his conviction was based almost solely upon the testimony of the child who was the victim of his alleged lust, the court should have called an interpreter in order that, in so far as the testimony was corroborative of that of the prosecutrix, it should have been clear in meaning and to no extent left to the conjecture of the jury.

[3] It appearing that the prosecutrix had, immediately following the commission of the alleged offense, made complaint to her aunt, the latter on direct examination by the district attorney was interrogated as to whether the prosecutrix, at the time when she made such complaint, also told her the name of the party who had committed the offense. The questions and answers to which defendant's objection was overruled were as follows:

> "Q. Did she tell you who it was that did this? A. Told what? Q. This act up there in the room that caused this torn— A. Yes; I told you she told me. Q. Whom did she tell you did it? Who was the man she told you did it? A. The little girl told me boy taken her—broken the clothes. Q. Did she mention the boy's name? A. Alex Avila. She told me one boy in uniform, the one boy in uniform call Alex. Q. I don't want you to tell us anything that the little girl did not tell you, but I want you to tell the jury if the little girl told you what this man did to her? A. There are some words that I cannot understand."

Like evidence, over defendant's objection, was adduced from the officer who arrested defendant. In so ruling the court committed prejudicial error. In such cases:

> "The true rule is to admit evidence of the fact of complaint in all cases, and in no case to admit anything more. The evidence, when restricted to this extent, is not hearsay, but in the strictest sense original, evidence. When, however, these limits are exceeded, it becomes hearsay in a very objectionable form. There is every reason, therefore, why it should be admitted to the extent indicated, and none why it should be admitted further." People v. Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126; Greenleaf on Evidence, vol. 3, § 213.

In People v. Wilmot, 139 Cal. 103, 72 Pac. 838, it is said:

> "It is clear that to allow any mere statement of the prosecutrix as to the details of the affair, or as to the name of the person accused by her, to be given in evidence, would be to allow hearsay evidence to prove the offense."

To the same effect, see People v. Stewart, 97 Cal. 238, 32 Pac. 8; People v. Barney, 114 Cal. 554, 47 Pac. 41; People v. Lambert, 120 Cal. 170, 52 Pac. 307.

That the testimony so given was not only erroneous, but highly prejudicial, appears obvious when considered in view of the fact that defendant not only denied the commission of the offense, but offered evidence which, if believed by the jury, clearly established an alibi. The Attorney General in his argument does not seek to justify the ruling, but contends that on examination of the entire record discloses that, notwithstanding the error, there was no miscarriage of justice, in which case he insists that under section 4½ of article 6 of the Constitution the judgment should be affirmed. Whether or not the jury, in the absence of the incompetent testimony, would have believed the testimony of the child as against that of defendant and evidence offered in support of an alibi, we cannot say. At all events, we are of the opinion that, upon the record herein, said provision of the Constitution should not be invoked in this case.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

50 Cal. App. 222

HOLM v. BURNELL et al. (Civ. 2131.)

(District Court of Appeal, Third District, California. Nov. 29, 1920.)

1. **Appeal and error ⚷1011(1)—Appellate court bound by finding of trial court where evidence conflicting.**

Where the evidence on the point whether defendants were merely sureties for plaintiff by mutual agreement, and hence not liable to the contribution sued for, was conflicting, the appellate court is bound by the finding of the trial court thereon.

2. **Principal and surety ⚷200(7)—Evidence held to sustain finding that defendants sued for contribution were not sureties.**

In an action by one stockholder in a corporation against others, all parties having executed to a bank holding the company's note, to prevent suit to collect it, their joint and several note, plaintiff seeking contribution as against co-obligors, evidence *held* sufficient to sustain the trial court's finding that defendants were not merely sureties for plaintiff, and hence not liable to contribution.

3. **Principal and surety ⚷200(2)—Makers liable without demand or notice to comaker who paid note to payee.**

Where stockholders in a corporation, to prevent suit to collect its note, executed to the holder bank their joint and several note, no notice of the payment of such note by a single maker with demand for contribution was necessary to subject the other makers to liability to him; they being liable directly to the payee bank without demand or notice, and standing in no more favorable position as to their comaker, who paid the note to the bank.

4. **Bills and notes ⚷120—Stockholder makers of a joint note not liable to contribute only in proportion to stock owned by them.**

Where stockholders in a corporation to prevent suit to collect its note executed to the payee bank their joint and several note, they were bound as joint and several obligors on their note, and were not liable to the payee bank or to one of their number who paid the payee bank only in the proportion which the stock owned by them severally bore to the entire capital stock.

5. **Interest ⚷60 — Interest in action by one maker of note against others for contribution should not be compounded.**

In an action by one of several makers of a note against the others for contribution, he having paid the note, wherein plaintiff asks interest only at the rate of 6 per cent. per annum, such interest should not be compounded, and any excess interest reached by compounding should be deducted from the judgment for plaintiff.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by Fred H. Holm against J. S. Burnell and others. From a judgment for plaintiff, and from order refusing to grant new trial, defendants appeal. Appeal from order denying new trial dismissed; judgment modified and affirmed.

H. L. Ford and J. S. Burnell, both of Eureka, for appellants.

Pierce H. Ryan, of Eureka, for respondent.

PREWETT, Presiding Justice pro tem. Action for contribution by one obligor on a joint and several promissory note against his co-obligors. The execution of the note and its payment by the plaintiff are conceded facts. It is necessary to go back into the early stages of the transaction to ascertain the present relation of the parties.

In January, 1917, the parties plaintiff and defendant were and yet are stockholders in a corporation. This corporation on said date borrowed from the First National Bank of Eureka the sum of $2,000, and, as evidence of its obligation to repay the same, executed its corporate promissory note to said bank in said sum of $2,000, with interest at the rate of 6 per cent. per annum compounded quarterly. In July of the same year, the note remaining wholly unpaid, the parties plaintiff and defendant herein, upon the demand of the bank and to prevent a suit to collect the note, executed to the bank their joint and several promissory note of like tenor and effect. The former note was delivered up to the corporation. This last note, dated in July, 1917, is the note in suit.

[1, 2] The defendants offer the defense that they were, by mutual agreement and understanding, merely sureties for the plaintiff and hence not liable to contribution. The point may be disposed of with the single observation that the evidence upon the point is conflicting and that an appellate court is bound by the finding of the trial court. This finding is adverse to the defendants. It may be added that the testimony of witnesses and evidence of the surrounding circumstances abundantly justify the finding. The claim of the defendants that the plaintiff, to gain to himself the trifling advantage of a period of delay, would undertake to bear the entire burden of a $2,000 note, is so contrary to ordinary experience that it would require quite persuasive evidence to establish it. Equally improbable is the defense closely interwoven with it, that the parties, plaintiff and defendants, mutually agreed among themselves that no one of them should claim contribution from any other. But, like the first point, the evidence upon it is conflicting, and we are neither inclined nor permitted to disturb the finding of the trial court.

[3] Another point offered in defense is that, if they are sureties, the plaintiff gave them no notice of the payment by himself and made no demand for contribution. But

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

this is unnecessary. The defendants were liable directly to the payee in the note without demand or notice and they stand in no more favorable position as to the one who pays the note to the payee. The case of Taylor v. Reynolds, 53 Cal. 686, is directly against the claims of the defendants as to this point. They admit this, but they insist that this court should overrule that authority. The case was carefully considered by the court and was concurred in by the entire bench. It is in harmony with the statute law on the subject, and we are satisfied as to its soundness.

[4] Another defense is that, if they were bound at all, it was only in that proportion which the stock owned by them severally bears to the entire capital stock. This claim is not tenable. The obligors were not bound on the promissory note in their technical capacity as stockholders, but as joint and several obligors. In view of the conclusions at which we have arrived as to the foregoing points, it becomes unnecessary to notice the claim of the plaintiff that such defenses cannot be proved by parol. We refrain from passing upon the question.

[5] Lastly, the defendants insist that the trial court should not have allowed compound interest. It seems that the portion of the interest arising from the process of compounding is the small sum of $11.60. The plaintiff asks interest only at the rate of 6 per cent. per annum. This should not be compounded. The sum of $11.60 should be deducted from the judgment.

The appeal from the order refusing to grant a new trial is dismissed. The judgment appealed from is modified by deducting therefrom the sum of $11.60 erroneously allowed as compound interest, and as thus modified the judgment is affirmed; the appellants to recover their costs on this appeal.

We concur: BURNETT, J.; HART, J.

184 Cal. 511

SIMAS v. CONSELHO SUPREMO DA UNIAO PORTUGEZADO ESTADO DA CALIFORNIA. (S. F. 9453.)

(Supreme Court of California. Dec. 20, 1920.)

1. Interpleader 🔑8(2)—Insurer held entitled to interplead beneficiary and another.

Where plaintiff's father and brother agreed to insure their lives in fraternal orders in each other's favor, but the father, in violation of the agreement, named plaintiff as beneficiary, the insurer, which had knowledge of the brother's rights, was entitled to require the brothers to interplead and litigate the matter between themselves.

2. Appeal and error 🔑882(3)—Plaintiff not entitled to rely on defendant's failure to pay money into court where he opposed interpleader.

Under Code Civ. Proc. § 386, authorizing defendant to apply for an order to substitute another party making a demand on the same contract, or for the same property, and providing for the discharge of the original defendant on payment of the amount claimed into court, plaintiff could not rely on defendant's failure to deposit the money in court to sustain a judgment in his favor, where defendant asked an interlocutory order of interpleader and alleged its willingness to make such deposit, but on plaintiff's motion the court granted judgment for plaintiff on the pleadings.

In Bank.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Alexander Simas, Jr., against Conselho Supremo Da Uniao Portugezado Estado Da California to recover a death benefit. From a judgment for plaintiff, defendant appeals. Reversed.

F. I. Lemos and Frank Mitchell, Jr., both of Hayward, and Rose & Silverstein, of Oakland, for appellant.

M. J. Rutherford, for respondent.

WILBUR, J. This is an action to recover a death benefit upon a certificate of membership issued by defendant, insuring the life of Alexander Simas, Sr., wherein the plaintiff is named as beneficiary. Judgment was given for the plaintiff upon the pleadings, and the defendant appealed. It appears from the pleadings that the defendant is liable upon its policy for the sum of $800, which liability is admitted in the pleadings. The only question raised by the defendant is whether or not that liability is to the plaintiff or to his brother. The father took out the certificate of membership in favor of his son John in pursuance of an agreement with John that John, in consideration thereof, would insure his life in the Woodmen of the World and make his father beneficiary therein. Both agreed to make no change in the beneficiary. John complied with the agreement on his part, and the father, in violation of his contract with John, named plaintiff as his beneficiary in accordance with the by-laws of the defendant. The defendant, having notice of John's rights in the policy by reason of the agreement with his father, asks leave to pay the money into court in order that the brothers may litigate their respective claims thereto. John was in the military service of the United States government when the suit was brought and when judgment was rendered. The question is whether under these admitted facts the court properly rendered judgment on the pleadings in favor of plaintiff or whether the court should have permitted the defendant to pay the money into court to wait the final judgment wherein the respective rights of the brothers should be determined.

[1] It is contended by the plaintiff that the judgment is proper for the reason that the certificate is conclusive upon the insurance company and the fact that Alexander is named therein as beneficiary not only justifies, but requires, the payment to him. But this position ignores the right of the defendant to compel the claimants to litigate that matter between themselves, for one or the other, of course, must have the better right. The cross-complaint sets out the claims of both, and it is evident therefrom that the right of the plaintiff to the fund was at least debatable. Adams v. Grand Lodge, 105 Cal. 321, 38 Pac. 914, 45 Am. St. Rep. 45; Jory v. Supreme Council, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Freitas v. Freitas, 31 Cal. App. 16, 159 Pac. 611; Grimbley v. Harrold, 125 Cal. 24, 29, 57 Pac. 558, 73 Am. St. Rep. 19; Brett v. Warnick, 44 Or. 511, 75 Pac. 1061, 102 Am. St. Rep. 639; Leaf v. Leaf, 92 Ky. 166, 17 S. W. 354, 854; McGrew v. McGrew, 190 Ill. 604, 60 N. E. 861; Stronge v. Supreme Lodge, K. P., 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. (N. S.) 1206, 121 Am. St. Rep. 902, 12 Ann. Cas. 941; Benard v. Grand Lodge, A. O. U. W., 13 S. D. 132, 82 N. W. 404; King v. Supreme Council, 216 Pa. 553, 65 Atl. 1108; Supreme Council, C. B. L., v. Murphy, 65 N. J. Eq. 60, 55 Atl. 497. In such a case a complaint in interpleader is proper. Fidelity Savings & Loan Ass'n v. Rodgers, 180 Cal. 684, 182 Pac. 426. And this has been the practice. Woodmen of the World v. Rutledge, 133 Cal. 640, 643, 65 Pac. 1105; San Francisco Savings Union v. Long, 137 Cal. 68, 70, 69 Pac. 687; Clark v. Mosher, 107 N. Y. 118, 121, 14 N. E. 96, 1 Am. St. Rep. 798.

[2] The respondent claims that because the appellant did not deposit the money in court it failed to comply with section 386, Code of Civil Procedure. But such deposit is to be made only in pursuance of an inter-

locutory order of court, and the defendant requested that such order be made and alleged its willingness to make such deposit, and the court, instead of making such an order, entered judgment on plaintiff's motion requiring the defendant to pay to the plaintiff the money it admitted to be due upon the insurance policy, thus in effect denying the application of the defendant to make the deposit in court, and for its discharge. Respondent cannot therefore rely upon the failure of the defendant to deposit the money in court to sustain the judgment, when that failure resulted from his own opposition to that course. Defendant pleaded the facts both by way of answer and a verified cross-complaint in interpleader, joining John Simas as a cross-defendant. We deem it unnecessary to further discuss the pleadings as the facts were fully before the court and upon such facts the judgment was erroneous.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SLOANE, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

184 Cal. 583

NIGHTINGALE v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, et al. (S. F. 9682.)

(Supreme Court of California. Dec. 28, 1920.)

Divorce 🔑217, 229—Court can modify order for temporary alimony and counsel fees.

The court can modify its previous orders for the payment to the wife of money necessary for her support during the pendency of the action and to enable her to prosecute or defend the action, as the circumstances with regard to the necessity change.

In Bank.

Application by Gladys Nightingale for a writ of certiorari to review an order of the Superior Court of the State of California in and for the City and County of San Francisco and James M. Troutt, Judge thereof, modifying an order for payment of alimony pendente lite. Writ denied.

A. P. Black, of San Francisco, for petitioner.

PER CURIAM. We entertain no doubt of the power of the court in divorce actions to modify its orders for the payment to the wife of money necessary to enable her to support herself during the pendency of the action, or to enable her to prosecute or defend the action, as the circumstances with regard to necessity change. As to orders for the payment of money for support there has never been any question in this behalf, and there is no difference in principle with relation to money to be paid to her for the purpose of enabling her to pay attorneys. The superior court did not exceed its jurisdiction in this matter.

The application for a writ of certiorari is denied.

ANGELLOTTI, C. J., and LENNON, WILBUR, SLOANE, LAWLOR, and OLNEY, JJ., concur.

184 Cal. 588

DORR v. MARSH et al. (L. A. 6343.)

(Supreme Court of California. Dec. 28, 1920.)

Landlord and tenant 🔑149—Municipal corporations 🔑120—Lessees under lease expiring September 1st liable for taxes under ordinance published August 31st.

Under Los Angeles Charter, § 39, providing that an ordinance shall not be effective until published at least once or posted, an ordinance levying a tax which was published on August 31st became effective on that day, so that lessees under a lease expiring September 1st which required them to pay taxes levied during the term are liable for the tax levied by the ordinance.

Department 2.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Cora B. Dorr, as executrix of the last will and testament of Eliza A. Lewis, deceased, against Robert Marsh and others. Judgment for the plaintiff, and defendants appeal. Affirmed.

Woodruff & Schoemaker, of Los Angeles, for appellants.

Kemp, Mitchell & Silberberg and Alex W. Davis, all of Los Angeles, for respondent.

WILBUR, J. Plaintiff recovered judgment against the defendants for rent and taxes alleged to be due under a lease between plaintiff's testatrix as lessor and the defendant Robert Marsh as lessee. It is conceded that $1,201 rent is due from appellants, but appellants contend that the balance of the judgment for taxes is erroneous for the reason that the taxes were not levied until September 1st, while the lease, appellants claim, terminated at midnight August 31, 1917. The ordinance of the city of Los Angeles levying the tax was passed August 28th, approved August 29th, and published August 31st. The charter of the city of Los Angeles (section 39, Stats. 1889, p. 465) provides that the ordinance shall not be effective until published at least once or posted, as the case may be. Appellants' position is that the ordinance did not become effective immediately upon its publication, but, as the law takes no account of fractions of days, it could only become effective on the next day. In support of this contention appellants also cite a number of cases wherein it is held that a publication or posting for one or more days or weeks is not completed until the expiration of the number of days or weeks. These cases, however, have no application to the situation here, where the taking effect of the ordinance is merely suspended until publication, but the situation, is analogous to a case where a statute takes effect upon passage. In Sutherland, Statutory Construction, it is said that, notwithstanding the legal fiction that the law takes no notice of fractions of a day:

> "The weight of American authority is that a statute which is to go into effect immediately is operative from the instant of its passage." Section 179, p. 320.

The rule is thus stated in Cyc.:

> "The rule that a statute shall take effect from its passage has usually been construed to make it effective from the time it has passed through all the forms required by the Constitution to give it force and validity. Thus, where the approval of the Governor is required, it takes effect from the time of receiving such approval. * * * In the jurisdictions where statutes take effect from their passage, it has been generally held that a statute takes effect on the day of the final enactment, without allowing any time for its publication or for its provisions to become known, even though provision is made by general law for the publication of statutes; but in some cases the day of approval has been excluded and the statute given effect at the first moment of the following day." 36 Cyc. 1197.

In the same section it is said:

> "As a general rule the law does not take notice of fractions of a day, and therefore a statute which takes effect from its passage or approval relates back and becomes effective from the first moment of the day on which it is passed or approved; but this doctrine of relation is only a legal fiction, and, wherever its application would cause injustice, the act will be given effect only from the moment of its approval." 36 Cyc. 1198, 1199.

In People v. Clark, 1 Cal. 406, and Davis v. Whidden, 117 Cal. 618, 49 Pac. 766, this court held that a statute took effect immediately upon its approval.

As the only thing necessary to render the ordinance effective was its publication, it seems clear that the ordinance went into effect immediately upon publication, and was therefore in effect on the 31st day of August, 1917. Inasmuch as the tax levy was made during the term of the lease, the defendants are liable therefor.

Judgment affirmed.

We concur: LENNON, J.; SLOANE, J.

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184 Cal. 553

VAN HOOSEAR v. RAILROAD COMMISSION OF STATE OF CALIFORNIA.

(S. F. 9374.)

(Supreme Court of California. Dec. 22, 1920.)

1. Waters and water courses 🔑217—Test of whether person supplying water is engaged in "public utility" business stated.

Whether one engaged in the business of supplying water is engaged in a "public utility" business depends on whether he held himself out expressly or impliedly as engaged in the business of supplying water to the public or to a limited portion of the public, such, for example, as could be served by his system or whether he merely held himself out as serving or ready to serve particular individuals as a matter of accommodation or for reasons peculiar and particular to them.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

2. Waters and water courses 🔑217—Finding of Railroad Commission conclusive if supported by evidence.

An order of the Railroad Commission that a person engaged in supplying water resume service cannot be annulled if there was any evidence before the commission justifying its finding that such person was engaged in a public utility business.

3. Waters and water courses 🔑217—Inference held warranted that person held himself out as in public utility business.

Where a farm owner supplying water from his plant to some of his neighbors applied to the Railroad Commission for leave to discontinue the service, and after such leave was refused continued the service with nothing to indicate that he did not do so in acquiescence with the order and in the character of a public utility operator, the inference was warranted in a subsequent proceeding that he thereafter held himself out as doing a public utility business.

4. Waters and water courses 🔑217—Business of supplying water is public utility when held out as such.

If a farm owner supplying water to some of his neighbors held himself out as engaged in a public utility business after the Railroad Commission refused leave to discontinue the business, the business then became a public utility business, whether it was previously so or not.

5. Waters and water courses 🔑217—Supplying water does not lose public character because customers consent to discontinuance.

If a farm owner supplying water to some of his neighbors was engaged in a public utility business, its character as such was not changed by the fact that all of the customers agreed that he might discontinue the business.

6. Waters and water courses 🔑217—Court cannot control discretion of Railroad Commission in denying leave to discontinue service.

The court on certiorari cannot control the discretion of the Railroad Commission in refusing to permit one supplying water to discontinue the service.

In Bank.

Original application by William S. Van Hoosear for certiorari to review an order of the Railroad Commission. Order affirmed.

H. S. Craig and W. B. Rinehart, both of Oakland, for petitioner.

Hugh Gordon, of Los Angeles, for respondent.

OLNEY, J. This is an original application to this court seeking to annul an order of the Railroad Commission made in a proceeding upon its own initiative, finding that the petitioner, Van Hoosear, was engaged in the business of supplying water to the public, had been charging rates not authorized by the commission, and had discontinued his service without the permission of the commission, and directing him to resume service and supply water at rates fixed by the order. There is no doubt as to the petitioner having engaged in the business of supplying water, or as to his having charged rates not authorized by the commission, or as to his having discontinued his services without permission, and it is apparent at once that, if the commission's finding that he was engaged in a public utility business is justified upon the facts shown, the commission had authority to make the order. The sole question, then, is as to the character of the petitioner's business.

[1, 2] The test to be applied is whether or not the petitioner held himself out, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them. Thayer v. Cal. Dev. Co., 164 Cal. 117, 128 Pac. 21; Pinney, etc., Co. v. Los Angeles, etc., Co., 168 Cal. 12, 141 Pac. 620, L. R. A. 1915C, 282, Ann. Cas. 1915D, 471; Associated, etc., Co. v. Railroad Commission, 176 Cal. 518, 169 Pac. 62, L. R. A. 1918C, 849; Allen v. Railroad Commission, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249. The rule, of course, is that if there was any evidence before the commission which would justify its finding, its order cannot be annulled.

[3, 4] There is one circumstance, or set of circumstances, which would seem sufficient for that purpose, and that is that in 1917, two years before the present proceeding was commenced, Van Hoosear himself petitioned the commission for leave to discontinue his service, that such leave was refused after a hearing and opposition, and that he continued his service thereafter without anything to indicate that he did not do so in acquiescence with the order of the commission and in the character of a public utility operator, which he and the commission assumed he had. It it were not for these circumstances, it is exceedingly doubtful at least if the present order of the commission could be sustained. The petitioner's plant is an exceedingly small one. It was originally built to supply water for his own use on his farm. He testifies, and his testimony is corroborated, that he began to supply water to some of his neighbors as a matter of accommodation and merely continued so doing; and he finally discontinued his service because he had sold his farm. It is a case to which the obligations and responsibilities of a public utility are wholly inappropriate, and where the petitioner, by dedicating his system to public use, would impose a perpetual servitude upon his farm from which there could be no escape except by the grace of the commission. It is a good illustration of the truth of the statement in Allen v. Railroad Commission, supra, that "to hold that property is dedicated to a public use is no trivial thing," and of the justice of the statement which immediately follows that "such declaration is never presumed without evidence of unequivocal intention."

Nevertheless we see no escape from the conclusion that it was not an unreasonable inference that by himself requesting leave of the commission to discontinue, and then, when this leave was refused after opposition, continuing the service, Van Hoosear held himself out as engaged in a public utility business. If he did so hold himself out, it fixed the character of his business from then on, no matter how foolish he may have been in so doing, or how ignorant he may have been of the legal consequences. His petition for leave to discontinue of necessity assumed that he was in a public utility business, as otherwise the commission would have had no authority in the premises. It was in effect a representation that he was so engaged. This representation, furthermore, was one made not only to the commission, but to his own consumers, against whom the petition was directed and some of whom opposed it. The order of the commission denying the request, while it does not expressly find that he was engaged in a public utility business, undoubtedly because no question was made upon the point, assumes it throughout and was made upon that basis. It may well be that, even by thus representing to the commission and his consumers that he was engaged in a public utility business and submitting himself in that character to the jurisdiction of the commission, Van Hoosear would not be estopped from showing that he was in truth not so engaged. But where, after having made this representation and after having been refused leave to discontinue, he to all outward appearances acquiesces in the refusal and continues his service, it is a fair inference that he continues in the character which he represented he had and which the commission assumed he had; in other words, it is a fair inference that by continuing in business under these circumstances he held himself out, from then on at least, as doing a public utility business. So holding himself out, his business became in truth a public utility business, no matter whether it was previously so or not. There would seem, as we have said, no escape from this conclusion, and it is supported by the authority of Franscioni v. Soledad, etc., Co., 170 Cal. 221, 149 Pac. 161, where a very similar state of facts was involved. This conclusion is decisive.

To avoid any misapprehension, we might add that what we have said is not to be taken as meaning that it was a necessary inference that Van Hoosear had held himself out as engaged in a public utility business. Upon all the evidence in the case, the commission might well have rejected the inference as contrary to the actual fact. But the commission did not do this, and, the inference mentioned being a not unreasonable one, it is sufficient to sustain the order.

[5, 6] We might also add that we have not overlooked the fact that, when Van Hoosear sold his place and discontinued service, all of his consumers, five only in number, had agreed, four of them in writing, that he might discontinue in case he sold. This circumstance, however, would not change the character of his business from a public utility business to a private business. If it were a public utility business, as the commission found, it would remain so, no matter how the number of consumers dwindled, even if it dwindled to none at all, and, being a public utility business, authority to discontinue it could be had only from the commission, and could not be conferred by the consumers. The circumstances might well have appealed strongly to the discretion of the commission to permit him to discontinue, but over the discretion of the commission we have no control.

Order affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

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184 Cal. 557

METROPOLITAN LIFE INS. CO. v. ROLPH, Mayor, et al. (S. F. 9523.)

(Supreme Court of California. Dec. 24, 1920.)

1. Mandamus 🔑14(1)—Will not lie to compel performance of public duty without proper demand.

Where demand must be made in order to impose a duty on a public officer, mandamus to compel the performance of the duty will not lie unless there has been a proper demand.

2. Municipal corporations 🔑1012 — No payment by San Francisco treasurer until claim is approved and checked by auditor.

Under Charter of City and County of San Francisco, art. 4, c. 2, § 3, and article 4, c. 3, § 2, the treasurer cannot make a payment on a claim until the demand on the claim has been checked and approved by the auditor.

3. Mandamus 🔑14(1)—Demand condition precedent to mandamus to compel payment of judgment.

Judgment creditor of city and county of San Francisco cannot institute and maintain a proceeding for mandamus directing the payment of the judgment until the auditor has been put in default by the presentation of a demand by judgment creditor for a proper warrant upon the treasury for the payment of the judgment, the treasurer not being in default until after he had been confronted with a warrant issued by the auditor under Charter of City and County of San Francisco, art. 4, c. 2, § 3, and article 4, c. 3, § 2.

4. Mandamus 🔑154(7)—Allegation that authorities "refuse" to pay judgment not sufficient.

In mandamus against auditor and other officials of the city and county of San Francisco to compel payment of judgment against the city and county, allegation that defendants "refuse" to pay the judgment *held* not sufficient pleading of demand on auditor for issuance of warrant and refusal thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Refuse.]

5. Evidence 🔑83(1)—Officer presumed to do duty.

It is presumed that an officer will do his duty.

6. Municipal corporations 🔑1037 — Judgment creditor entitled to whole amount of judgment on collection of tax sufficient to pay it.

If the board of supervisors of the city and county of San Francisco actually levies and collects a tax sufficient to pay the whole of a judgment against the city and county, under St. 1901, p. 794, § 3, the right to pay the judgment in installments has ceased, and judgment creditor is entitled to the whole amount of the judgment.

7. Pleading 🔑403(2)—Defect in petition cannot be cured by allegation in answer.

Defect in petition for writ of mandamus cannot be cured by allegation of answer filed at the same time as demurrer.

8. Pleading 🔑403(2)—Defect in pleading cannot be cured upon demurrer by allegation in answer filed at same time as demurrer.

When considering the sufficiency of a pleading attacked by demurrer, defects in the pleading attacked cannot, under Code Civ. Proc. § 472, be held to be cured by allegations in the answer filed at the same time as the demurrer, for the answer is before the court only in the event that the petition, too, stands the test of a demurrer.

In Bank.

Application for mandamus by the Metropolitan Life Insurance Company against James Rolph, Jr., as Mayor of the City and County of San Francisco, and others. Writ denied.

Samuel Knight and F. Eldred Boland, both of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., of San Francisco, for respondents.

LENNON, J. Petitioner recovered a judgment against the city and county of San Francisco in 1917. Demands by the petitioner for the taking of steps necessary to the levy of a tax for the liquidation of the judgment were refused. Thereupon, on August 22, 1919, petitioner obtained from the District Court of Appeal a peremptory writ of mandate, directed to the mayor, auditor. and members of the board of supervisors of the city and county of San Francisco, commanding that the said judgment be examined, audited, and certified to the board of supervisors by the auditor, and that the board of supervisors and mayor include in the tax levy for the fiscal year 1919–1920:

> "A rate or sum sufficient to pay said judgment as aforesaid, or to pay an aliquot part or fraction of the amount of said judgment, such aliquot part or fraction of said judgment in no case to be less than one-tenth of the whole amount of said judgment, in conformity with that certain act of the Legislature of the state of California duly and regularly approved March 23, 1901, and entitled 'An act to provide for the payment of judgments against counties, cities, cities and counties, and towns.'" Metropolitan Life Ins. Co. v. Deasy (App.) 183 Pac. 243.

In accordance with the writ issued, in September, 1919, when a tax for the fiscal year 1919–1920 was levied, a sum to meet the obligation of the judgment in favor of petitioner was included therein.

In the present proceeding petitioner seeks a writ commanding the payment of the judgment. After setting forth the preliminary facts, the petition alleges that, in pursuance of said tax levy, a sum sufficient to pay the judgment in favor of petitioner was paid into the treasury of the city and county of San Francisco; that this sum still remains in the treasury; but that respondents, namely, the mayor, board of supervisors, auditor, and treasurer of the city and county of San Francisco, neglect and refuse to pay the same to petitioner. Respondents demur to the petition upon the ground that it fails to state facts sufficient to constitute a cause of action.

[1] Where demand must be made in order to impose a duty upon a public officer, mandamus to compel the performance of the duty will not lie unless there has been a proper demand. Fox v. Workman, 155 Cal. 201, 100 Pac. 246; Ferguson v. Board of Education, 7 Cal. App. 568, 95 Pac. 165. The demurrer to the petition raises the question as to whether or not an allegation of demand was necessary to the statement of a case entitling petitioner to the relief herein prayed for.

Presumably and necessarily a demand upon the claim for damages must have been presented in limine, or no judgment could have been recovered upon the claim in the first instance. Charter of the City and County of San Francisco, art. 2, c. 2, § 8. In addition, as previously stated, a demand for the taking of steps necessary to raise money with which to pay the judgment was made prior to the institution of the proceeding for the writ issued by the District Court of Appeal in Metropolitan Life Ins. Co. v. Deasy, supra. Therefore the question raised by the demurrer is whether or not, after the money with which to pay the judgment has been collected, it is necessary for petitioner to make and allege a separate and specific demand for the payment of the judgment before a writ commanding the payment can be issued.

The statute which regulates the payment of judgments against counties and municipalities (Stats. 1901, p. 794) imposes upon the county clerk the duty of filing with the auditor and furnishing to the body authorized to levy taxes a list of judgments against the county or municipality; the auditor must then examine and audit the final judgments so reported and certify the same to the treasurer; thereupon the tax for the payment of such judgments is to be levied by the body authorized to levy taxes upon the property within the county or municipality. These provisions are general in scope and do not dispense with or supplant rules regulating details of local government. In this connection it is to be noted that the city and county of San Francisco keeps two separate and distinct sets of books—the auditor's and the treasurer's. Charter of the City and County of San Francisco, art. 4, c. 2; article 4, c. 3, § 2. These books should at all times agree, for the charter requires that it shall always be possible for the auditor to tell the exact condition of the treasury. This system is only possible by requiring all deposits to be made through the auditor's office and all withdrawals to be approved by the auditor, so that, deducting the unpaid warrants, the auditor's books will always show the amount of money in the treasury. Accordingly, the charter of the city and county of San Francisco prohibits the payment of a claim against the city and county until a demand is first presented to the auditor and approved and certified by him to the treasurer. Charter of the City and County of San Francisco, art. 4, c. 3, § 2; article 4, c. 2, § 3. These provisions thus operate to establish a double check upon the finances and provide for the formal notification to those in charge of the funds of the amount of the claims against said city and county and the names of the holders thereof. They also furnish an added protection to the municipality by bringing those accepting payments from the treasury within section 72 of the Penal Code, by virtue of which the presentation of a fraudulent claim against a municipality is made a felony.

[2, 3] It is thus essential, before any payment can be made from the treasury, that the demand upon the claim should receive the check and approval of the auditor. Were payments of judgments to be made without formal demand upon the judgment claim and the issuance of the auditor's warrant, not only would there be a disarrangement of the bookkeeping system of the municipality, but the treasurer would be required to assume that the judgment creditor receiving payment had not assigned or in other manner disposed of his claim, and a person could demand money from the treasury without any written evidence of his authority, either from the auditor or any other source. It is therefore apparent that grave confusion would be the consequence of a failure to compel a judgment creditor to comply with the charter requirement that all demands of every sort shall first be presented to and approved by the auditor before payment can be made from the treasury. This being so, the petitioner is not in a position to institute and maintain a proceeding for a writ directing the payment of the judgment until the auditor has been put in default by the presentation of a demand by petitioner for a proper warrant upon the treasury for the payment of petitioner's judgment, and certainly the treasurer is not in default until after he has been confronted with a warrant issued by the auditor.

[4, 5] We conclude, therefore, that a demand upon the auditor for the issuance of a warrant and a refusal thereof should have been alleged. The petition does not show the making of any demand, unless a demand can be inferred from the allegation that respondents "refuse" to pay the judgment. While it is true that sometimes the allegation of a refusal to perform an act may be sufficiently definite that an allegation of demand may be implied therefrom (Evansville, etc., R. Co. v. State, 149 Ind. 276, 49 N. E. 2; Commonwealth v. Council of Pittsburgh, 34 Pa. [10 Casey] 496), nevertheless, it is also true that it is presumed that an officer will do his duty, and therefore the allegations with respect to demand and refusal must be made with such precision as to show a violation of the particular duty owed to the petitioner (Price v. Riverside, etc., Co., 56 Cal. 431; Ingerman v. State, 128 Ind. 225, 27 N. E. 499). In this case the general allegation of a refusal of respondents to pay the judgment fails to point with exactness to the violation of a specific duty, and is therefore too vague to support an implication of a demand upon the auditor for the issuance of a warrant.

It is next contended in behalf of petitioner that, conceding that a demand for the payment of a judgment would ordinarily be a prerequisite to a proceeding in mandamus to compel the payment of the judgment, nevertheless, such a demand was not necessary in the instant case. A demand is claimed to have been unnecessary for the reason that the attitude of the officials in charge of the funds had been officially declared to be such that a demand would have been idle and useless, and that in such cases no demand is required. Moore v. Super. Ct., 20 Cal. App. 299, 128 Pac. 946.

The official declaration relied upon by petitioner in support of this argument is a resolution of the board of supervisors directing the treasurer to pay petitioner, upon proper demand therefor, an amount equal to only one-tenth of the judgment, whereas petitioner is seeking to compel the payment of the whole amount of said judgment. Petitioner claims that an amount equal to the whole judgment was included in the tax levy and collected for the purpose of paying the judgment in question. Under the provisions of the statute of 1901, above referred to (Stats. 1901, p. 794), the board of supervisors, in levying a tax to pay the judgment, was free to exercise the option of raising a sum sufficient to pay the whole of petitioner's judgment or of raising an amount equal to an aliquot part of the judgment, but not less than one-tenth thereof. Cary v. Long, 184 Pac. 857; Metropolitan Life Ins. Co. v. Deasy, supra.

[6] If the board of supervisors has, in fact, actually levied and collected a tax sufficient to pay the whole of the judgment, the right to pay the judgment in installments has ceased. Section 3 of the statute of 1901 requires the body authorized to levy taxes to "include in the tax levy for the next fiscal year a rate or sum sufficient to pay all final judgments existing against such county, city and county, city, or town." If the amount of any judgment is not included in that tax levy, the amount of such omitted judgment must be included in the next tax levy. The following proviso is then made:

> "Provided, that the board of supervisors * * * may provide for the payment of such final judgments * * * by including in the tax levy for the next fiscal year an aliquot part or fraction of the amount of such judgments, and thereupon the treasurer shall pay to each judgment creditor a like aliquot part or fraction of the amount of the judgment of the creditor, and thereafter a like aliquot part or fraction of the amount of such judgments shall be levied and paid each successive year until the whole thereof shall be fully paid; but such fractional levy and payment shall in no case be less than one-tenth ($^1/_{10}$) of the whole amount of such judgments."

According to this section, in general the whole amount of the judgment must be included in a single tax levy. There is, however, a specific proviso granting the right to include in the tax levy an amount equal to only a part of the judgment; "thereupon" a part only of the judgment is to be paid to the judgment creditor; "thereafter" a like fractional part of the judgment is to be levied and paid each year. The words "thereupon" and "thereafter" signify both sequence and consequence, and indicate that an event follows and is dependent upon the occurrence of a preceding event. By the use of these words in the proviso, the existence of the right of paying a fractional part of the judgment after the collection of the tax and of the right of collecting and paying in subsequent installments is made to depend upon and follow the collection of only a fractional part of the judgment in the first instance. The payment of a fractional part of the judgment is mentioned only in this proviso, which is a separate and distinct portion of the section, providing a special mode of collection and payment complete in itself and different from the method prescribed in other parts of the section. Every time that a payment of a fractional part of the judgment is referred to, it is expressly mentioned as concomitant to a tax levy of only a fractional part of the amount of the judgment. Moreover, whenever the levy of a fractional part of the judgment is made, the statute provides that a like fractional amount shall be paid over to the judgment creditor, thus expressing an intent to prevent the retention in the treasury of any part of the tax levied for the payment of the judgment.

[7, 8] The statute requires a choice between two alternatives; either a single levy and payment of the whole amount of the judgment, which would be to the advantage of the judgment creditor, or annual levies and payments of a fractional part of the judgment, which would be to the interest of the taxpayers. There is no provision permitting the city to collect the whole amount of the judgment from the taxpayers, and, at the same time, to withhold a considerable part thereof from the judgment creditor by retaining it in the city treasury over a period of years. Therefore, if petitioner's statement that the whole amount of the judgment has been collected is correct, petitioner was, upon proper demand, entitled to receive the whole amount of the judgment in one payment. However, the fact that the treasurer was directed to pay only one-tenth of the judgment was not set forth in the petition. Respondents, at the time they demurred, filed answers which set forth the resolution of the board of supervisors directing the treasurer to pay to petitioner a sum equal to only one-tenth of the judgment, and it is upon these answers that petitioner relies for the allegations of facts excusing a demand. When considering the sufficiency of a pleading attacked by demurrer, defects in the pleading attacked cannot be held to be cured by allegations in an answer filed at the same time as the demurrer, for the answer is before the court only in the event that the petition withstands the test of the demurrer. Code Civ. Proc. § 472. If there were facts existing which would make a demand an empty and unavailing formality, these should have been alleged in the petition.

By reason of failing to allege a demand for the issuance of a warrant by the auditor, the petitioner failed to show a default on the part of the officers whom it seeks to charge with the performance of a duty. The demurrer must therefore be sustained.

The writ is denied.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.; SLOANE, J.

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184 Cal. 579

AHEARN v. DAVIS et al., Board of Fire Com'rs. (S. F. 9431.)

(Supreme Court of California. Dec. 27, 1920.)

Municipal corporations 🔑48(2)—Employees held entitled to hold over under new charter, whether salary fixed thereby or not; "officers and members."

The words "officers and members," as used in San Francisco Charter, art. 9, c. 2, § 1, relating to immediate reorganization of the fire department by appointments from the force, mean employees, whether enumerated and salaries fixed by chapter 8, or not, so that employees were properly allowed to hold over after the adoption of the charter without civil service examination, and were senior to those subsequently appointed on examination, under a rule for laying off men in inverse order of appointment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Daniel A. Ahearn against John F. Davis and others, as the Board of Fire Commissioners of the City and County of San Francisco, for a writ of mandate to compel plaintiff's reinstatement in the Fire Department, and payment of wages while deprived of employment. From a judgment denying the writ, plaintiff appeals. Affirmed.

Grant & Zimdars, of San Francisco, for appellant.

George Lull and Maurice T. Dooling, Jr., both of San Francisco, for respondents.

Sloss, Ackerman & Bradley and Samuel M. Shortridge, all of San Francisco, amici curiæ.

OLNEY, J. This is an appeal by the plaintiff from a judgment of the superior court denying him a writ of mandate directing the board of fire commissioners, the civil service commission and the auditor of San Francisco to recognize the plaintiff as harness maker for the fire department of the city. As defendants with the officials mentioned are joined two individuals, Buckley and Karney, and the question in dispute is as to whether the plaintiff, Ahearn, has a right superior to that of either of these two to the position mentioned of harness maker.

It seems that, at and before the going into effect of the present charter of San Francisco, both Buckley and Karney were in the employ of the city as harness makers for the fire department. On the going into effect of the charter on January 8, 1900, and the consequent reorganization of the department, they continued as harness makers for it, and have been such up to the present time, but have never taken a civil service examination for the positions they hold. In 1912 the civil service commission held an examination for mechanics, and the plaintiff took the examination and was given first place on the eligible list. The number of harness makers was increased from two to three, and in November, 1913, the plaintiff was appointed to the additional position so created. In 1917 the number was reduced again to two, and the plaintiff was laid off. He thereupon commenced this proceeding, claiming to be entitled to remain in the employ of the city in preference to either Buckley or Karney.

The rule of the civil service commission is that, in case of a reduction in the number of permanent employees of a particular class in any department, the employees shall be laid off in the inverse order of their appointment. The plaintiff claims that, although he came into the employ of the department long after Buckley and Karney, he is not subject to the rule just stated, for the reason that they are not civil service appointees, and therefore, according to plaintiff, not legally appointed to their positions. The claim of the defendant, on the other hand, is that Buckley and Karney were not required to be civil service appointees by reason of section 1 of chapter II of article IX of the charter, and therefore have held their positions regularly and have full rights of seniority. The section just mentioned deals with the duties of the fire commissioners in the matter of the organization of the fire department on the going into effect of the charter, and the pertinent portion of it reads:

> "The board of fire commissioners shall immediately after their appointment and qualification proceed to reorganize the fire department in conformity with the provisions of this charter. In so doing the board shall make its appointments of officers and members from the persons constituting the force in the service of the fire department at the time this charter goes into effect. Such officers and members shall not be required to pass any civil service examination."

It is perfectly evident from the mere reading of this section that it sustains the contention of the defendants, bearing in mind that Buckley and Karney were harness makers for the department when the charter went into effect, provided they come within the designation "officers and members" of the department. It is the plaintiff's contention that they do not, and this is the crux of the case.

That Buckley and Karney were and are employees of the department would seem to be plain. Some point seems to be made of the fact that no order appointing them was ever made by the fire commissioners. They simply kept on in their positions, being carried on the rolls of the department and doing their work and getting their pay, and this for some 17 years before their position as employees was questioned, and even then questioned not by the city authorities, but by a person who wanted one of their places. What additional strength a formal appointment would give to such a recognition we do not see.

It is also plain that, according to the ordinary and usual meaning of words, an "employee" of a city department is a "member" of that department. It also appears that almost immediately after the charter took effect the then city attorney, Franklin K. Lane, formally advised the fire commissioners that the section of the charter quoted applied to all employees of the department, whether they were members of its regular fire companies or of its office organization or not, and that the construction of the charter so advised was adopted and has been consistently followed ever since. We have, then, as opposed to the plaintiff's contention, a construction of the charter sustained by the natural meaning of the language used and by the consistent practice in actual administration for many years. Under these circumstances, only the most compelling reasons would justify our refusing to follow this construction.

The only reason advanced why we should refuse to do so is certain language from the opinion of this court in Maxwell v. Fire Commissioners, 139 Cal. 229, 72 Pac. 996, wherein the question was presented as to whether or not one who had been clerk of the fire department prior to the charter was entitled to the position of secretary of the fire commissioners in the reorganized department, by virtue of the same charter provision which is under consideration here. It was held that it could not be said that the two positions were the same, and therefore the old clerk was not entitled to become the new secretary. In its opinion the court used the following language (139 Cal. 231, 72 Pac. 997), upon which reliance is now placed:

"Chapter 8 of article IX of the charter provides that 'the officers and members of the fire department shall receive annual salaries as follows,' and then enumerates the different classes of officers and members, but does not mention the secretary of the board, nor any 'clerk' of the fire department. It is a fair inference that the direction in chapter 2, that in reorganizing the force the department shall make its appointments of 'officers and members' from the force in service when the charter took effect, applies only to the 'officers and members' whose salaries are fixed in chapter 8, and, as the secretary is not one of those enumerated, it would follow that the board is not required to select him from the members of the old fire department."

But, in the first place, this language was not necessary for the decision, and is but the statement of a further reason in addition to that upon which the decision primarily rests. Language so used would hardly justify the rejection of a construction sustained by the fair meaning of the words of the charter and by the actual practice in administration for years. In addition, the question presented was very different from that presented here. The question there was as to a position specially created by the charter, and the salary for which was fixed by the charter, but which was not enumerated in the section fixing the salaries of "officers and members" of the department. It was a reasonable conclusion that such a position was outside the scope of a general provision for such "officers and members." The question here is as to positions not created by the charter, and the salaries or wages attaching to which are not specially fixed by the charter. So far as appears, it was not brought to the attention of the court in the Maxwell Case that there were in the department, both before and after the charter, a number of employees not mentioned by the charter. Certainly no question was presented as to the status of such employees, nor was there any thought that it was being decided. It would be most unreasonable to consider that that question is now controlled by a sentence or two from a former opinion, dealing with a different question and a different state of facts. The question not being so controlled, we are free to give effect to the natural meaning of the words of the charter and to the construction adopted in actual practice, and to hold that "employees" of the department, whether they are enumerated and their salaries fixed by chapter VIII or not, are included under the designation in chapter II of "officers and members." This we do, and it is decisive of the case.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

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184 Cal. 584

In re O'CONNELL. (Cr. 2306.)

(Supreme Court of California. Dec. 28, 1920.)

1. Attorney and client ⚷39—Record conclusive evidence of conviction of attorney of offense requiring disbarment.

A record showing that an attorney was convicted of a felony or of a misdemeanor involving moral turpitude, which is ground for disbarment under Code Civ. Proc. § 287, subd. 1, is conclusive evidence of such conviction, and on production of such record the Supreme Court must give judgment striking the attorney from the roll of attorneys and counselors.

2. Attorney and client ⚷39—Bill of exceptions, not properly in record, cannot be considered on disbarment for conviction.

In proceedings for disbarment for conviction of a crime, matters which respondent attempted to set out in a bill of exceptions on writ of error from his conviction in the United States court, but which was held by the United States Supreme Court not a bill of exceptions because not presented until after the power of the trial court had expired, cannot be considered in the disbarment proceedings.

3. Attorney and client ⚷39—Conspiracy to violate Espionage Act involves "moral turpitude."

A conviction of an attorney for conspiracy to violate the Espionage Act June 15, 1917, § 3, making it unlawful to obstruct recruiting in time of war is a conviction for an offense involving moral turpitude, which includes those contrary to justice, honesty, modesty, or good morals, and therefore requires the disbarment of the attorney.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moral Turpitude.]

In Bank.

Disbarment proceeding against Daniel O'Connell, an attorney and counselor at law. Respondent disbarred.

See, also, 189 Pac. 700.

Daniel O'Connell, of San Francisco, in pro. per.

PER CURIAM. This is a proceeding for disbarment, instituted by the filing in this court of a certified copy of the judgment of the United States District Court for the Northern District of California in the cause entitled United States of America, Plaintiff, v. Daniel O'Connell, No. 6220, from which it appears that said Daniel O'Connell was convicted therein of the crime of conspiracy to violate the act of Congress of May 18, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), and the act of Congress of June 15, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 10212a–10212h), and that by said judgment said Daniel O'Connell was on September 29, 1917, sentenced to imprisonment in the United States penitentiary at McNeil Island in the state of Washington for a period of seven years.

This judgment having been affirmed by the Supreme Court of the United States (O'Connell v. United States, 253 U. S. 142, 40 Sup. Ct. 444, 64 L. Ed. 827) a certified copy of the judgment and mandate of such court was filed herein, and an order to show cause was thereupon made by us, requiring said Daniel O'Connell to show cause why, on account of said conviction, his name should not be stricken from the roll of attorneys and counselors of the court, and he be precluded from practicing as such attorney or counselor in all the courts of the state. He filed a demurrer and answer, and has also filed a brief in support of his claim that his conviction constitutes no ground for disbarment.

[1] The conviction of an attorney and counselor "of a felony or misdemeanor involving moral turpitude" in a court of this or another state or in a court of the United States is ground for his disbarment, and in such a case the record of conviction is conclusive evidence of such conviction. Upon production of such a record in this court, it is made the duty of the court to proceed thereon and to give judgment striking the name of the attorney from the roll of attorneys and counselors of the court, and precluding him from practicing as an attorney and counselor in all of the courts of the state. See Barnes v. District Court of Appeal, 178 Cal. 500, 173 Pac. 1100.

The claim of the accused is that the crime of which he was convicted did not involve moral turpitude, which he claims is an essential to disbarment when the proceeding is under subdivision 1 of section 287, Code of Civil Procedure, which states the cause for disbarment as follows:

> "His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence."

[2] In his answer the accused sets up certain matters alleged to be shown by the so-called bill of exceptions attempted to be incorporated as a part of the record in his case on the review of the proceedings by the Supreme Court of the United States, as showing that under the circumstances of his case there was no moral turpitude on his part. We cannot even enter upon a discussion of this claim on its merits. As we have seen "the record of conviction" is made conclusive evidence in so far as this proceeding is concerned. Even if we should assume for the purposes of this decision that a properly settled bill of exceptions might properly be held to constitute a part of the "record of conviction" within the meaning of this statute, for which so far as we have seen there appears to be no authority, we have the decision of the Supreme Court of the United States to the effect that the bill of exceptions in this case was not presented until after the power of the trial court over the cause expired, with the result that the attempted proceedings "concerning settlement of a bill thereafter were coram non judice," and that the bill copied in the record could not be considered. See O'Connell v. United States, supra. Clearly, in view of this ruling, the so-called bill constitutes no part of "the record of conviction."

[3] The record shows that the indictment against the accused contained two counts, on each of which he was convicted. It will be necessary here to consider only the offense charged in one of these counts, viz., conspiracy to violate section 3 of the act of Congress of June 15, 1917 (40 Stat. 219), commonly known as the Espionage Act, in so far as the same prohibits in time of war the willful obstruction of the recruiting or enlistment service. Section 3 of that act at that time was as follows:

> "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies" and "when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

From the foregoing it conclusively appears that the accused, an attorney and counselor of this state, was convicted of the crime of having willfully engaged in a conspiracy having for its definite purpose the obstruction, while the United States was at war, of the recruiting or enlistment service of the United States. The simple question remaining is whether such an offense on his part involves "moral turpitude." It seems to us that it would, indeed, be a narrow and restricted definition of the term that does not include such an offense. To put it in other words, the accused, an attorney and counselor of this state, was convicted of engaging in a conspiracy for the purpose of hindering his country, while at war, from procuring by recruiting or enlistment the military force deemed essential to the carrying on of war. That such conduct on his part would involve moral obliquity and constitute a base offense against his fellow men and his country entirely regardless of statute prohibiting it, cannot, it seems to us, be seriously questioned. It is conduct closely akin to that constituting treason, than which, in the estimation of mankind generally, nothing could be more base. Moral turpitude has been defined by many authorities as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." See In re Henry, 15 Idaho, 755, 758, 99 Pac. 1054, 1055, 21 L. R. A. (N. S.) 207. In the Matter of Coffey, 123 Cal. 522, 56 Pac. 448, we approved the definition of turpitude given by Bouvier, viz. anything done "contrary to justice, honesty, modesty, or good morals." We entertain no doubt that the offense with which the accused was charged and of which he was convicted comes within these definitions. As we have already said, it is not for us to determine whether or not he was in fact guilty of this offense, our statute making the conviction the ground of disbarment, and the record thereof conclusive.

It is ordered that the name of Daniel O'Connell be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as an attorney or counselor in all the courts of this state.

ANGELLOTTI, C. J., and SHAW, WILBUR, LENNON, SLOANE, LAWLOR, and OLNEY, JJ., concur.

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184 Cal. 632

ARNOLD v. SAN RAMON VALLEY BANK.

(S. F. 9349.)

(Supreme Court of California. Jan. 4, 1921.)

1. Banks and banking 🔑134(1)—Deposit in wife's name held that of husband as to right of set-off.

Where a depositor transferred his account to his wife's name to protect it from his creditors with the bank's knowledge and consent, but thereafter drew checks against the account in his own name, which were honored by the bank and charged to the account, the account must be treated as the account of the depositor, not as that of his wife, as respects the bank's right of set-off.

2. Banks and banking 🔑119—Deposit is mere debt.

The relation between a general depositor and a bank is that of debtor and creditor, the moneys deposited becoming the property of the bank for which it becomes indebted to the depositor.

3. Assignments 🔑49 — Banks and banking 🔑138—Check creates no lien against deposit.

A check drawn against a general deposit in a bank creates no lien upon the money on deposit, and does not operate as an equitable assignment of the deposit, or any interest therein.

4. Banks and banking 🔑134(1) — Bank can set off depositor's debt against deposit.

A bank to which a depositor is indebted can set off against the deposit the amount of the debt owed by the depositor.

5. Banks and banking 🔑134(7) — Bank can set off against deposit of trust funds of which bank had no notice.

Where a depositor who was indebted to the bank deposited to his general account funds intrusted to him for a special purpose, the bank can set off its claim against the depositor against such deposit if it had no notice of the trust.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Marten Arnold against the San Ramon Valley Bank. Judgment for plaintiff, and defendant appeals. Reversed, and judgment directed for defendant.

Chas. E. Snook, of Oakland, for appellant.

W. S. Tinning and A. B. Tinning, both of Martinez, for respondent.

SHAW, J. Defendant appeals from the judgment. The record on appeal consists of the judgment roll alone. The judgment was for $500, and was based on the following facts set forth in the findings: Several years prior to 1916 one Wallace Taylor became indebted to the defendant upon a promissory note to the amount of $700. In February, 1916, he gave a new note in renewal thereof and it became due June 30, 1916. From December, 1915, to August 7, 1916, Taylor had a regular ordinary deposit account with the defendant. Prior to May 8, 1916, the account of said Taylor was kept in his own name, but on that day, at the request of the defendant, the same was changed, and was thereafter kept in the name of Clara Taylor, wife of said Wallace Taylor. At that time defendant knew that Taylor was financially embarrassed, and the change was made in the name of the account in order to protect the deposit against demands by creditors of Taylor. Said Clara Taylor had no interest in the account or in any of the moneys which were then, or were thereafter to be, deposited therein. Taylor was engaged in the business of buying and selling live stock, both for his own account and for others on commission, acting as a broker. This was known to the defendant. On August 3, 1916, the plaintiff intrusted to Taylor, as such broker, the sum of $500, instructing him to use the same in buying live stock and selling the same for the plaintiff. On that day Taylor deposited with the defendant to the said account in the name of Clara Taylor said sum of $500 so intrusted to him by the plaintiff, and the same was placed to the credit of Clara Taylor, and it was then agreed between Clara Taylor and the defendant that any checks which might thereafter be drawn by Wallace Taylor against the defendant should be paid out of the moneys so deposited in the name of Clara Taylor. Thereafter Wallace Taylor, pursuant to his agreement with plaintiff, purchased live stock for the account of plaintiff to the aggregate amount of $500, and between August 3 and August 6, 1916, he gave checks therefor to the persons from whom he bought the same on the said account of Clara Taylor with the defendant, amounting to $500. Between August 3 and August 12, 1916, said checks were presented to the defendant for payment, and payment was refused. Wallace Taylor never notified the defendant that the said $500 was not his own property, nor that the same had been intrusted to him as a broker for the plaintiff or any other person, and the defendant did not know said facts until long after it credited said account on said note. On the day said deposit was made the defendant requested said Clara Taylor to apply the deposit, or a portion thereof, toward the payment of said note of Wallace Taylor. She refused to do so, and informed the defendant that checks had been drawn by Wallace Taylor against said account. On August 7, 1916, while the defendant still held said promissory note of Wallace Taylor, and while it was still unpaid, the defendant applied thereon, in satisfaction thereof to that extent, the sum of $713.44, the same being the balance then remaining on deposit in the aforesaid account in the name of Clara Taylor, and said sum was thereupon credited upon said note and charged to said account. On August 5, 1916, checks on said account drawn by Wallace Taylor, amounting to $250, were presented to the bank for payment, but payment was refused on the ground that there were not sufficient funds in the account to pay said checks. Neither Arnold nor Taylor consented to said application of the money in said account. Taylor expressly objected thereto at the time the application was made, and made his objection known to the defendant.

[1] The deposit in the defendant bank in the name of Clara Taylor did not belong to her, and she had no interest therein. Her name was used solely for convenience. It was her husband's account carried under her name, and his checks thereon were to be honored after the change of name as before. This clearly appears from the facts found, and it is not disputed. The case must therefore be decided in the same manner as if the deposit account had remained in the name of Wallace Taylor. It was a general account between him and the bank.

[2] "It is well settled here that the relation between a general depositor and the bank in which his deposit is made is simply that of debtor and creditor. The moneys deposited immediately become the property of the bank, and the latter becomes the debtor of the depositor for the amount of the deposit, the same being payable on demand and on checks of the creditor." Smiths' Cash Store v. First National Bank, 149 Cal. 34, 84 Pac. 664, 5 L. R. A. (N. S.) 870; Janin v. London, etc., Bank, 92 Cal. 22, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82; People v. Wilson, 117 Cal. 243, 49 Pac. 135; Pullen v. Placer County Bank, 138 Cal. 172, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; Plumas County Bank v. Rideout Bank, 165 Cal. 138, 131 Pac. 360, 47 L. R. A. (N. S.) 552.

[3] A check drawn against such deposit creates no lien upon the money on deposit, and it does not operate as an equitable assignment of the deposit or any interest therein or part thereof. Pullen v. Placer Co., supra; Florence v. Brown, 124 U. S. 385, 391, 8 Sup. Ct. 531, 31 L. Ed. 424; Hopkinson v. Forster, L. R. 19 Eq. Cas. 76; O'Connor v. Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816.

[4] Since the relation between Taylor and the bank, growing out of the deposit, was that of creditor and debtor, and the debt of Taylor was due, it follows that the bank had the right of set-off to the extent of any debt it then held against Taylor. The debt due from the bank to Taylor on account of the deposit and the note of Taylor to the bank were cross-demands. If either had sued the other upon such demand, the other could have pleaded the cross-demand as a counterclaim. Consequently, the two demands are "deemed compensated so far as they equal each other." Code Civ. Proc. § 440; McKean v. German S. Bank, 118 Cal. 341, 50 Pac. 656; Ainsworth v. Bank, 119 Cal. 474, 51 Pac. 952, 39 L. R. A. 686, 63 Am. St. Rep. 135; People v. California, etc., Co., 168 Cal. 241, 141 Pac. 1181, L. R. A. 1915A, 299; Estate of Gamble, 166 Cal. 253, 257, 135 Pac. 970; Morse on Banks (5th Ed.) § 304. This establishes the proposition that, so far as Taylor and the bank were concerned, the bank had the right to balance the account and discharge its lien thereon by crediting the amount thereof on the note due to it from Taylor.

Our Civil Code provides that—

> "A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business." Civ. Code, sec. 3054.

This is but a restatement of a well-known rule of commercial law. Under this rule the defendant had the right to refuse payment of checks and to apply the amount of the deposit as a credit on its note against Taylor, thus discharging the lien and balancing the account.

[5] The plaintiff contends that where the money deposited actually belonged to another person, and the depositor held it in trust for the true owner at the time of making the deposit, this rule does not hold good against the true owner, and that, upon proof that it was so held in trust, he may recover it from the bank, notwithstanding the fact that the banker had no knowledge of such trust relation or of the character of the money deposited. We understand the rule to be otherwise. No exception of this character is found in the statement of the rule in section 3054. The question was directly involved in Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106, and it was there decided contrary to the claim of plaintiff. One A. B. Perry had a general deposit account with the bank in the name of A. B. Perry & Co. When the account was opened he was the sole owner of the business carried on under that name. He used that name for appearances only, but expected at some time to take a partner in with him. These facts were stated to the bank when the account was opened. Soon afterwards he transferred an interest in the business to a corporation as a partner therein. Thereafter the partnership business was conducted under the name of A. B. Perry & Co., as before, and the fact that the corporation was a partner was kept secret from the bank from that time forward. After this partnership was thus formed Perry became personally indebted to the bank on a note, and the bank charged the amount of said note on the said deposit account, and credited the note as having been paid in full. The court held that the bank had a right to set off the note against the account by crediting one against the other, notwithstanding the fact that the corporate partner had an equitable interest in the account. The essential facts in that case are the same as in the case at bar. In 7 Cor. Jur., at page 659, the rule is stated as follows:

> "It is usually considered, however, that where a bank has no notice that funds deposited are held by the depositor in trust, it may apply such deposit to the depositor's debt without becoming liable to the beneficial owner."

There is a footnate to this statement which gives a long list of decisions in the several states, all of which support the text. In 111 Am. St. Rep. at page 419, appears a note to Garrison v. Union T. Co., 139 Mich. 392, 102 N. W. 978, 70 L. R. A. 615, 5 Ann. Cas. 813, in which note the cases are also collected, showing that the majority are largely in support of the position of the defendant here. Another full citation of cases may be found in McStay S. Co. v. Stoddard, 35 Nev. at page 297, 132 Pac. 545. We need not repeat these citations here. The point is so well established by authority, both in this state and elsewhere, that we deem it unnecessary to discuss it on principle.

The plaintiff relies on Burtnett v. First Nat. Bank, 38 Mich. 630; Shotwell v. Sioux F. S. Bank, 34 S. D. 109, 147 N. W. 288, L. R. A. 1915A, 715; Cady v. South Omaha Bank, 46 Neb. 756, 65 N. W. 906, and cases in Texas and South Carolina, all of which appear to hold the opposite doctrine to that above stated. In Michigan the later case of Garrison v. Union T. Co., supra, follows the prevailing rule and apparently overrules the Burtnett Case, although it does not mention it. So, also, in Nebraska a later decision indicates that the Cady Case has been repudiated there. Globe Sav. Bank v. Nat. Bank of Commerce, 64 Neb. 413, 89 N. W. 1030. We are not disposed to follow these cases, in view of the thoroughly established rule to the contrary.

For these reasons we think the court erred in its conclusions of law in favor of the plaintiff, and that the judgment should have been for the defendant.

The judgment is reversed, and the court below is directed to enter judgment for the defendant.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; OLNEY, J.; LENNON, J.; WILBUR, J.; SLOANE, J.

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184 Cal. 602

MOUND WATER CO. et al. v. SOUTHERN CALIFORNIA EDISON CO. et al.

(L. A. 6142.)

(Supreme Court of California. Jan. 4, 1921.)

1. Waters and water courses ⟹217—Water company held not public utility subject to jurisdiction of Railroad Commission.

Where owners of certain lands organized a water company to obtain water for such lands, and furnished the money for acquisition and construction of the water system, with the understanding that their lands were to be supplied with water before water could be furnished other lands, and that the right to such water was to be appurtenant to their land, and where the system was sold to another corporation under agreement whereby purchaser agreed to furnish specified amount of water to such lands at specified rate, purchaser and its successor in interest were not subject to the control of the Railroad Commission, under Utilities Acts of 1911 and 1913, in so far as water to be furnished such owners was concerned, but held the system in trust for benefit of such owners until their lands were supplied.

2. Evidence ⟹48—Judicial notice not taken of decision of Railroad Commission.

The court will not take judicial notice of a decision of the Railroad Commission.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Judgment ⚿948(1)—Adjudication by Railroad Commission must be pleaded.

An adjudication of the Railroad Commission, to constitute a defense, must be pleaded.

4. Evidence ⚿22(1)—No judicial notice as to character of corporations.

Courts do not take judicial notice as to public utility character of corporations.

5. Pleading ⚿205(3)—Defects in form objected to by special demurrer.

Where complaint states a cause of action, defects in form must be objected to by special demurrer.

In Bank.

Appeal from Superior Court, Ventura County; Grant Jackson, Judge.

Action by the Mound Water Company and others against the Southern California Edison Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Argabrite & Drapeau, of Ventura, for appellants.

Harry J. Bauer, Robert M. Clarke, and Roy V. Reppy, all of Los Angeles, for respondents.

SHAW, J. The defendants demurred to the complaint on two grounds: (1) That the court had no jurisdiction of the subject of the action; (2) that the complaint does not state facts sufficient to constitute a cause of action. The court below sustained the demurrer without leave to amend, and thereupon gave judgment for the defendants. The plaintiffs appeal.

The complaint contains five counts. They each relate to the alleged failure of the defendant Southern California Edison Company, hereinafter called Edison Company, to furnish water to or for the stockholders of the plaintiff Mound Water Company, hereinafter called Water Company, for use upon their several and respective tracts of land in accordance with an agreement made on February 1, 1907, between the Water Company and a corporation known as the Ventura County Power Company, transferring to the latter the water sources and system of distribution of the former, under which agreement the Edison Company, as successor in interest of the Power Company, holds such rights as it has in the water in question. The plaintiffs Sexton and Harkey are holders of stock in the said Water Company, and join as plaintiffs for that reason, claiming water rights under said agreement.

The complaint alleges the making of the agreement above mentioned between the Water Company and the Power Company and the subsequent execution of a deed by the Power Company to the Edison Company transferring to the latter all the rights of said Power Company under said agreement. The said agreement, and also certain so-called rules for distribution of water mentioned therein, are set forth as exhibits to the complaint and are expressly made a part thereof. The first count alleges that the Edison Company in June, 1918, refused to deliver any water to the plaintiff George S. Sexton, to which it is alleged he was entitled under said agreement, and which he demanded. The second count alleges a similar refusal to deliver water to the plaintiff Harkey for use on his land under said agreement. The third count alleges that the Water Company on behalf of its stockholders, on June 1, 1918, demanded of the Edison Company that it should deliver to said stockholders, naming them, certain quantities of water specified for each, amounting to 150 inches, as the same should be demanded by said stockholders, and that said company failed and refused to furnish the water in accordance with said notice. The fourth count alleges that the present daily capacity of said water system was no greater than a constant daily flow of 90 miners' inches of water, that said Edison Company proposed to supply therefrom to one Chrisman, who was not a stockholder of said Water Company, water sufficient for 77 acres of land that was not entitled to water from said system, all of which was in violation of the said agreement; that the needs of the stockholders of the Water Company will require a constant daily flow of 150 miners' inches for the season of 1918, and the same in future years, and that the result would be that the stockholders of the Water Company would be deprived of water to which they were entitled from said system. The fifth count, in effect, alleged that the Edison Company, in violation of said agreement, had for the year preceding July 1, 1918, failed and neglected to develop more than a constant daily flow of 90 miners' inches of water from said water system; that the same was capable of producing a constant daily flow of more than 150 miners' inches; that the said plaintiff and its stockholders entitled to the use of said water, would, by reason of nonuser, lose all rights to water from said system in excess of the constant daily flow so maintained by said Edison Company, and that the said stockholders entitled to the water needed the full amount of 150 miners' inches to properly irrigate their lands upon which they are entitled to use said water. The prayer of the complaint is that the defendants be restrained from delivering or disposing of any waters of said water system to said Chrisman or to any person, other than to said Water Company for the use and benefit of its stockholders upon their respective tracts of land set forth in the agreement referred to, until said defendants shall first have delivered the water necessary for the use and benefit of such stockholders, to wit, a constant daily flow of 150 miners' inches as provided in said agreement, and that said Edison Company, by mandatory injunction, be ordered and directed "to develop from said Mound Water System not less than a constant daily flow of 150 miners' inches of water for the use and benefit of the stockholders of said Mound Water Company."

The theory of the complaint is that the waters which the respective stockholders claim the right to receive are private property, not dedicated to public use, that under the agreement referred to said stockholders have the right to receive the same for use upon their respective tracts of land, and that the Water Company, as agent and trustee for them, has the right to maintain this action in their behalf. The soundness of this theory obviously depends upon the terms of the agreement set forth in the complaint.

The agreement purports to be tripartite in character. The Mound Water Company was named as party of the first part, Ventura County Power Company, as party of the second part, and 27 persons described as stockholders of the Mound Water Company as parties of the third part. Said stockholders, however, did not sign the agreement, but the covenants of the agreement appear to have been made in their behalf and for their benefit.

It first recites that the parties of the third part owned all of the issued stock of the Water Company and hold one share of stock for each acre of their lands, respectively. It then sets forth the holdings of stock by each one of the stockholders, respectively, naming them, and describes the respective tracts of land owned by each stockholder, stating the number of acres in each tract. The number of acres correspond to the number of shares of stock owned by such stockholder. Then follows a recital, setting forth the terms of the resolution adopted at a stockholders' meeting of said Water Company, authorizing the execution of the agreement. It then declares that the Water Company, in consideration of the covenants and agreements of the Power Company therein set forth, grants, sells, assigns and transfers unto the Power Company all of the property embraced in and pertaining to the water system of the said Water Company, describing it at length, including the water sources and supply, and that in consideration thereof the said Power Company thereby granted, sold, assigned, and transferred unto the Water Company, for the use of its said stockholders and their successors in interest in the lands thereinbefore described as belonging to them and for use upon said lands, 150 miners' inches of water from said system, to be delivered by said Power Company on said lands at 25 cents per miners' inch of the water furnished and used by said stockholders, respectively. It further declared that said 150 inches of water so granted to said Water Company should be appurtenant to the aforesaid lands of said stockholders and should be an absolute right in the Water Company, that said stockholders were to have said 150 inches of water so delivered on said lands from the present water system, and that said water should be so delivered by said Power Company to said respective stockholders "in accordance with the rules for distribution now obtaining in said party of the first part for the distribution of water to its stockholders at such times and in such quantities as said (stockholders) may respectively in writing request; it being understood that said 150 miners' inches of water in this indenture granted to said party of the first part shall constitute and be a part of such water so to be delivered to said stockholders." There was a further agreement by the Power Company to deliver to said stockholders water for stock and domestic purposes on the said lands at the price of $25 a year for each 100,000 gallons of water so supplied. The Power Company further convenanted to maintain and keep in repair and use the system so obtained, and that no other or different system should be used to supply water to said stockholders without the consent of the Water Company, and that it would so use and maintain the water rights and property so transferred to it that no forfeiture or diminution should be permitted to arise or happen, and so that no adverse right or rights should be permitted to accrue as against the right of the said Power Company and said Water Company therein or thereto. It further appears by said agreement that the Water Company was organized and exists for the purpose of furnishing and supplying to its stockholders water for use on their lands, and that the stockholders by and through said Water Company had expended more than $75,000 in the purchase of the water-bearing lands, and water rights, and in the construction of the works for the delivery thereof to the said lands, which constituted the water supply, distributing system, and works so transferred to said Power Company.

The rules for water distribution referred to in said agreement and made a part of the complaint are contained in the by-laws of said Water Company. They provide that each share of water stock shall be definitely allotted to an acre of land, and that no transfer of stock should be made so as to alienate the water from the land to which it was originally applied, and that no stockholder shall own more shares of stock than he has acres of land. And further that every stockholder should receive his share of water in a certain order specified therein, naming each person and giving his consecutive number. Also that no stockholder should receive more than 6 inches of water for each acre of his land, without the consent of the majority of the stockholders, and that an annual assessment of 6 cents per share should be paid by the stockholders.

[1] From this statement it appears that the water supply and water system owned and operated by said Water Company in 1907, when said agreement was made, was acquired and constructed with money paid to the company for that purpose by its stockholders; that this was done under an arrangement and with the understanding that the system was to be operated by said Water Company to produce from said sources water to the extent of 150 miners' inches and distribute the same by means of the pipes and conduits of the system to the said stockholders, to the extent of their needs, for use on the lands described in the agreement, to each stockholder in the proportion which the acreage of his land bore to the total acreage of all the lands described, and to no other lands until after those lands were supplied. Also that such rights were appurtenant to the respective tracts of land. This water and the system of distribution thereof were therefore held in trust by the Water Company for the benefit of its stockholders, and, until said lands were supplied, for the stockholders only. The Water Company was therefore nothing more or less than an agency whereby the stockholders procured the water for use on their own lands, exclusively, in the proportions stated. Nothing in the agreement or in the allegations of the complaint indicates any intention on the part of said Water Company or its stockholders to devote any part of said 150 inches to public use. As this trust was impressed upon the properties when it was conveyed to the Edison Company, the trust and the corresponding duty remained upon it thereafter, and that company is bound to perform it.

It is a well-established proposition that a water system of this character, so owned and controlled, is not a public utility, and that the water owned, held and used in that manner is not dedicated to public use or subject to control by public authority. The Water Company was of the class designated in our decisions as a mutual water company. The case is not distinguishable in any material particular from McFadden v. Los Angeles County, 74 Cal. 571, 16 Pac. 397. That was a proceeding in mandate to compel the board of supervisors to fix the water rates to be charged by the Anaheim Union Water Company. The company was a corporation formed for the purpose of supplying water to the owners of certain lands. The waters it owned were acquired and held for use on the lands of stockholders only, and not for sale, distribution, or rental. No water was to be sold or used by any one except the stockholders, or was to be used on land not covered by stock of the company. It was not intended that the water so held was to be sold, rented, or used in any way to accumulate funds with which to pay a dividend. The court held that the board of supervisors was not authorized to fix rates under the Constitution (article 14, § 1), or under the act of 1885 (Stats. 1885, p. 95). It was said:

> "An individual can certainly acquire water to be used on his own land. With such use a board of supervisors would have nothing to do. We know of no reason why individuals cannot associate themselves, take on a corporate form, and acquire water to be used on their own lands. When this is done, we are of opinion that a board of supervisors can have no more power over the rates to be paid by the stockholders than in the case of individuals."

This opinion was reaffirmed in McDermott v. Anaheim, etc., Co., 124 Cal. 114, 56 Pac. 779. In that case it was held, with respect to the same corporation, that a stockholder could maintain an action to enjoin the corporation from supplying water to persons who were not stockholders of the company, where it was made to appear that the effect would be to deprive the stockholders of a portion of the water necessary for their use on their lands. The same general doctrine was announced in Barton v. Riverside Water Co., 155 Cal. 518, 101 Pac. 790, 23 L. R. A. (N. S.) 331, and Hildreth v. Montecito Water Co., 139 Cal. 29, 72 Pac. 395. In the latter case it was said that the constitutional provision did not "cover the proposition that all water which is distributed among a number of persons is, from that fact alone, to be considered as devoted to a public use." There are many cases in which the rights served by corporations of this character have been considered by this court, and in none of them is there any suggestion that such disposition or distribution constitutes a public use. The cases are collected and cited in Thayer v. California Development Co., 164 Cal., on pages 135 and 136, 128 Pac. on page 28. In that case the subject was elaborately considered, all the cases were reviewed, and it was held that, where a water company was organized for the purpose of selling water to certain designated persons selected by it at the time of its organization, or to its stockholders alone for use on their lands, and to no other person, such sale and distribution of water did not constitute a public use. We refer to that case for a more complete discussion of the subject.

In the respondents' brief it is suggested that the Water Company had sold some of the water to persons other than stockholders, presumably for profit, and from this it is argued that the company must have been selling water for public use. Even if this were shown by the complaint, it would not affect the right to the water necessary for the lands of the stockholders described in the agreement. Under the trust shown therein and by the terms of the by-laws it would have no right to dispose of any part of the 150 miners' inches to public use or at all, to the detriment of its own stockholders. That portion of the water was set apart for their use and its conduct in selling it contrary to their rights would not give it the right to continue to do so or make it a public utility as to that water, without the consent of its stockholders. Furthermore, whenever there was a surplus, either from an excess of supply over the needs of the stockholders, or from the fact that the stockholders at particular times did not need all of the 150 inches, while the company might perhaps dispose of such surplus to whoever should apply for it and would be thereby devoting such surplus to public use, it would not affect the part of the water appropriated to the preferred private use of the stockholders. It has been held that a water company may devote a part of its water supply to private use and the excess thereof to public use, or it may dedicate a portion of its water to a public use, and reserve the remainder, if any, for some private use, although it cannot, after dedicating any part to public use, transform any of that part into a private use, without the consent of the proper public authority. Del Mar, etc., Co. v. Eshleman, 167 Cal. 666, 680, 140 Pac. 591, 948; Leavitt v. Lassen Irr. Co., 157 Cal. 86, 106 Pac. 404, 29 L. R. A. (N. S.) 213; Thayer v. California Development Co., supra. But really these questions are not before us, for the fact does not appear on the face of the complaint, and no controvertible fact not alleged can be considered on demurrer.

[2, 3] It is further suggested that in a certain proceeding before the Railroad Commission in the matter of an application of the Ventura County Power Company for an increase in rates for the water so obtained by it from said Water Company, the commission decided that the Ventura County Power Company held that water for public use, but denied its application to increase the rates. It is argued that this was an adjudication as to the character of the Power Company, and that when it conveyed the water system to the Edison Company the water remained subject to the public use. It is unnecessary here to determine the effect of that decision. The court does not take judicial notice of it, and the question can only be raised by an answer setting up the defense of former adjudication. It may be suggested, however, that it does not appear from anything said in the briefs that the plaintiffs in the present action were parties to the proceeding before the Railroad Commission.

[4] It is also suggested that the court will take judicial notice of the fact that the Edison Company is a public service corporation, and from this fact that upon its acquisition of this water the same became devoted to public use, even if it were not so previously. There is nothing in the complaint to show that the Edison Company was a corporation of that character. The courts do not take judicial notice of such matters. Furthermore, even if it was of that character it could not, under the allegations of the complaint, convert the private use, to which the water was subjected when it obtained title thereto, into a public use such as that claimed by respondent, unless the stockholders of the Water Company, who were interested in the private use and entitled thereto, had consented thereto. Del Mar, etc., Co. v. Eshleman, supra, 167 Cal. 666, 140 Pac. 591, 948. No such consent appears in the complaint. If the facts exist they must be set up by way of defense before the defendants can take advantage thereof.

Reference is made to the definitions of public utilities in the Public Utilities Act of 1911 (St. 1911, p. 1394), and in the act of 1913, defining the conditions under which a water corporation shall be deemed to be a public utility subject to the jurisdiction of the Railroad Commission. Stats. 1913, p. 84. The status of this water depends upon the terms of the agreement set forth in the complaint. That was executed in 1907. It should require no argument to establish the proposition that a statutory definition of a public utility, or of the conditions under which water shall be deemed to have been devoted to public use, could have no effect whatever upon private property or water devoted to private use prior to the enactment of the statute. Del Mar, etc., Co. v. Eshleman, supra, 167 Cal. 680, 140 Pac. 591, 948.

It follows from what we have said that the Railroad Commission had no power or authority over the water or the water system, so far as the water necessary for the use of said stockholders of the Water Company was concerned, and that the superior court had jurisdiction of the action. It appears that the learned judge of the court below sustained the demurrer upon the theory that the jurisdiction was exclusively in the commission. In this we are satisfied that he erred.

[5] As against a general demurrer, the complaint states a cause of action against the defendants. Some of the allegations may be defective in form, but it is clear that the court below did not sustain the demurrer on that ground. Defects of that character should have been raised by special demurrer, and if well taken the plaintiff should have had leave to amend if so advised.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LENNON, J.; LAWLOR, J.

(184 Cal. 590)

PEOPLE v. WILLIAMS. (Cr. 2322.)

(Supreme Court of California. Dec. 29, 1920.)

1. Criminal law 🔑1023(8), 1134(10)—An order denying motion in arrest is not appealable.

An order denying a motion in arrest is not an appealable order, and any error in denying such motion may be reviewed on appeal from the judgment.

2. Criminal law 🔑311—One accused is presumed sane.

A person charged with crime is presumed to be sane until the contrary is established by a preponderance of evidence.

3. Criminal law 🔑48—For "insanity" to be a defense, insane person must be incapable of distinguishing between right and wrong.

For "insanity" to be a defense in a criminal action, there must be such a deranged condition of the mental faculties as to render a person incapable of knowing the nature and quality of the act he is charged with doing, or, if he did know this, such a derangement as made him incapable of distinguishing between right and wrong.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Insane—Insanity.]

4. Criminal law 🔑493—The weight of opinion evidence is for the jury.

In a prosecution for homicide the weight and credibility of testimony of intimate acquaintances of defendant who gave opinion evidence as to his insanity under Code Civ. Proc. § 1870, subd. 10, is for the jury.

5. Homicide 🔑237—Jury held warranted in finding defendant sane.

In a prosecution for wife murder defended on ground of insanity, *held*, that despite testimony as to insanity the jury were warranted in finding that defendant was sane.

6. Criminal law 🔑824(2)—Failure to define preponderance of evidence not error in the absence of request.

Where defendant requested no instruction explaining the term "preponderance of the evidence," failure to instruct thereon was not error; the term so clearly expressing its significance.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

George C. Williams was convicted of murder in the first degree, and from judgment of conviction and from orders denying new trial, and motion in arrest of judgment, he appeals. Affirmed.

Harold C. Faulkner and K. Green, both of San Francisco, for appellant.

U. S. Webb, Matthew Brady, and Stanislaus Riley, all of San Francisco, for the People.

ANGELLOTTI, C. J. The defendant was convicted of the crime of murder in the first degree for the killing of his wife, Emily Williams, on February 7, 1920. He appeals from the judgment pronounced upon such conviction, and also from an order denying his motion for a new trial, and an order denying his motion in arrest of judgment.

[1] The order denying the motion in arrest of judgment is not an appealable order. Any error of a trial court in denying such a motion is reviewable on the appeal from the judgment. There is no suggestion that the trial court erred in denying the motion in this case. It is clear that the information presented and filed against him in the superior court was without defect of any kind. Section 1185, Pen. Code.

The only defense in the case was that defendant committed the act charged without being conscious thereof, and that he was temporarily insane. The undisputed facts left little room for any other defense than insanity. Mrs. Williams had left the apartment at 275 Turk street, where she and her husband were living, about two months prior to February 7, 1920, and thenceforth they lived separate and apart, she, with a daughter by a former marriage, at the Bernal Apartments on Seventeenth street near Church street, and he at the King Edward Apartments at 275 Turk street. She had commenced an action for a divorce, and issue had been joined therein and the case set for trial. An order for the payment of temporary alimony had been made, and deceased was endeavoring to collect the same, none of which was ever paid. According to defendant's story, he was earnestly seeking her return to him. During the afternoon of February 7, 1920, he got into telephonic communication with her, she then being in the apartment of a friend, a Mrs. Brown, in the King Edward Apartment building, and she definitely informed him that she would not return to him. A little later in the afternoon, when deceased and Mrs. Brown left the building to go to the office of the attorney of the former, they encountered defendant on the street at the entrance to the building, and he made a violent assault upon the deceased and endeavored to drag her back into the building. She managed to escape, and, with Mrs. Brown, went to the Hall of Justice and procured a warrant for the arrest of defendant. Later she and Mrs. Brown started for the apartment of deceased, taking a street car for the corner of Church and Seventeenth streets. In the meantime defendant purchased a revolver at a pawnbroker's place on Third street near Market street, and, with the same fully loaded in his possession, went first to the apartment occupied by deceased on Seventeenth street near Church street. He gained access to the apartment, but was ordered out by the landlady when complaint of his presence was made by the daughter of deceased. He then left the house and went to the corner of Church and Seventeenth streets, near which place he was when the street car on which were deceased and Mrs. Brown arrived. When they saw him after deceased alighted from the car, deceased started to run to her apartment, and defendant pursued her. The daughter, who had come out to meet her mother attempted to stop him, succeeding in taking hold of him, and he shot her, inflicting a mortal wound, and continued his pursuit of deceased. He overtook her and shot her twice, she imploring him not to shoot, and as the result of the wounds inflicted she died almost immediately. The evidence as a whole was such as to show very clearly that he went to the neighborhood of his wife's habitation with the deliberate purpose of putting her to death, unless she would return to him, and that he killed her in pursuance of such deliberate intent. In view of the record, his testimony to the effect that he remembered nothing that occurred between about 12 noon on February 7th and the next morning is so incredible as to be unworthy of consideration, and there is nothing else to suggest that he was not "conscious" of what he was doing when he sought out and killed his wife.

[2, 3] It is conceded, of course, that in this state it is the well-settled rule that a person charged with crime is presumed to be sane until the contrary is established by a preponderance of evidence, and that insanity interposed as a defense in a criminal action means such a diseased and deranged condition of the mental faculties as to render the person incapable of knowing the nature and quality of the act he is charged with doing, or if he did know this, incapable of distinguishing between right and wrong in relation to such act.

[4, 5] It is claimed here that, in view of certain evidence introduced on behalf of defendant in an attempt to show insanity, the "preponderance of the evidence" was in favor of that theory. The prosecution introduced no evidence addressed exclusively to this question, resting on the presumption of sanity and the evidence of the acts and conduct of the defendant, as shown by all the evidence in the case, including various statements made by him to officers of the law, one of which was made during the evening of February 7th. The claim of defendant in this regard appears to be that there was no evidence to contradict that of certain alleged "intimate acquaintances" who were allowed to give their opinions as to his mental sanity (subdivision 10, § 1870, Code Civ. Proc.) based on their observation of him during the few weeks that elapsed between the commencement of the divorce action and the homicide. To our minds this opinion evidence was, in view of the reasons given for the opinions, of very slight value on the question of the existence of such a condition of mind as would be a defense in this case. In any event, the question of the weight and credibility to be given the testimony of these witnesses was solely for the jury, and the testimony was to be considered by the jury in connection with all the other evidence as to the acts and conduct of the defendant, all of which was material on the question of insanity. To our minds there is no warrant whatever, in the light afforded by the record, for a claim that the evidence in favor of the theory of insanity preponderates over that in favor of the theory of sanity, and certainly no warrant for a claim that the jury was not fully justified in concluding from all the evidence that insanity was not shown by a preponderance of the evidence bearing on that question. As we said in People v. Miller, 171 Cal. 649, 652, 154 Pac. 468, 470:

> "The term [preponderance of evidence] simply means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed."

[6] It is urged that the trial court erred to the substantial prejudice of defendant in failing to give an instruction as to what was meant by the term "preponderance of the evidence." No such instruction was requested by defendant, and to our minds no intimation given the trial court that such an instruction was desired. We cannot see that the requested instruction relied on by defendant in this connection was of such a nature as to suggest to the court any such desire. In the absence of such a request or intimation the defendant should not be heard here to complain of the failure of the court to give such an instruction. The term "preponderance of the evidence" so clearly expresses its meaning as to make so plain to the ordinary mind what is intended thereby that further definition is not ordinarily requisite to a proper understanding by a jury. We cannot conceive that the absence of such an instruction here in any degree operated to the prejudice of defendant.

Consideration of the record herein satisfies us that the trial of the defendant was in all respects fair and free from substantial error and that the verdict was fully justified by the evidence.

The appeal from the order denying the motion in arrest of judgment is dismissed. The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

184 Cal. 595

SNEIDER v. BANK OF ITALY.
(S. F. 9429.)

(Supreme Court of California. Dec. 30, 1920.
Rehearing Denied Jan. 24, 1921.)

1. Banks and banking 🔑139 — Payment of check after knowledge of depositor's death makes bank liable to estate.

Under Civ. Code, § 3265e, providing that a bank check is not an assignment of the funds until the bank accepts or certifies the check, the vitality of a check, not accepted or certified prior to knowledge of the depositor's death, ceases upon receipt of such knowledge by the bank, and if the bank thereafter pays the check it is liable to the depositor's estate.

2. Banks and banking 🔑320 — Adjustment between banks through clearing house held not "payment" of check.

A clearing house transaction, whereby checks were delivered to the representative of the bank upon which they were drawn, and the bank presenting them received money or credit to cover their amount, did not in itself constitute a payment of the check, preventing the drawee bank from subsequently refusing payment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Payment.]

3. Banks and banking 🔑320—Check presented through clearing house and rejected not paid, though wrong reason given.

Checks presented through a clearing house were not paid, where the bank on which they were drawn refused payment and returned them to the presenting bank, though it erroneously stated as a reason for refusing payment that they were not drawn on it.

4. Banks and banking 🔑319—Rules of clearing house not binding on parties to check.

The rules of a clearing house as such do not govern the rights of a drawer or payee of a check who are not members of the clearing house, and do not contract with express reference to such rules.

5. Banks and banking 🔑140(1)—Payment of check may be refused without reason without liability to drawee.

In view of Civ. Code, § 3265e, a drawee bank can refuse to pay a check for no reason at all without incurring any liability to the payee, and where such refusal is made there is no payment of the check.

6. Banks and banking 🔑320—Bank, directing that rejected checks be again put through clearing house, not entitled to pay them after depositor's death.

Where a bank to which checks were presented through the clearing house refused payment, erroneously stating that they were not drawn on it, and, when the error was brought to its attention by telephone, directed the presenting bank to again put them through the clearing house, but the depositor died before they were again presented, such direction did not amount to actual payment, or an agreement to pay entitling it to make payment after the depositor's death, especially where it did not debit the depositor's account with their amount, but honored other checks, leaving insufficient funds to meet the checks in question.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Emma Sneider, as administratrix of George C. Sneider, deceased, against the Bank of Italy. From a judgment for plaintiff, defendant appeals. Affirmed.

Harry G. McKannay, of San Francisco (McKannay & Hunt, of San Francisco, of counsel), for appellant.

Tum Suden & tum Suden, of San Francisco, for respondent.

LENNON, J. Plaintiff, the administratrix of the estate of George C. Sneider, deceased, is suing to recover the sum of $838.35, claimed to be the balance due on account of moneys deposited with defendant, the Bank of Italy, by said George C. Sneider during his lifetime. The present litigation is the outgrowth of a dispute over the payment of two checks for $600 each, drawn by George Sneider against his account with said defendant bank. These two checks, which were drawn on March 13, 1918, were indorsed by the payee and delivered to the Wells Fargo Nevada National Bank on March 14, 1918, and on the same day were sent to the clearing house by the last-named bank. At the clearing house the checks were delivered to the clearing house representative of the Bank of Italy, and, in turn, for the purpose of clearing the accounts between the two banks, the Bank of Italy gave money or credit to the Wells Fargo Nevada National Bank to cover the amount represented by the Sneider checks. When the checks reached the Bank of Italy, they were rejected by that bank, which sent them back to the Wells Fargo Bank by messenger on the afternoon of March 14, 1918. A slip was attached to the checks, stating that the reason for the rejection was the fact that they were not drawn upon the Bank of Italy. This statement was a self-evident error; there was, however, some evidence tending to show that, when the checks reached the Bank of Italy, there were not sufficient funds in Sneider's account to cover them, by reason of overdrafts, and that this was the real reason for the rejection. The Wells Fargo Bank, upon receiving the rejected checks, issued its own check to the Bank of Italy for $1,200 in order to return the sum received on account of the two checks in the clearing house transaction that morning. This check was subsequently cashed by the Bank of Italy.

Later in the afternoon of March 14, 1918, after the Wells Fargo Bank's teller had issued the refunding check and the messenger of the Bank of Italy had departed with it, it was discovered that the reason assigned for the rejection of the checks in question was obviously erroneous. One of the clerks of the Wells Fargo Bank telephoned to the Bank of Italy and talked with "some one," it does not appear whom, about the matter. The last-mentioned person directed that the checks be returned to the Bank of Italy by the messenger, but, upon being informed that the messenger had left, told the clerk of the Wells Fargo Bank to put them through the clearing house again. Accordingly, the Wells Fargo Bank sent these checks to the clearing house on the morning of March 15. When they again reached the Bank of Italy, the latter again rejected them, this time on the ground that Sneider, the drawer of the checks, had died that morning. A second reclamation was made against the Wells Fargo Bank and $1,200, covering the checks in question, was included in a check issued by the Wells Fargo Bank to the Bank of Italy by way of reclamation, although it is claimed that the Wells Fargo Bank in fact refused to reclaim these checks a second time, and that the $1,200 was included in the refunding check by mistake. After considerable controversy with the Wells Fargo Bank and the administratrix, the Bank of Italy turned $1,200 over to the Wells Fargo Bank, took up the two checks, and, on March 29, 1918, charged Sneider's account with the amount of the checks, leaving Sneider's estate chargeable with an overdraft of $361.61.

The trial court held that the administratrix was entitled to recover the amount on deposit at the time of death of the intestate without any deduction on account of the two $600 checks, and, accordingly rendered judgment in favor of the plaintiff for the sum of $838.35. Defendant appeals from the judgment.

[1] In this state a bank check is a direction by a creditor to a debtor for the disposition of funds, and it does not operate as an assignment of the funds themselves unless and until the bank accepts or certifies the check. Civ. Code, § 3265e. Consequently the vitality of a check, at least where it has not been accepted or certified prior to the knowledge of the death of the depositor, ceases upon receipt of such knowledge by the bank, and a bank which pays such a check after knowledge of the death of the depositor is liable to the estate of the depositor. Pullen v. Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; 35 Ann. Cas. 443, note; 7 C. J. 702. The sole issue in the present case is therefore whether or not the two $600 checks drawn by the decedent were paid by the defendant bank prior to the morning of March 15, 1918.

[2] The clearing house transaction on the morning of March 14, wherein the Wells Fargo Bank received the amount of the two checks from the Bank of Italy in credit or otherwise, did not, in and of itself, constitute a payment of the checks. As stated in Hentz v. Nat. City Bank, 159 App. Div. 743, 746, 144 N. Y. Supp. 979, 981:

> "A payment through the clearing house and a payment over the counters of a bank upon which a check is drawn are entirely different. The clearing house is simply a representative of all the banks who are members of it. Its purpose is to enable these banks to go to the clearing house each day and there present checks drawn on other clearing house banks received the day before and receive from the clearing house checks drawn on the presenting bank which have been sent in by some other member. The clearing house then balances the checks sent by a bank against those sent to it, and later in the day a bank either pays or receives the balance due to or owing by it; in other words, it is an adjustment of balances, solely for the convenience of the banks who are members of the association. It is in no sense a payment binding upon the bank upon which the check is drawn, so far as the payee named therein is concerned. * * * The payment of a clearing house balance is not a payment of any particular check. * * * This would seem to follow from the necessity of each case, because a bank upon which a check is drawn has no opportunity to examine it until after it has been received from the clearing house."

See, also, Columbia-Knickerbocker Trust Co. v. Miller, 156 App. Div. 810, 142 N. Y. Supp. 440; First Nat. Bk. v. Nat. Park Bk., 181 App. Div. 103, 168 N. Y. Supp. 422, affirmed 180 N. Y. Supp. 937.

[3, 5] Proceeding, then, upon the premise that the transaction at the clearing house did not constitute a payment, but was merely a presentation for payment and a preliminary adjustment of balances, the issue before us is narrowed to a consideration of the question as to whether or not the Bank of Italy did in fact accept or pay the checks between the time when it received them from its clearing house representative on March 14 and the morning of March 15, when it received news of the death of Sneider. Looking to the facts, we find not only that the bank did nothing which could be construed as an acceptance or payment, but, on the contrary, refused to pay the checks and perfected its refusal by returning the checks to and receiving a refunding check from the presenting bank. The effectiveness of the refusal to pay was in no way impaired by the fact that the reason assigned for the refusal was based on a mistake of fact. The rules of a clearing house, as such, do not govern the rights of a drawer or payee who are not members of the clearing house and do not contract with express reference to such rules. Brady, Law of Bank Checks, § 229; 7 C. J. 897. By the provisions of the Civil Code a check is not an assign-

ment of funds and the drawee is not liable thereon to the holder until it accepts or certifies the same. Civ. Code, § 3265e. It is immaterial, therefore, in determining the question of payment, whether the bank had in fact a valid ground for refusal to pay, such as insufficiency of funds, and, through clerical error assigned an incorrect reason, or whether the refusal was entirely without justification; the drawee bank can refuse to pay a check for no reason at all without incurring any liability to the payee, and, where such a refusal is made, whatever the liability of the drawee bank to the drawer, there is, in fact, no payment of the check.

A situation similar to that presented in the instant case was passed upon in the case of Eastman Kodak Co. v. Nat. Park Bk. (D. C.) 231 Fed. 320, affirmed 247 Fed. 1002, 159 C. C. A. 662. In that case, a check which was presented through the clearing house was refused by the drawee and returned to the presenting bank, which refunded the money received through the clearing house to cover the check, the reason assigned by the drawee for the rejection of the check was based upon a mistake of fact. The court held there had been no payment of the check, and in discussing the question of the mistake in rejecting the check said:

> "The mistake was quite irrelevant. Had the National Park Bank refused to honor the check willfully and for no reason whatever, no liability would have attached to it; the payee can sue only the drawer, and the drawer must look to the drawee."

The fact that the presenting bank, upon receiving the rejected check, issued its own check to the drawee by way of reclamation, thus in form making a "repayment," instead of changing the clearing house entries, was also held an immaterial factor in the determination of whether or not there had ever been an actual payment. Upon this phase of the case the court said:

> "In form that was a repayment, but it was not such in its whole setting; it was only to avoid garbling the original entries and the footings, and so confusing the bookkeeping."

The clearing house settlement between the banks is only a tentative arrangement of balances for the facilitation of business, and the refunding of money or credit received in the course of such a preliminary settlement is no more than a step in the correction of errors in bookkeeping, temporarily tolerated in the interests of expedition.

[6] The undisputed facts of the present case further reveal that, as previously stated, on the afternoon of March 14, "some one" in the Bank of Italy told a clerk of the Wells Fargo Bank, over the telephone, to return the rejected checks to the Bank of Italy by messenger, and it is upon this point that appellant relies in support of the contention that the checks were, from that time, considered as paid by both banks. The answer to this argument is to be found in the following statement, quoted from appellant's own brief:

> "Had the messenger of the Bank of Italy tarried a few moments longer at the Wells Fargo Nevada National Bank, and had the checks been given back to him pursuant to instructions, there would have been no litigation before this court."

It is possible that in the meantime additional deposits had been made by the drawer of the checks, and that therefore, had the checks been returned by messenger, they would have been paid on the afternoon of March 14, but the difficulty with appellant's position is that nothing of the sort ever happened. Upon hearing that the messenger had departed from the Wells Fargo Bank, no arrangement was made for the immediate return of the checks to the Bank of Italy, or for their immediate cancellation or acceptance. The direction was given to "put them through the clearing house again." It may be that, upon learning that the messenger had departed, the person in the Bank of Italy thought that the clearing house would provide the most convenient method for returning the checks, and that at that time there was no doubt but that the Wells Fargo Bank was entitled to receive payment. On the other hand, it is equally possible that, upon second thought, the said person deemed it more advisable that the defendant bank should have an opportunity to re-examine the checks in question. All this, however, is a matter of mere conjecture, and the rights of the present parties must be determined by what was actually done. The direction given, while it amounted to an abandonment for the time being of the reason assigned for the refusal to honor the checks, did not constitute an agreement to pay aside from the fact that the acceptance of a check must be in writing (Civ. Code, §§ 3265a, 3213), nor did it amount to actual payment. It left matters where they were before the clearing house transaction of March 14, and required a new presentation for payment, a new temporary adjustment of balances and a reconsideration of the checks by the defendant bank. Before the time for reconsideration arrived, a different or a new reason might be and was, in fact, found for the rejection of the checks, namely, the death of the drawer. The second rejection was promptly made, and the checks were not taken up and canceled until a considerable interval after knowledge of the death of the drawer.

There are other indications that the Bank of Italy did not consider that these checks had been paid on March 14. At the close of banking hours on March 14, there was, due to additional deposits on that afternoon, a balance on hand in Sneider's account which more than covered the amount of the checks in question. After the direction to the Wells Fargo Bank to return the checks in question through the clearing house, the defendant bank did not then and there debit them to Sneider's account, but, on the contrary, on the ensuing morning paid and honored other checks of Sneider's to the amount of $939, thereby so depleting his balance as to leave insufficient funds to meet the two checks being presented through the clearing house. This fact militates strongly against appellant's contention to the effect that the checks in question were paid as between the banks, conversationally or otherwise, on March 14.

The facts of the case show that there was no payment of the two $600 checks prior to March 15, 1918, and the trial court was therefore correct in holding that the plaintiff is entitled to recover the balance to the credit of Sneider without deducting the amount of the two checks.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

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184 Cal. 565

REALTY & REBUILDING CO. v. REA et al.

(S. F. 8988.)

(Supreme Court of California. Dec. 27, 1920. Rehearing and Petition to Modify Judgment Denied Jan. 24, 1921.)

1. Corporations 🔑264—Limitations on stockholders' liability runs from creation of corporation's liability.

Limitations against stockholders' liability under Civ. Code, § 322, and Const. art. 12, § 3, begin to run from the creation of the corporation's liability, and not from the existence of a right of action against it.

2. Corporations 🔑264—When liability of corporation for rent created, relative to limitations as to stockholders.

Relative to running of statute of limitations against liability of stockholders under Civ. Code, § 322, and Const. art. 12, § 3, where a lease, providing that at expiration of its three-year term the lessee might, by giving notice, elect to take a three-year extension, was assigned to a corporation without any agreement on its part, its liability to pay the rent during the extended term was not created till it gave notice of exercise of option and entered into a contractual relation.

3. Appeal and error 🔑719(6)—Findings assumed supported in absence of specification of insufficiency of evidence.

There having been no specification of insufficiency of evidence, it must be assumed that the findings are supported by the evidence.

4. Corporations 🔑244(2)—To escape liability for debts, one selling his stock must try to have transfer.

A stockholder, to escape liability for corporation's debts contracted after he sells his stock without a transfer having been made on the books, must have done all in his power to have the transfer made.

5. Appeal and error 🔑694(2)—Record on appeal from nonsuit held not open to objection of no proper offer of evidence.

Plaintiff during the discussion of the motion for nonsuit on the ground that the covenants to repair did not require the lessees to rebuild, having made a general offer of evidence supporting all the averments of the complaint, which the court in granting the motion obviously considered sufficient to justify its consideration of the merits of the motion, as to the inadequacy of the covenants, there is no merit to defendants' contention, on plaintiff's appeal from the granting of the motion, that a sufficient record for the consideration of the question is not presented because there was no proper offer of evidence to support the averments of the complaint.

6. Landlord and tenant 🔑152(5)—Covenant to restore destroyed buildings breached by refusal to comply therewith and by surrender before end of term.

If covenants of a lease are sufficient to require lessees to restore destroyed buildings, they are breached by lessees' refusal to comply therewith and by surrender of the premises, though before the end of the term.

7. Abatement and revival 🔑40—That action is prematurely brought must be specially pleaded to avail defendant.

A plea that an action has been prematurely brought is in the nature of a dilatory plea, which must be specially pleaded to be available.

8. Landlord and tenant 🔑152(3)—Covenant to repair a general covenant.

Covenant that lessees will repair the whole of the premises at their own cost, and that they waive all right to make repairs at lessor's expense, as authorized by Civ. Code, § 1942, is a general covenant, and not one for such repairs only as are contemplated in sections 1941, 1942; the conjunction "and" indicating a break in the thought equivalent to the commencement of a new sentence.

9. Landlord and tenant 🔑152(3)—Covenant to repair held general, notwithstanding mention of particular repairs.

Covenant of lessees to "keep in good order and repair all buildings and structures," and the piping and plumbing thereof and the sidewalks, is a general covenant, the enumeration of particular repairs not being intended to operate as a waiver of obligation to make other repairs naturally comprehended in the agreement.

10. Landlord and tenant 🔑152(5)—Rebuilding after fire not included in general covenant to "repair."

General covenant of lessee to repair *held* not to include rebuilding after total destruction, "repair" having no such meaning in its normal sense, and Civ. Code, § 1644, declaring that words of a contract are to be understood in their ordinary and popular sense, unless used in a technical sense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Repair—Repairs.]

11. Landlord and tenant ⚷160(3)—Rebuilding not required by covenant to surrender in as good condition.

Rebuilding of leased premises, which lessee covenants merely to repair, is not required by covenant to surrender in as good condition as at beginning of or during term, where they were totally destroyed by fire without fault of lessee.

In Bank.

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by the Realty & Rebuilding Company against L. A. Rea and others. From part of the judgment, plaintiff appeals. Reversed in part and affirmed in part.

See, also, (App.) 188 Pac. 621.

Charles S. Wheeler and John F. Bowie, both of San Francisco (Nathan Moran and A. A. Heer, both of San Francisco, of counsel), for appellant.

A. E. Shaw and Bert Schlesinger, both of San Francisco, for respondent A. Ruef.

LENNON, J. The complaint in this action purported to state two causes of action, one for money claimed as rent and one for money claimed as damages for the breach of an alleged covenant to rebuild. The action was prosecuted against defendants Rea, Kehrlein, and Sullivan, the original lessees, against Fillmore Arcade Company, a corporation, the assignee of the lease, and against the remaining defendants as stockholders in the latter corporation.

The undisputed facts are these: On July 1, 1906, the original lessees accepted a lease of the premises in question. By this lease they obligated themselves to erect forthwith upon the demised land buildings of the approximate value of $150,000, and they further obligated themselves to pay the sum of $3,500 monthly as rent for the said premises for the period of three years. The lessees further agreed that at the expiration of three years from the commencement of the lease they would either surrender possession, together with all buildings constructed upon the premises, accepting one-half of the appraised value of said buildings, or, at their option, continue in possession under the lease for three additional years, paying as rent the sum of $2,500 monthly and surrendering all interest in the buildings to the lessor. The lease also contained certain covenants relative to repairs which will be considered in detail elsewhere in this opinion. On December 14, 1906, this lease was assigned to defendant Fillmore Arcade Company and accepted by it. On May 28, 1909, defendant company gave notice of its election to continue in possession for the additional three-year period. On May 29, 1911, the buildings on the leased premises were destroyed by fire. The rent was paid up to the 1st of June of that year. On August 7, 1911, this action was commenced to recover rent for the months of June, July, and August, and to recover damages alleged to have been sustained by reason of defendant company's refusal to rebuild.

Judgment was entered in favor of plaintiff and against the original lessees and against defendant Fillmore Arcade Company upon the first cause of action. It was held, however, that defendant company's liability to pay the rent had been created at a time over three years prior to the bringing of the action, and that therefore the action was barred as to the stockholders of the corporation under the provisions of section 3 of article 12 of the Constitution of California and section 322 of the Civil Code. Upon the second cause of action, a nonsuit was entered against plaintiff on the ground that the lease was not properly to be construed as requiring the lessees to rebuild in case of the destruction of the building by fire.

This appeal has been taken by plaintiff from so much of the judgment as was adverse to it. Two questions are therefore presented for our consideration; the first relating to the time of the creation of the liability of defendant Fillmore Arcade Company to pay rent, the second relating to the construction of the covenants in the lease obligating the lessees to make repairs.

[1, 2] It is conceded that if the liability of defendant Fillmore Arcade Company to pay rent during the second three-year period was created when it accepted the assignment of the lease, the stockholders are subject to no liability in the present action, and that if, on the other hand, this liability was not created until the company exercised its option to continue in possession for this further period, the stockholders are liable herein for the rent demanded by plaintiff and appellant.

In respect to the rights and liabilities of stockholders of a corporation there is a clear distinction between the creation of the liability of the corporation and the existence of a right of action against it. Upon this subject the cases uniformly hold that the liability of stockholders of corporations under section 322 of the Civil Code has its inception in the creation of the original liability of the corporation, and ceases at the end of three years after said date. Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87; Coulter, etc., Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 Pac. 939; Chambers v. Farnham, 187 Pac. 732. The determination

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of the time of the creation of the stockholders' liability in the instant case rests upon the recognized distinction between the nature of the liability imposed upon an assignee of a lease who takes possession under a bare assignment of the lease, and that assumed by an assignee who, in addition to accepting an assignment of the lease, expressly agrees to be bound by the covenants of the assigned lease. As stated by this court in Samuels v. Ottinger, 169 Cal. 209, 211, 146 Pac. 638:

> "A lease has a dual character—it presents the aspect of a contract and also that of a conveyance. Pollock on Contracts (3d Am. Ed.) p. 531. 'Consequently the lease has two sets of rights and obligations—one comprising those growing out of the relation of landlord and tenant, and said to be based on the "privity of estate," and the other comprising those growing out of the express stipulations of the lease, and so said to be based on "privity of contract."' Tiffany on Real Property, § 46."

See, also, Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 979. An occupant of real property who holds by virtue of a bare assignment of the lease and without entering into any contract, either with his assignor or the lessor, affirmatively binding himself to fulfill the covenants of the lease, is subject only to such obligations as he impliedly assumes by entry and taking possession of the leased premises. Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104; Bonetti v. Treat, 91 Cal. 223, 229, 27 Pac. 612, 14 L. R. A. 151; Baker v. Maier, etc., Brewery, 140 Cal. 530, 74 Pac. 22; Lutton v. Rau, 37 Cal. App. 429, 173 Pac. 1111; Seventy-Eighth Street, etc., Co. v. Purssell Co., 166 App. Div. 684, 152 N. Y. Supp. 52. The obligations thus imposed as the result of the creation of the relation of landlord and tenant are said to arise from "privity of estate" as distinguished from "privity of contract"; liability of this nature continues only during occupancy by the assignee, and terminates upon reassignment. Bonetti v. Treat, supra; Lutton v. Rau, supra. Where, however, the assignee expressly agrees in writing to be bound by the terms of the lease, there arises, as distinguished from any obligation resulting from mere occupancy, a new and different obligation which which is not dependent upon occupancy of the premises, but is based upon privity of contract. By virtue of this agreement, a contractual relation is established, whereby the assignee becomes liable upon and entitled to the benefit of all of the covenants of the lease as such. Chase v. Oehlke, 185 Pac. 425; Lopizich v. Salter, 187 Pac. 1075.

It is an undisputed fact in the instant case that, neither at the time of the assignment of the lease to the defendant corporation, nor at any time subsequent thereto up to the time of the exercise of the option to extend the term of the lease, was there any express agreement on the part of the assignee to be bound by the covenants of the lease. By the assignment of the lease, and until the exercise of the option to extend the term of the lease, any obligation of the corporation with respect to the premises in question was dependent upon mere occupancy under the assignment, and arose solely by virtue of privity of estate.

The lease assigned to the defendant corporation contained a provision to the effect that, at the expiration of the three-year term, the lessee might, by giving notice, "elect to take a three years' extension of this lease at a monthly rental of twenty-five hundred ($2,500.00) dollars." The assignee elected to extend the term of the lease, and, in May, 1909, served a written notice of election, which contained the following statement:

> "This notice of election and intention is given under and upon and subject to all the terms and conditions in said lease contained."

This express declaration that the parties were to be governed by the covenants of the lease, signed by the assignee, and accepted by the lessor definitely created and established a contractual relation between the lessor and the assignee, and the covenants of the lease were made the measure of the rights and liabilities of the parties for the extended three-year period. It may be that, irrespective of the creation of a contractual relation, the liability of the corporation during the extended term arose upon its election to extend the term, inasmuch as, until that time, any liability for an extended term was entirely optional with the corporation. Chambers v. Farnham, 187 Pac. 732. It may be that the creation of a contractual relation between the lessor and assignee of the lease would be implied from the mere exercise of the option to extend the term of the lease, without any express adoption of the covenants of the lease. Probst v. Rochester Steam Laundry Co., 171 N. Y. 584, 64 N. E. 504. It is unnecessary, however, for the purposes of this case, to determine whether or not it would have been possible for the assignee to elect to extend the term without creating a new liability, inasmuch as the parties expressly assumed a contractual relation at that time.

The contractual liability for the payment of rent during the extended term was created at the beginning of the extended term or at the time of the exercise of the option, each of which was less than three years before the commencement of the present action, and it is upon this contractual liability upon the covenants of the lease that the present action is brought. It follows that the stockholders are liable for the rent sued for.

[3, 4] It then becomes necessary to determine the question of the liability of the defendant A. Ruef, sued as a stockholder of the defendant corporation. This defendant set up the defense that he was not a

stockholder at the time the liability of the corporation was created, claiming that, in or about December, 1908, he transferred and assigned all of his stock in said corporation to one Henrietta Sittenfeld. The trial court found that said defendant Ruef was not the owner of the stock after December, 1908, basing its findings upon the testimony of said defendant to the effect that he had delivered a duly indorsed certificate representing his shares of stock to said Henrietta Sittenfeld, and had requested the secretary of the corporation to issue the stock to the transferee. The court, however, further found that no transfer was, in fact, ever made upon the books of the corporation, and that all of said shares have ever since remained on the books of the corporation in the name of said defendant Ruef. Judgment was rendered in favor of said defendant.

In view of the fact that there was no specification of insufficiency of evidence, we must assume that the findings are supported by the evidence. The fact remains, however, that the findings as made are not sufficient to support the judgment in favor of Ruef. It is to be noted that this is not a case where shares of stock have been issued without authority in the name of a person who never assumed the relation of a stockholder, as was the fact in the cases relied upon by respondent Ruef. Welch v. Gillelen, 147 Cal. 571, 82 Pac. 248; Shattuck, etc., Co. v. Gillelen, 154 Cal. 778, 99 Pac. 348; Shean v. Cook, 180 Cal. 92, 179 Pac. 185, 3 A. L. R. 1042. The defendant Ruef, having voluntarily acquired the stock in his name, sought to transfer it, and, under section 324 of the Civil Code, the transfer is, in general, ineffective, except as between the transferor and the transferee, unless the transfer has been recorded upon the corporation's books. It is true that, as a general rule, the presumption that a person is a stockholder as long as his name appears on the books of a corporation as such is not conclusive. Nevertheless an owner who claims to have transferred his stock cannot overcome the presumption of continued ownership, at least as to creditors of the corporation, without proof that he has done all in his power to have his name removed from the books, and thus placed himself in the position of an involuntary record holder. The trial court merely found that the defendant Ruef was not the owner of the stock after December, 1908; that he had delivered the indorsed certificate to the transferee, and had requested the secretary of the corporation to issue a new certificate. Ruef himself testified that he did not personally deliver the stock certificate to the secretary of the corporation, and that, so far as he knew, no one had ever delivered it to the secretary for the purposes of the transfer. No request was made by the transferee for the issuance of a new certificate, nor was the assignment exhibited to the corporation or the old certificate surrendered. To issue a new certificate under these circumstances might render the corporation liable both to the holder of the new and old certificates. Morawetz on Private Corporation (2d Ed.) § 186. In short, the findings fail to show that the defendant Ruef made any showing of a proper or diligent effort to procure a removal of his name as stockholder from the corporation's books, and they do show that his name appeared upon the books at the time of the creation of the liability sued upon. Therefore, assuming that the trial court was justified in finding that Ruef had transferred the stock, and was not in fact the owner after December, 1908, he, nevertheless, remained liable as a stockholder of record to the creditors of the corporation, and the judgment that he was not liable to plaintiff is not supported by the findings, and is erroneous. Plumb v. Bank of Enterprise, 48 Kan. 484, 29 Pac. 699; Borland v. Haven (C. C.) 37 Fed. 394, 407.

The next point for consideration is whether or not the trial court erred in granting a nonsuit upon the cause of action for damages on the ground that the covenants to repair the buildings did not require the lessees to rebuild in case of total destruction of the buildings by fire.

[5] We are not in accord with respondents' suggestion that appellant has not presented a sufficient record for the consideration of this question because no proper offer of evidence appears to support the averments of the complaint. During the discussion arising upon the making of the motion for a nonsuit, plaintiff made a general offer of evidence supporting all of the averments of its complaint, and the trial court in granting the motion obviously considered the offer sufficient to justify its consideration of the merits of the motion upon the larger ground of the inadequacy of the covenants in the lease to require the defendants to restore the destroyed structures upon the lands covered by it. The question in this larger aspect is, we think, properly before the court.

[6, 7] Nor do we favor respondents' contention that the action, if maintainable at all, has been prematurely brought, because the duty, if such existed, of the tenant in possession to restore the destroyed structures was one which, under the covenants in the lease requiring the tenant to surrender the premises in good order at the close of the term, could have been performed at any time before the close of such term, and that therefore there had been no default in its performance at the time of the institution of this action. If the covenants relied upon by appellant are sufficiently broad to require the tenant to restore the destroyed buildings, they were broken by the defendants' refusal to comply with the express demand in writing, served upon them by the plaintiff and

by the surrender of the premises by the tenant in possession to the plaintiff prior to the commencement of this action. Moreover, the plea that an action has been prematurely brought is in the nature of a dilatory plea, which must be specially pleaded in order to be taken advantage of by the defendant in such action. Bemmerly v. Woodward, 124 Cal. 568, 57 Pac. 561.

We are also inclined to adopt appellant's contention that the covenants to repair contained in the lease are general covenants. These covenants read as follows:

> "That the said lessees will repair and keep in good order, condition and repair the whole of said premises, at their own cost and expense and said lessees hereby expressly waive all right to make repairs at expense of landlord, as provided for in section 1942 of the Civil Code of California."
>
> "The lessees hereby covenant and agree at their own cost and expense to keep in good order and repair all buildings and structures, and the piping and plumbing thereof, upon said property, and the sidewalks in front of the same. And in the event that new plumbing or piping, or new sidewalks or repairs to sidewalks, are at any time during the term or any extension thereof required by the municipal or other authorities, then as often as the same are so required the lessees shall furnish the same at their own cost and expense."
>
> "The foregoing provision shall apply to all structures now upon said property which are not removed to make way for new buildings as herein provided for, and also to the said buildings and other structures which shall be built hereunder."

The lease also contained an agreement on the part of the lessees to surrender the premises "in as good state and condition as the same are now or may be put into, reasonable use and wear thereof, and damages by the elements, excepted."

[8] With respect to the first covenant, it is urged by respondents that the term "repairs," as used in the first clause, means only such repairs as are contemplated in sections 1941 and 1942 of the Civil Code. This contention is unsound. A fair interpretation of the sentence requires a construction of the two clauses as expressing agreements independent of each other, the conjunction "and" in this instance indicating a break in the thought equivalent to the commencement of a new sentence. This being so, there is no basis for the argument that the term "repairs" in the first clause is not to be taken in its general sense.

[9] With respect to the second covenant, it is even more obvious that the enumeration of particular items of repair was not intended to operate as a waiver of the obligation to make other repairs naturally comprehended in the agreement to "keep in good order and repair all *buildings and structures.* * * * " (Italics ours.)

[10] It is appellant's contention that a general covenant to repair imposes an obligation to rebuild structures which have been completely destroyed. This must necessarily be the nature of appellant's claim, inasmuch as the amended complaint filed herein avers and repeatedly affirms the fact that the buildings upon the demised premises were destroyed by fire on the 29th day of May, 1911, and the general offer of proof made during the trial was confined to an offer to prove the averments of the complaint.

Upon the question as to whether or not a general covenant to repair imposes an obligation to rebuild structures completely destroyed, the decisions in the different jurisdictions are not harmonious. Appellant relies upon the early case of Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115, and the more recent case of Egan v. Dodd, 32 Cal. App. 706, 164 Pac. 17, in both of which cases the tenant's liability to make repairs under a general covenant to repair was asserted and affirmed. In the latter case it affirmatively appears that the dilapidations were not such as to require the rebuilding or replacement of the entire structure. The case of Polack v. Pioche, supra, was primarily concerned with the determination of the meaning of the phrase "damages by the elements or acts of Providence"; it does not appear that there was a total destruction in that case, although the case has been cited as requiring the rebuilding of totally destroyed structures. Wattles v. Omaha, etc., Co., 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am. St. Rep. 554, 566, note. The reason for this interpretation is, perhaps, to be found in certain statements in the argument of counsel, a summary of which is printed in the California Reports, (pages 417–419), preceding the opinion in the case. The expressions therein contained, of course, were merely by way of argument, and were in no sense intended as a statement of the facts of the case. Moreover, even assuming that the case under discussion goes to the extent of requiring a rebuilding of a structure totally destroyed by fire without the fault of the tenant, and that such was the rule of the common law, that rule cannot be followed in the instant case.

The rule is at most a rule of construction and is necessarily subject to such contrary or inconsistent rules of construction as may have been devised and promulgated by our own Legislature. In 1872, after the decision in Polack v. Pioche, supra, section 1644 of the Civil Code was adopted, providing:

> "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

There is no apparent reason why a lease of real property should not be construed as any other contract pursuant to the Code provisions, by the application of the prescribed tests. We must therefore look to the subject-matter of the contract and the language of the parties in its ordinary signification in order to determine therefrom what was their intention, upon what proposition their minds actually met, and to what they did consciously consent.

By the contract the lessees were to have the use of a small and very valuable tract of land in a city for a certain period of time, and in return for such use they were not only to pay a large sum of money each month but were also to place upon the land buildings of very considerable value which were to become the property of the lessor, not only by operation of law (Civ. Code, § 1013), but by the express terms of the contract itself. These buildings were to be kept and surrendered in good order, condition, and repair, damages by the elements excepted. It must be conceded that the exception of "damages by the elements" does not include damage by fire, unless the fire is caused by lightning or some other super human agency. Polack v. Pioche, supra; Pope v. Farmers' Union, etc., Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87; Ahlgren v. Walsh, 173 Cal. 27, 35, 158 Pac. 748, Ann. Cas. 1918E, 751. The extent of the liability of the lessees in respect to the damages in question is therefore dependent entirely upon the interpretation of the terms "repair" and "keep in repair." These terms are not technical, nor is there anything to indicate that they were used in any technical or special sense or in accordance with any special usage. A general covenant to repair on the part of the tenant is, as stated in Polack v. Pioche, supra, binding unless limited by express exception, but such a covenant, even if it be in the most general terms, does not constitute an agreement to rebuild unless the term "repair" means also to replace. It has no such meaning in its normal sense. To repair means to mend an old thing, not to make a new thing; to restore to a sound state something which has become partially dilapidated, not to create something which has no existence. Wattles v. Omaha, etc., Co., supra. When we speak of repairing a thing, the very expression presupposes a thing in existence to be repaired. If a workman undertakes to repair an article, he obviously contemplates making whole an existing article and not the manufacture of something new. Indeed, this very distinction is recognized in the covenants of the lease itself, wherein it is provided that the lessees shall furnish "new sidewalks *or* repairs to sidewalks." (Italics ours.) And the very fact that with respect to the plumbing and sidewalks the lease specifically required replacement as well as repairs in itself furnishes internal evidence of a very convincing nature that the parties did not use the term "repair" in any other than its ordinary and generally accepted meaning.

It is urged, in appellant's behalf, that the fact that the value of the buildings erected by the lessees constituted a substantial portion of the consideration for the lease indicates that it was the intention of the parties that the lessees should rebuild in case of destruction of the buildings. The lease under consideration sets forth the agreement on the part of the lessees to erect buildings on the property, and specifically limits the amount to be so expended by the lessees to $155,000. It is reasonable to suppose that, if it was intended that the lessees were to assume liability for an additional $155,000 in case of the accidental destruction of the buildings, such liability would have been set forth with equal particularity. Moreover, appellant's argument in this particular is further weakened by the fact that, while it is true that the value of the buildings erected constituted an important part of the consideration for the lease, still the covenants with respect to the erection of buildings had been fully performed prior to the fire, the performance had been accepted by the lessor, and, by the express terms of the lease, all liability upon these covenants had ceased. The lease provided that if, at the end of the first three years, the lessees did not elect to extend the term, the lessor was to purchase from the lessees the buildings erected by them at half of the appraised value. On the other hand, if the lessees elected to extend the term, then, immediately upon the exercise of the option to extend, the buildings were to "belong to and become and remain the absolute property of the lessor, and in such event the lessees do hereby sell, assign, transfer and set over the said building or buildings to the said lessor." The lease expressly provided that the lessees' "obligation to erect buildings" should terminate at the end of the first three-year period. The buildings were destroyed during the second three-year term, after the exercise of the option, and, therefore, after the buildings had become the property of the lessor, after performance of the covenants to build had been completed by the lessees and after these covenants "to erect buildings" had ceased to operate. The liability of a tenant cannot be extended to include the liability of an insurer of the property of another by implication or by aught save a clear and unequivocal agreement in any case where such liability is not created by operation of law.

[11] The general agreement to surrender the premises, at the expiration of the term, in as good condition as they may have been in at the beginning of or during the term must be construed with the other covenants in the lease prescribing the liability of the lessees in the event of damages to the premises. It follows that the agreements to keep the premises in good repair and, at the

end of the term, to surrender them in as good condition as they were in at the beginning of or during the term are not, and do not include, a covenant to replace a structure totally destroyed by fire without the fault of the tenant. Wattles v. Omaha, etc., Co., supra; Miller v. Morris, 55 Tex. 412, 40 Am. Rep. 814; Levey v. Dyess, 51 Miss. 501.

We conclude, therefore, that, under the covenants of the lease now under consideration, neither the original lessees, nor their assignee, the tenant in possession, were required to rebuild the destroyed structures, and consequently that they are not bound to respond in damages for their failure to do so. The trial court did not err in granting a nonsuit as to plaintiff's second cause of action.

That part of the judgment which directs that the plaintiff take nothing upon the first cause of action as against the stockholders of the defendant corporation and the defendant A. Ruef is reversed; that part of the judgment which directs that plaintiff recover upon the first cause of action against the defendant corporation and the original lessees is affirmed. The judgment of dismissal of the second cause of action as to all of the defendants is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

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184 Cal. 491

MACMILLAN CO. v. CLARKE et al.

(Sac. 3113.)

(Supreme Court of California. Dec. 17, 1920. Rehearing Denied Jan. 13, 1921.)

1. Schools and school districts 🔑168—High schools not part of elementary school system to be furnished free text-books.

High schools are not a part of the elementary school system within Const. art. 9, § 6, providing that the public school system shall include day and evening elementary schools and secondary schools, but come within Pol. Code, § 1720, declaring that secondary schools shall be known and designated as high schools and junior colleges, so the provision of article 9, § 6, for furnishing free text-books does not apply to high schools.

2. Schools and school districts 🔑168—Provision for supplying free text-books to elementary schools held not to prohibit supply to high schools.

Const. art. 9, § 7, providing that free text-books shall be supplied to elementary schools, does not prohibit the Legislature from directing the supplying free text-books to high schools, for there is nothing in the nature of the provision of text-books for the use of high school pupils which requires a different or more specific constitutional authority than has been found sufficient for the building and furnishing schoolhouses, employing teachers, supplying stationery and other equipment.

3. Constitutional law 🔑48 — Presumption of constitutionality.

There is a presumption in favor of the constitutionality of legislative acts.

4. Constitutional law 🔑26 — Legislature has power except as restrained by Constitution.

The Legislature is vested with the whole of the legislative power of the state, and may deal with any subject within the scope of civil government unless it is restrained by the provisions of the Constitution.

5. Constitutional law 🔑26—Enumeration of legislative powers is not exclusion of others.

Enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms.

6. States 🔑119—Provision for free text-books in high schools is not a "gift" to individuals.

As Const. art. 9, § 1, provides that the Legislature shall encourage by all suitable means the promotion of the intellectual, scientific, moral, and agricultural improvement, through the agency of a free public school system, the right to extend free text-books to high schools can only be questioned on the theory that it violates Const. art. 4, § 31, providing that the Legislature shall not have the right to make any gift or authorize the making of any gift of public money; the providing of free text-books being no more a "gift" than free instruction, and both being sustainable on the ground that they are for the benefit of the state and not the individual.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

7. Schools and school districts 🔑99—Provision for free text-books for high schools held not to violate inhibition against taxes on counties and towns.

While Const. art. 11, § 12, declares that the Legislature shall have no power to impose taxes on counties, cities, towns, or other public or municipal corporations for any county, city, or other municipal purposes, but may by general laws vest in the corporate authorities the power to assess and collect taxes for such purposes, the Free Text-Book Act of 1917, providing in section 1 that the high school board of every school district shall adopt text-books from a list prescribed by the state board and shall furnish the same free to pupils, is not invalid in view of the provisions of Pol. Code, §§ 1756, 1757, and 1763, relating to the levying of taxes for the maintenance of high schools, nor can the act be stricken down because of the provisions of section 2 for the reimbursement of a high school district for text-books furnished pupils outside of such district, on the theory that there was no legislative discretion left to the supervisors of the districts from which came the pupils so supplied.

8. Statutes 🔑64(2)—Invalidity of section of Free Text-Book Act held not to invalidate entire act.

As the Free Text-Book Act of 1917, providing for the furnishing of free text-books for high school pupils, contains a complete scheme in section 1, the fact that section 2, which provides for reimbursement for text-books furnished to pupils outside of the state, might be invalid, does not carry with it the entire act.

9. Schools and school districts 🔑99—Free Text-Book Act not invalid as placing on high school districts additional tax burdens.

As school districts are but instruments of the state, although quasi municipal in character, the Free Text-Book Act of 1917, requiring the furnishing of free books to high school students, cannot be deemed invalid under Const. art. 11, § 12, as resulting in imposing additional taxes on the school districts, for the Legislature may define the extent of the burden to be borne by the district and prescribe the duties of school boards in providing equipment.

Shaw, J., dissenting.

In Bank.

Application by the MacMillan Company, a corporation, for a writ of mandate to be directed to E. P. Clarke and others, composing the State Board of Education, and another, to require the issuance of a list of high school text-books pursuant to Pol. Code, § 1750. Writ denied.

Cushing & Cushing, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Leon French, Deputy Atty. Gen., for respondents.

SLOANE, J. This is an application for a writ of mandate to require the respondents, the state board of education, and the state superintendent of instruction, to issue a list of high school text-books in conformity to the requirements of section 1750 of the Political Code.

The only question presented is as to whether said section of the Political Code has been repealed and a different procedure substituted by the act of the Legislature entitled "An act to provide for the adoption of text-books for use in the public high schools of the state and for furnishing text-books for the pupils of such schools," approved May 18, 1917, referred to as the Free Text-Book Act (Stats. 1917, p. 729). It seems to be conceded by petitioners that their right to the relief demanded depends upon a showing that the last-cited act is invalid and inoperative.

Petitioner concisely states its position in the following words:

"If the Free Text-Book Act contains provisions that conflict with this section (section 1750, Pol. Code), and therefore in form repeals the same, the repeal is void, since the repealing statute is unconstitutional. If, on the other hand, the provisions of the two statutes are not inconsistent, the Political Code section is likewise in exclusive force and effect, since the other statute is unconstitutional."

Two grounds of unconstitutionality are relied on: First, that there is no authority under the Constitution of California for providing free text-books to high school pupils; and, second, that the act in question is violative of section 12 of article 11 of the Constitution, in that it is an attempt to impose taxes upon the high school districts by direct legislative authority and without the interposition of the corporate officers in whom the power to assess and collect local taxes is vested.

The obnoxious portions of said act are contained in sections 1 and 2 thereof, which are as follows:

"Section 1. The high school board of each and every high school district shall adopt text-books for use in such district from a list prescribed by the state board of education. Such list shall include text-books in such high school subjects as in the judgment of the state board of education require the use of text-books; provided, that separate classics in English and modern languages need not be listed. The high school board of each and every high school district may purchase text-books for the use of pupils enrolled in the high schools of such district, which text-books shall at all times be and remain the property of such district, to be supplied to the pupils thereof for use without charge, or at an annual rental, payable in advance, which shall not exceed three dollars for all text-books required by any pupil during any school year; provided, that after July 1, 1920, text-books shall be so supplied to pupils of the high schools without charge. Whenever a majority of the heads of families or a majority of the electors in any high school district shall petition in writing the high school board to furnish text-books free for the use of the pupils enrolled in such high school district, it shall thereafter be the duty of the high school board to furnish such text-books free for the use of such pupils. The high school board may pay for text-books furnished in accordance with the provisions of this act, out of the special fund of such high school district. All moneys collected for rental of text-books shall be deposited in the county treasury to the credit of such high school district within thirty days after collection.

"Sec. 2. Whenever the high school board of any high school district purchases text-books for the use of pupils residing in portions of the county not included in any high school district and attending the high school of such district, and furnishes text-books free for the use of such pupils, the board may on or before August first of each year file with the county superintendent of schools of the county in which such pupils reside, a list of such pupils and an itemized statement of the amount expended for text-books for their use during the preceding school year. The county superintendent of schools shall include such amount in his estimate of the county high school fund required, and the board of supervisors shall include the amount in levying the county high school fund. Before the county superintendent of schools shall apportion any of the county high school fund on average daily attendance, he shall transfer from said fund to the fund of each of the several high school districts of the county, or draw a warrant in favor of the board of trustees of such high school district, for the amount claimed by each on account of text-books furnished free for the use of pupils residing in portions of the county not included in any high school district, and attending such high school."

[1] It may be conceded that there is no specific authority in the Constitution for furnishing free text-books to pupils of high schools. Section 7 of article 9 of the Constitution provides for the adoption of a uniform system of text-books for use in the day and evening elementary schools throughout the state, and directs that they "shall be furnished and distributed by the state free of cost of any charge whatever to all children attending the day and evening elementary schools of the state."

High schools are not a part of the elementary school system of the state. Section 6 of article 9 of the Constitution provides that "The public school system shall include day and evening elementary schools, and such day and evening secondary schools, normal schools and technical schools as may be established by the Legislature;" and in providing such secondary schools the Legislature has declared (Pol. Code, § 1720) that "The secondary schools of the state shall be known and designated as high schools and technical schools and junior colleges."

[2] While it is thus apparent that no direct constitutional provision has been made for free text-books in high schools, and that the free text-book provision of section 7 of article 9 only applies to elementary schools, no good reason has been suggested why any further constitutional authority should be needed for supplying free text-books to pupils in the high schools at the discretion of the Legislature than the general powers granted by the Constitution under which the high school system itself has been created, operated, and maintained. Section 5 of article 9 of the Constitution directs that the Legislature "shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in the year," and section 6, in addition to authorizing such secondary schools as may be established by the Legislature, further provides that the Legislature may authorize and cause to be levied a special state school tax for the support of day and evening secondary schools and technical schools, and "that all revenue derived from such special tax shall be applied exclusively to the support of the schools for which such special tax shall be levied." The liberal policy of the state toward the maintenance of public schools is declared by section 1 of article 9 of the Constitution:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement."

There are other references in the Constitution to supplement the conclusion that the organization, management, and support of the public school system has been left within the legislative discretion, subject to the few mandatory provisions quoted, whereby it was intended to safeguard certain features of elementary education by the Constitution itself.

There is nothing in the constitutional requirement that free text-books shall be supplied to the elementary schools which negatives a legislative power to also supply free text-books to secondary schools.

It is merely a question of how far the Legislature may go in its paternal provision for the cause of education without exceeding the bounds of the general constitutional discretion that has been granted. There is nothing in the nature of the provision of text-books for the use of high school pupils to require different or more specific constitutional authority than has been found sufficient for the building and furnishing schoolhouses, employing teachers, supplying crayons, pens, pencils and stationery, maps, charts, and other high school equipment.

[3, 4] The presumption which attends every act of the Legislature is that it is within the constitutional power. The Legislature is vested with the whole of the legislative power of the state, and may deal with any subject within the scope of civil government unless it is restrained by the provisions of the Constitution, and the presumption that the Legislature is acting within the Constitution holds good until it is made to appear in what particular it is violating constitutional limitations. In re Madera Irrigation District, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

We have been able to find no authority questioning the right of the Legislature to provide free text-books in the high schools. There are decisions holding that boards of education and trustees of school districts cannot exercise such power under general authority to provide necessary supplies for the schools, and without express legislative sanction, but such limitation of power is obvious. The implication is generally conceded, however, that such power does not rest with the Legislature in the absence of constitutional restraint. Board of Education v. Common Council, 80 Mich. 548, 45 N. W. 585; Harris v. Kill, 108 Ill. App. 305; Honey Creek School v. Barnes, 119 Ind. 213, 21 N. E. 747.

The people have seen fit to safeguard certain features of a free school system by mandatory provisions of the Constitution, relating particularly to elementary schools, but beyond this, in the matter of secondary and high schools, the Legislature seems to be left with plenary power to act in its discretion for the public welfare.

In considering the power of the Legislature of Indiana to establish a free library, the Supreme Court of that state (School City of Marion v. Forrest, 168 Ind. 94, 78 N. E. 187), applying the general provisions of section 1, article 8, of the Indiana state Constitution, which is the same, in substance, as section 1 of article 9 of our Constitution, says:

> "That article provides that, 'knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the general assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to all.' It may, with propriety, be said that a law providing for the organization and maintenance of public libraries is a part of the educational system of the state."

In McGee v. Franklin Publishing Co., 15 Tex. Civ. App. 216, 39 S. W. 335, the Texas Court of Civil Appeals, in applying section 1 of article 7 of the Constitution of Texas, which provides that "it shall be the duty of the Legislature of the state to establish and make suitable provision for the support and maintenance of an efficient system of free schools," says, in language very pertinent to the situation here, that—

> The section quoted "is a command to the Legislature to adopt such ends and means and appliances as, in its discretion, it may regard necessary or useful for the support and maintenance of an efficient system of free schools. The true meaning to be given the term 'efficient system' embraces the idea of instruction in an enlarged sense, and not that it should be confined to narrow lines. Its meaning is broad enough to allow such a scheme of instruction as the Legislature in the exercise of its discretion may provide. It may include all the * * * appliances that are used in this enlightened age that are necessary or useful as part of an efficient 'system' of public schools; and, in furthering and providing for this efficient system, the Legislature may exercise its discretion in determining what may be necessary or useful as a part of it."

[5] We see no grounds for holding that the express and mandatory requirement of our Constitution that free text-books shall be furnished to pupils of the elementary schools should be construed as a limitation upon the power of the Legislature to also furnish free text-books for the use of high school pupils. It may well be that it was considered expedient in this as in other respects to require legislative action in behalf of the elementary schools, and to leave the provisions for more advanced education to the discretion of the Legislature. Express enumeration of legislative powers is not exclusive of others not named unless accompanied by negative terms. Ex parte McCarthy, 29 Cal. 395. A construction of a provision of the Constitution of Colorado, involving the application of this doctrine, is upheld by the Supreme Court of that state. The Constitution of Colorado requires the Legislature to provide for the maintenance of a uniform system of free public schools throughout the state for the education of all residents between the ages of 6 and 21 years. On a question as to the power of the Legislature to establish a kindergarten for pupils under the age of 6 years the court in Re Kindergarten School, 18 Colo. 234, 32 Pac. 422, 19 L. R. A. 469, says:

> "The Legislature being invested with complete power for all the purposes of civil government, and the state Constitution being merely a limitation upon that power, the court will look into it, not to see if the enactment in question is authorized, but only to see if it is prohibited. Unless, therefore, the Constitution, in express terms or by necessary implication, limits it, the Legislature may exercise its sovereign power in any way that, in its judgment, will best subserve the general welfare. Read in the light of this rule of interpretation, and the wise and liberal policy of the state in educational matters, the section is clearly mandatory, and requires affirmative action on the part of the Legislature to the extent and in the manner specified, and is in no measure prohibitory or a limitation of its power to provide free schools for children under six years of age, whenever it deems it wise and beneficial to do so."

[6] It seems clear under the comprehensive direction of our Constitution, which requires that the Legislature "shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement," through the agency of a free public school system, that the right to extend the free use of text-books can only be questioned under some express constitutional limitation. It has been suggested, although the point is not raised by the petitioner in this proceeding, that such inhibition is found in section 31 of article 4, of the Constitution, whch provides that the Legislature shall not have power "to make any gift or authorize the making of any gift of any public money or thing of value to any individual." It would appear that this objection, if pertinent, applies to every phase of a free school system as well as to the free use of text-books. All the furnishing, equipment, and appliances of our public schools, the very tuition itself, is a contribution of something of value to the school patrons. To argue that some of these agencies and not all are expressly authorized for the benefit of the school population by the general constitutional provisions for the maintenance of a free school system, or that the scope of school service is limited to rudimentary education in the "three R's" and such equipment as was deemed sufficient when our Constitution was adopted, is to place our public schools under the blight of the "dead hand," with no chance for expansion and development in line with our growing culture and civilization. Such a construction would be a serious limitation upon the numerous high school centers throughout the state of California, and the normal and technical schools, with their costly and elaborate equipment of libraries, chemical, electrical, and mechanical laboratories and appliances provided for the use of pupils.

The true explanation of the apparent conflict of authority would seem to be that the free school system with all its equipment is not primarily a service to the individual pupils, but to the community, just as fire and police protection, public libraries, hospitals, playgrounds, and the numerous other public service utilities which are provided by taxation, and minister to individual needs, are for the benefit of the general public. It is so interpreted by the introductory declaration of our constitutional provisions for a free school system that—

> "A general diffusion of knowledge and intelligence" is "essential to the preservation of the rights and liberties of the people."

It is to be noted that under the Free Text-Book Act the books remain the property of the district, and the pupils have the use of them only in substantially the same manner that they have the use of other school appliances. To hold that the Legislature is without power to provide text-books for the high school pupils would place a limitation upon its discretion in encouraging "by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement" that might seriously cripple our boasted system of public education.

[7] The second point of contention is raised under section 12 of article 11 of the Constitution, which is as follows:

> "The Legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

It is claimed that a school district comes within the application of this section, and that taxes for high school purposes are for county or municipal purposes within the meaning of this section. McCabe v. Carpenter, 102 Cal. 469, 3 Pac. 836; Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067.

The general procedure for estimating and levying taxes for maintenance of high schools is provided in sections 1756 and 1757 of the Political Code. Under section 1756 it is made the duty of the high school board to make and file with the county superintendent of schools an estimate of the amount of money required for maintaining the high school of said district for the current school year, showing the amounts required for (a) teachers' salaries; (b) current expenses; (c) books, magazines, and apparatus; (d) sites, buildings, and furniture; (e) other miscellaneous expenses. Should the board of any county high school district fail to make this estimate it becomes the duty of the county superintendent of schools to make it. Such estimate, when fully prepared, is to be submitted to the board of supervisors. Section 1757 directs that the board of supervisors at the time of making the tax levy for the year for county purposes shall levy a special tax on the property of the high school district "sufficient in amount to carry out the purposes legally specified in the estimate."

The constitutionality of such a levy and its conformity to the limitations imposed by section 17, article 11, of the Constitution, is upheld by this court. People v. Lodi High School District, 124 Cal. 694, 57 Pac. 660; Board of Education v. Board of Trustees, 129 Cal. 599, 62 Pac. 173; Brown v. Visalia, 141 Cal. 372, 74 Pac. 1042. The money collected under the tax levy so provided for is required by section 1763 of the Political Code to be placed in a special fund for the high school district for which it was intended, to be used only for the purposes for which the same was levied, and such moneys are made available for all legitimate supplies for the schools. The Free Text-Book Act under consideration here provides that the high school board may pay for text-books furnished in accordance with the provisions of the act out of the special fund of such high school district. There thus appears to have been provided an adequate and valid method of procuring and paying for free text-books under this disputed act.

The decision in the case of McCabe v. Carpenter, 102 Cal. 469, 36 Pac. 836, relied upon by petitioner, is made inapplicable to the present case by the fact that the statute under which that decision was rendered now stands amended for the express purpose of meeting the objection there raised. At the time of the tax levy there called in question, the act to provide for the establishment of high schools, approved March 20, 1891 (Stats. 1891, p. 182), required an estimate to be made by the county superintendent of schools and to be furnished to the board of supervisors, and made it the duty of such board of supervisors "to levy such rate as will produce the amount estimated to be necessary for such purpose." It was held in that case that the Legislature had attempted to vest in the county superintendent of schools legislative power to determine the amount of the tax levy and had deprived the local body whose duty it was to levy taxes of all discretion in fixing the amount to be raised, and was, therefore, unconstitutional. By the High School Act of 1895 (St. 1895, p. 293), this objectionable provision of the act of 1891 was amended so as to provide that upon receiving the estimate of the requirements of the district the supervisors were to include in the tax levy "an amount sufficient" to maintain the school. As is said in People v. Lodi High School, and Board of Education v. Board of Trustees, supra, this amendment was made to obviate the infirmity of the law of 1891. As thus amended this provision is upheld in the cases last cited, and is incorporated in the law governing taxation for high schools as it exists today. (Pol. Code, §§ 1756, 1757.) Petitioner, however, urges that the vice of the act of 1891 is repeated in section 2 of the Free Text-Book Act, where, in providing for reimbursement of a high school district for the cost of text-books supplied to pupils residing outside such district upon an estimate furnished by the superintendent of schools, "the supervisors shall include the amount in levying the county high school fund." It is argued that this provision leaves no legislative discretion to the supervisors, but requires them to increase their tax levy by the precise sum included in the superintendent's estimate. It, however, signifies no more than a direction to the supervisors to include in their tax levy a sufficient amount to cover this extra cost. It merely happens, this being a liquidated claim, that the estimate of the superintendent, if his figures are correctly compiled, must of necessity correspond with the "sufficient amount" covering the legislative discretion of the supervisors. If there is a debt of $1,000 to be provided for, there can be little difference in meaning between a direction to the supervisors to add the amount to the tax levy, or a direction to make the levy sufficient to cover the indebtedness. The element of discretion only exists in the fact that the taxing power is not bound to accept the superintendent's figures as correct and final any more than in the matter of estimates for teachers' salaries or other school expenses.

[8] But there is another answer to this last objection to the validity of the Free Text-Book Act. Section 2 is no part of the authority or procedure for providing free text-books. Section 1 of the act provides for the adoption by the high school boards of the respective districts of text-books for use in high schools, and directs that after July 1, 1920, text-books shall be supplied to pupils of the high schools without charge. This includes all pupils of the school, whether residents or nonresidents of the district. It is further provided that the high school board may pay for text-books furnished in accordance with the provisions of this act out of the special fund of such high school district. Section 2 is an independent and supplemental provision, in no way affecting the sufficiency or validity of the preceding enactment. It merely provides a method by which the district that has furnished and paid for free text-books to its pupils residing in other parts of the county may recover the moneys thus expended. It is not apparent how the invalidity of this provision, if it should be held invalid, could affect the constitutionality of the general scheme of providing text-books to pupils of the high schools, or in what way the elimination of this provision for reimbursement would entitle petitioner to the relief demanded. This particular fund provided for by section 2 has no relation to the payment of the publisher's claim for books supplied, referred to in section 9. We are of the opinion that, even though this provision of section 2 might be held invalid, it is not so vitally a part of the general scheme and purpose of the act as to nullify its main features, and the act would still stand as a valid substitute for section 1750, which petitioner is seeking to enforce, at least to whatever extent the two enactments are in conflict.

[9] If it is contended by petitioner that the act of the Legislature in placing upon high school districts the burden of providing free text-books must necessarily result in imposing additional taxes upon such districts and municipalities, the answer is that the obligation thus created is not different from those originating in the same manner for other school supplies, the validity of which have been repeatedly upheld by the courts. The school district is created by the Legislature as an instrument of the state. Such quasi municipal corporations are but the agents or representatives of the state. They are organized for the purpose of the Legislature in its province of providing for the general welfare. The organization and administration of a uniform public school system is especially delegated to the Legislature by the Constitution. The Legislature has provided for the institution and maintenance of schools through the agency of school districts and boards of education. If the Legislature is denied the power to fix the nature and extent of the burden to be borne by the districts, and to define and prescribe the duties of school boards in providing equipment for the schools, there would be an end to any coherent or uniform system of public education.

In State ex rel. Clark v. Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240, at the petition of the relator for writ of mandate to compel the school trustees to certify the required text-books for their school and to procure and furnish such books under the provision of a certain act of the Legislature, a somewhat similar question of the invasion of local rights was raised. The Supreme Court of Indiana in that case, and under the general provisions of a Constitution similar to ours, uses this apt language:

> "Essentially and intrinsically the schools * * * are matters of state and not of local jurisdiction. In such matters, the state is a unit, and the Legislature the source of power. The authority over schools and school affairs is not necessarily a distributive one to be exercised by local instrumentalities; but, on the contrary, it is a central power residing in the Legislature of the state. It is for the lawmaking power to determine whether the authority shall be exercised by a state board of education, or distributed to county, township, or city organizations throughout the state. * * * Both by the Constitution and by the intrinsic nature of the duty and the power, the authority is exclusively legislative, and the matter over which it is to be exercised solely of state concern. * * * It is impossible to conceive of the existence of a uniform system of common schools without power lodged somewhere to make it uniform; and, even in the absence of express constitutional provisions, that power must necessarily reside in the Legislature. If it does reside there, then that body must have, as an incident of the principal power, the authority to prescribe the course of study * * * as well as the books which shall be used. * * * Having this authority, the Legislature may not only prescribe regulations for using such books, but it may, also, declare how the books shall be obtained and distributed."

Under the California law the Legislature has seen fit to create municipal districts through which to organize and conduct the schools. It retains all the powers not expressly conferred upon the school trustees or boards of supervisors.

It may well be questioned if the imposition of financial burdens upon school districts by general laws for maintenance of public schools comes within the restriction of the Constitution against taxation for local or municipal purposes. The public schools are state schools, and it is within the discretion of the Legislature whether to make them a charge upon the state at large, or to do as has been done in the matter of elementary schools, make them partly a charge upon the state at large and partly upon local districts, or, as in the case of high schools, place practically the entire burden for the local school upon a district organized for that purpose. But conceding the rule as recognized in McCabe v. Carpenter, supra, its application goes no further than to place the constitutional inhibition upon the power of the Legislature to assess and collect the tax.

In other words, in dealing with these local municipal agencies for conducting the state administration, the Legislature reserves the right to impose burdens which must be met by local tax levies. The whole county government system is based on that theory. The state, for example, enumerates the officers who are to conduct the public business of the municipality and fixes their compensation, which the county is required to pay through the levy, collection, and disbursement of local taxes. In the administration of the public schools the general laws of the state direct the purchase of certain supplies and require the directors or school board to include estimates for that purpose in their annual budgets, and impose upon the board of supervisors of the county the duty of including in the tax levy a sufficient amount to cover the cost. Section 1620 of the Political Code provides that—

> "Writing and drawing paper, pens, inks, blackboards, blackboard rubbers, crayons and lead and slate pencils, and other necessary supplies for the use of the schools, must be furnished under the direction of city boards of education and * * * of school trustees, and charges therefor must be audited and paid as other claims against the county school fund of their districts are audited and paid."

This section applies primarily to elementary schools, but the High School Act (Pol. Code, § 1741) provides that except as otherwise provided the powers and duties of high school boards shall be "such as are now or may hereafter be assigned by law to boards of education or boards of school trustees in school districts." And, as has been pointed out, section 1756 of the same Code requires every high school board to file annually with the board of supervisors an estimate of the amount of money required for the annual expenses of the high school, including that for "books, magazines and apparatus" and for "other miscellaneous expenses," and under section 1757 the supervisors are required to include in their tax levy as a special fund for such high school districts a sufficient amount to cover such expenses. This provision for free text-books stands upon precisely the same grounds.

Having reached the conclusion that there is no constitutional limitation upon the Legislature in supplying free text-books, it follows, on the facts and reasoning stated, that the method of procuring and paying for such text-books as provided in the Free Text-Book Act is not in violation of the limitation of section 12, article 11, of the Constitution.

The petition is denied.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; OLNEY, J.; LENNON, J.

SHAW, J. I dissent.

If an amendment of the Constitution was necessary to authorize the Legislature to provide for free text-books in the elementary schools, as would seem to be implied from the adoption of the amendment of 1912, expressly giving such authority (section 7, art.

9), I can see no reason why it is not also necessary in order to authorize the Legislature to provide free text-books for the high schools for the use of the pupils therein. Both, alike, are gifts by the state to the pupil, or to the parents or guardians of the pupil, of the use of the text-books during the attendance at school, and both are, therefore, gifts of a "thing of value" to an individual. As such it is expressly forbidden by section 31 of article 4, of the Constitution. If the prevailing opinion is correct, the submission by the Legislature and the adoption by the people of the free text-book amendment of section 7, article 9, in 1912, was a vain and useless performance.

There is not, as it seems to me, any force in the suggestion that providing free text-books to a high school pupil is no more a gift than is the providing of buildings and the furniture, fixtures, and appliances therein which are reasonably necessary to carry on the schools. The Constitution itself provides that the Legislature "shall provide for a system of common schools by which a free school shall be kept up and supported" (section 5, art. 9), and that "the public school system shall include * * * elementary schools and * * * secondary schools" (section 6, art. 9). The history of section 6 and its successive amendments shows that the term "secondary schools" has been substituted for the term "high schools" and means, or at least includes, high schools. The authority to provide for and support high schools, of necessity, implies authority to provide the buildings and the furniture, fixtures, and appliances therein necessary to carry them on. The authority to provide all these things is therefore derived from the express language of the Constitution.

The fact that a provision for free text-books is not essential to the maintenance of the high school system is demonstrated by the history of the common or elementary schools in this state and elsewhere. Such schools were successfully and effectively carried on in this state for more than 60 years before any free text-books were furnished for the pupils. Consequently, the authority to keep up and support high schools does not, by implication, include authority to furnish text-books for the pupils who attend them.

If it were not for the aforesaid constitutional prohibition against gifts by the state to any individual, I believe the Legislature would have power under the general grant of section 1, article 4, and under the command of section 1, article 9, to "encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement," to go to the length of providing free text-books for pupils in all of the schools. But with this inhibition in force such gift is, in my opinion, beyond the legislative power.

(184 Cal. 637)

MERVYN INV. CO. v. BIBER et al.

(S. F. 9000.)

(Supreme Court of California. Jan. 4, 1921.)

1. Partnership 🔑227—Partner's rights under contract held not terminated by copartner's conveyance of interests to corporation.

Where partnership agreement between owner of apartment house and manager thereof provided for conveyance to manager of a one-third interest after indebtedness incurred by owner had been paid and advances made by owner had been repaid, and stipulated that owner could transfer interests to corporation which should be bound by the contract, owner's conveyance of his interests to a corporation, which agreed to be bound by such contract, though it terminated partnership relation between manager and owner, did not terminate manager's rights, under the contract, to pay off the liabilities of the business and acquire a one-third interest therein freed from such liabilities.

2. Partnership 🔑227—Assignee of partnership interest who agrees to be bound by partnership contract steps into assignor's shoes.

A partner's assignee who agrees with copartner's consent to be bound by the partnership contract steps into the partnership shoes of the assignor.

3. Corporations 🔑379—May enter partnership if so authorized by charter.

A corporation can become a partner if so authorized by its articles of incorporation and charter.

4. Corporations 🔑389—Burden of proving that charter did not permit corporation to become partner held on corporation.

A corporation which was organized to take over a partner's interest in certain business, and which for a time through its board of directors operated the business conjointly with the copartner, had burden of proving that its charter did not permit it to become a partner, to substantiate its claim that such a relation was ultra vires.

5. Corporations 🔑379—May be held liable as a partner to prevent injustice.

Though a corporation is without authority under its charter to form a partnership with another, it may be held liable as a partner to prevent injustice.

6. Partnership 🔑263—Withdrawal of partner prior to expiration of term does not affect interests of remaining partners.

Under Civ. Code, § 2451, a partner may withdraw from copartnership, notwithstanding agreement for a fixed term, but such withdrawal does not terminate partnership interests of remaining partners or deprive them of the right to carry out the articles of copartnership.

7. Partnership 🔑233—Right to control and disposition of assets in remaining partners after sale of partner's interest to stranger.

If one partner sells his interest to a stranger, the right to the control and disposition of the firm assets vests in the other partners, and a receiver may not be appointed in the absence of a showing of prejudice to retiring partners in permitting the remaining partners to liquidate the business.

8. **Partnership 🔑81—Accounting to be governed by the copartnership agreement.**

The accounting between partners is to be governed by the copartnership agreement.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by the Mervyn Investment Company against George V. Biber and another. Judgment for plaintiff, and the named defendant appeals. Reversed.

Aitken & Aitken, Aitken, Glensor & Clewe, and R. H. Morrow, all of San Francisco, for appellant.

Milton A. Nathan, of San Francisco (Crabbe & Webster, of San Francisco, of counsel), for respondent.

SLOANE, J. The appellant and one Carl Werner were associated in the business of conducting an apartment house in the city of San Francisco.

Werner held a 10-year lease on the premises and had advanced money and incurred indebtedness for outfitting the apartments and otherwise financing the business. The appellant was operating the business and giving his entire time and attention to its management.

The business was conducted for some months under an oral agreement which was on the 8th of March, 1913, reduced to writing and duly executed by the parties. The agreement recites that:

> "Whereas the parties hereto have been and now are engaged in the business of conducting an apartment house on those certain premises located at 766 Sutter street, city and county of San Francisco, state of California, commonly known and designated as the Lucerne Apartments; and whereas, the said business has been financed by the said Carl Werner, both by advances in money and by the pledging of his financial credit; and whereas, since the commencement of said business the said George V. Biber has given his entire time and attention to the management of it: Now, therefore, it is agreed as follows."

The contract then declares:

That the parties have been and now are partners, and that they shall share in all profits and losses of the business in the proportion of one-third by appellant and two-thirds by Werner; that appellant shall devote all his time to the business and shall receive as compensation therefor $100 per month and the use of an apartment; that the indebtedness of the business shall be paid out of such income and profits as may be available for that purpose; and that Werner shall receive out of the first profits available for that purpose the sum of $3,855.70, and some further sums, with interest, on account of money advanced by him to finance the business.

It is provided further that when said sums have been repaid, Werner shall immediately convey to the appellant, Biber, a "one-third interest in all the property of the said Lucerne Apartments, including one-third interest in the lease thereof and of the business itself."

After other details, not material here, it is provided that the party of the first part, Werner, may at any time assign to a corporation all his rights, title, and interest in and to said apartment house and business, but that in the event of such transfer said corporation and the party of the second part, Biber, "shall be bound by all the terms and conditions of partnership herein contained."

The record discloses that within three weeks after the execution of this contract Werner made an assignment of all his interests in the partnership and in and to the apartment house and lease to the plaintiff corporation.

It appears that Werner organized this corporation, and it seems to be conceded that he organized it for the purpose of taking over the interests so conveyed, and that he held and owned substantially all the stock. The corporation accepted such transfer and assignment subject to all the terms and conditions set forth in the agreement between Werner and appellant and agreed to be bound thereby.

Thereafter Werner transferred all his stock in the corporation to one Jacoby, and at the time of the commencement of this action had no further interest in the apartment house or its business.

This suit was begun by the corporation, the respondent Mervyn Investment Company, which obtained a judgment adjudging the corporation to be the owner of the apartment lease, equipment, and business, subject to the rights of Biber accruing upon the completion of the payments under the original partnership agreement. It was further decreed that the assets of the partnership be sold and the proceeds be applied to payment of the remaining debts, together with the amounts advanced by Werner and claimed by plaintiff under its assignment from Werner, and that any remaining amount be paid to plaintiff and defendant Biber in the proportion of two-thirds to the former and one-third to the latter; also a receivership was created to take charge of the business and carry out the judgment of the court. It is from this judgment that the appeal is taken by defendant Biber.

The trial court, upon sufficient evidence, finds the facts substantially as herein stated, and further finds that the appellant was faithfully carrying out the terms of his contract; that the business was making a substantial profit; that the running expenses had been paid, as well as several thousand dollars of the indebtedness on Werner's credit; that appellant had not paid to Werner or to plaintiff the advances of money made by Werner in financing the enterprise. These payments were under the contract to be made only from available profits, and, as the profits of the business had thus far been applied to other indebtedness incurred by Werner, there had not come into appellant's hands any money available to that purpose. It does not appear from the contract in what order payments were to be made as between the amounts due Werner for advances and the amounts due his creditors, but the latter claims had to be met to keep the business going, and no question is made as to appellant's right to give preference to such claims. In short, there is nothing in the findings or in the evidence to indicate that there had been any default on the part of appellant in the faithful performance of the conditions of his contract.

There is nothing in the record tending to support the judgment other than the conclusion of the trial court that the copartnership between Werner and appellant terminated on the assignment by Werner of all his interest to the plaintiff.

[1] The assignment by Werner of his interest did undoubtedly terminate the partnership relation between Werner and Biber, but it did not terminate the right of Biber under the contract to pay off the liabilities of the business from the profits and acquire a one-third interest therein freed from these liabilities.

There is no express agreement under the contract that the partnership relation should continue for any given time. But the nature of the interest acquired thereunder by Biber, and the agreement that in the event of Werner selling out to a corporation the corporation was to accept the assignment subject to all the stipulated conditions, established a mutual understanding that the business relations were to continue and Biber was to remain in control until the debts were paid from the profits. The rule laid down in 30 Cyc. 417, is applicable here:

> "Oftentimes the parties do not state their intentions explicitly. In such event the term of the partnership is a matter of inference from the contract provisions and surrounding circumstances. If the partnership has for its object the completion of a specified piece of work or the conduct of a business which obviously continues through a particular season, it will be presumed that the parties intended the relation should continue until the object had been accomplished."

In the absence of any failure of Biber to conduct the business at a profit, or to carry out his part of the agreement, he cannot be deprived of the rights so guaranteed.

There is no finding by the trial court as to the effect of the acceptance by the plaintiff corporation of the assignment and transfer by Werner, as agreed to by Biber, with the express stipulation that it would be "bound by all the terms and conditions of the contract." Under the terms of this agreement and transfer the corporation was to stand in Werner's shoes as a partner. It is contended, however, on the part of respondent that the attempt to create such a relation was ultra vires.

In the first place, the contract between Werner and Biber was something more than the mere assumption of the business relations of partners. It was an agreement which vested in Biber the right to acquire a one-third interest in the assets of the business from its profits, and to conduct and manage it until from the proceeds he could receive that interest freed from existing debts and liabilities. Neither Werner nor his assigns could deprive him of this right by arbitrarily dissolving the partnership and shutting down the business. Conceding the right of Werner to withdraw from the partnership relation and the incapacity of respondent to enter into it, the property rights of appellant remained, and this right does not permit that the business be thrown into the hands of a receiver, sold at forced sale, and that he accept in satisfaction of his interest one-third of what was left, if anything, after all liabilities were paid out of the assets of the business itself instead of from its profits. If the respondent and its assignor from choice or legal necessity withdrew from the partnership relation, through no fault of appellant, equity, if not the law, should protect him in his right to the fruits of his contract.

[2, 3] It is not clear that the plaintiff did not consummate partnership relations with Biber. It accepted the assignment from Werner subject to precisely that condition and with Biber's consent. That under such conditions an assignee of one partner steps into the partnership shoes of his assignor is well recognized by the courts. Gorder v. Pankonin, 83 Neb. 204, 119 N. W. 449, 131 Am. St. Rep. 629; Rowley Mod. Law of Partnership, p. 768; Merrick v. Brainard, 38 Barb. (N. Y.) 579; Heck v. McEwen, 12 Lea (Tenn.) 101; Tyrrell v. Washburn, 88 Mass. (6 Allen) 470. Conceding that ordinarily the assuming of such a relation would be ultra vires on the part of a corporation, we know of no reason why it could not enter into a partnership if so authorized by its articles of incorporation and charter. White v. Pecos L. & W. Co., 18 Tex. Civ. App. 634, 45 S. W. 207; Bates v. Coronado Beach Co., 109 Cal. 160, 41 Pac. 855. Our Civil Code provides (section 286) that:

> "Private corporations may be formed for any purpose for which individuals may lawfully associate themselves."

[4, 5] It appears here that this corporation was organized by Werner, and that he was the principal stockholder. It is alleged by appellant, and not disputed, that the corporation was organized for the purpose of taking over Werner's interest in this business. The corporation did, through its board of directors, assume to exercise this power and for a time operated the business conjointly with Biber. The burden should rest upon it under such circumstances to show that its charter did not permit such a contract. Belch v. Big Store Co., 46 Wash. 1, 89 Pac. 174. It has not done this so far as this record discloses. Even where a corporation is without authority under its charter to form a partnership with another, it may be held liable as a partner to prevent injustice. Rowley Mod. Law of Partnership, vol. 1, §§ 193–197; Cleveland Paper Co. v. Courier Co., 67 Mich. 152, 34 N. W. 556; Boyd v. Am. C. B. Co., 182 Pa. 206, 37 Atl. 937.

[6] It is not necessary to a decision of this case in appellant's favor that it should appear that plaintiff corporation became a partner with appellant upon Werner's transfer to it of his interest. If it did become a partner, it was not precluded from withdrawing from such partnership. Even where a copartnership is for an agreed and fixed term any of the partners may withdraw. Section 2451 of the Civil Code provides that—

> "A general partnership may be dissolved, *as to himself only*, by the expressed will of any partner notwithstanding his agreement for its continuance."

The words we have italicized, however, indicate that the partnership interests of remaining partners are not thereby to be terminated. One member of a partnership created for a designated term may not of his own volition dissolve the same, so as to deprive remaining partners of the right to carry out the articles, and courts may not decree a dissolution against the will of remaining partners without other causes justifying it. Ferrero v. Buhlmeyer, 34 How. Prac. (N. Y.) 33.

It is entirely clear that the plaintiff by accepting this assignment under the expressed conditions of the original contract is in no better condition than Werner would have been after a voluntary withdrawal from the partnership.

Biber was left in a position where under the law he was entitled to continue the business as a liquidating partner until the contractual conditions and liabilities were carried out. Miller v. Brigham, 50 Cal. 615; Page v. Summers, 70 Cal. 123, 12 Pac. 120; Civ. Code, § 2458 et seq.; Crossen v. Murphy, 31 Or. 124, 49 Pac. 858.

The powers of remaining partners with respect to rights created pending the partnership remain after dissolution. Braun v. Woollacott, 129 Cal. 107, 61 Pac. 801; Davis v. Megroz, 55 N. J. Law, 427, 26 Atl. 1009.

[7, 8] If one partner sells his interest in the firm to a stranger, the right to the control and disposition of the firm assets vests in the other partners. 30 Cyc. 664; Reece v. Hoyt, 4 Ind. 169; Chase v. Scott, 33 Iowa, 309; Macdonald v. Trojan, etc., Co., 56 Hun, 648, 10 N. Y. Supp. 91. And a receiver may not be appointed in the absence of a showing of prejudice to retiring partners in permitting the remaining partners to liquidate the business. Painter v. Painter, 4 Cal. Unrep. Cas. 636, 36 Pac. 865; Bates, Law of Partnership, § 993. The accounting between partners is to be governed by the copartnership agreement. Neudecker v. Kohlberg, 3 Daly [N. Y.] 407. Although there is nothing in the findings or judgment fixing Biber's status as a liquidating partner, he is recognized and referred to as such in the findings here. We think he was entitled to be so recognized, and as such to remain in possession and control of the business, and to liquidate its obligations and liabilities and carry out the objects of the partnership under the terms of the original agreement.

The conclusions of law and the judgment of the court should have so determined under its findings of fact.

Upon the showing made here of entire faithfulness and good management of the business and that it was a going concern operated at a profit there was no valid ground, in our judgment, either for ordering a forced sale of the property to liquidate its liabilities, or for creating a receivership.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.; SHAW, J.

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184 Cal. 612

BERNHARD v. WALL. (Sac. 2784.)

(Supreme Court of California. Jan. 4, 1921.)

1. Public lands ⚷54(5) — Mandamus proceeding by applicant held to keep application to purchase alive.

Under St. 1885, p. 139, under which an application to purchase state lands could not be considered void, though on file for more than six months, if approval of the application had been demanded by the applicant, a mandamus proceeding by the applicant to compel approval of the application was in effect a continuing demand for such approval, and kept the application alive.

2. Public lands ⚷54(5) — Contest involving validity of prior deeds should have been referred to superior court or to court in which mandamus proceeding was pending.

Under Pol. Code, §§ 3414, 3499, requiring contests between applicants for the purchase of state lands involving a question of law to be referred to the superior court, where an application was refused because the applicant would not pay certain taxes, penalties, etc., and a mandamus proceeding was instituted to compel approval of the application, pending which third parties filed an application to purchase, the surveyor general should have referred the applications to the superior court, or presented the matter of the conflicting claims to the court having jurisdiction of the mandamus proceeding.

3. Public lands 🔑54(5) — Prior applicant's claim paramount to that of subsequent applicant.

If one applying for the purchase of state lands, but refusing to pay certain taxes, penalties, etc., had a right to purchase on the terms proposed by him, his claim was paramount to that of subsequent applicants, and the surveyor general had no right or power to postpone his claim to that of the subsequent applicants.

4. Public lands 🔑54(9) — Patent issued to prior applicant in response to mandamus held to relate back and prevail over patent to subsequent applicant.

Where the surveyor general rejected an application for the purchase of school lands because the applicant refused to pay certain taxes, penalties, etc., but was compelled by mandamus to receive the application and issue a patent, the applicant's rights under the patent related back to the time of the application, and prevailed over patents previously issued to subsequent applicants.

5. Public lands 🔑54(7) — Foreclosure decree not void because copy of summons misdescribed land where judgment recited service.

A decree, forfeiting the rights of the purchaser of state lands for failure to make the deferred payments, was not void because a copy of the summons attached to the proof of publication included in the judgment roll misdescribed the land, where the decree recited that the purchaser was regularly served with process and the original summons was not on file, as it would be presumed from the recital in the decree that there was a summons actually published or served, correctly describing the land, if such description was required.

6. Public lands 🔑54(8)—Purchaser need not pay taxes, etc., where tax deed to state is void.

Pol. Code, § 3788, providing that when land purchased from the state is sold to the state for taxes and a tax deed issued to the state it shall again become subject to sale, but that the applicant must pay the delinquent taxes, penalties, etc., necessarily implies a valid tax sale, and does not apply where the deed is void on its face, because showing that the first publication of the notice of sale was more than 28 days prior to the date fixed for sale.

7. Taxation 🔑734(9)—Tax deed void, when first publication of notice of sale is more than 28 days prior to date fixed.

Under Pol. Code, § 3767, providing that the notice of tax sale shall designate the time of sale which must not be less than 21, nor more than 28, days from the time of the first publication, the publication was insufficient, and the deed based thereon void, when the notice was first published more than 28 days prior to the date fixed for sale.

8. Taxation 🔑788(5) — Tax deed only prima facie evidence that sale was at proper time and overcome by recital showing contrary.

Under Pol. Code, §§ 3786, 3787, tax deeds are only prima facie evidence that the tax sales were made at a proper time, and this prima facie proof is refuted by recitals in the deeds showing that the sales were made more than 28 days after the first publication of the notice of sale.

9. Taxation 🔑788(2)—Statute as to conclusiveness of tax deed construed as to deeds to which applicable.

Pol. Code, § 3786, providing that "such deed" is primary evidence of certain facts, and section 3787, providing that "such deed" is conclusive evidence of the regularity of all other proceedings, refers to tax deeds authorized by section 3785, as well as those authorized by section 3785b.

10. Judgment 🔑713(2) — Estops defendant from claiming that matter not relied on would have been a defense if relied on.

The judgment in a mandamus proceeding, requiring the surveyor general to approve an application for the purchase of state lands without requiring the applicant to pay certain taxes, penalties, etc., estopped the surveyor general from claiming that a tax deed, not relied on in such proceeding, would have been a defense thereto, as it was conclusive of any fact which might have been alleged and proved to show that the applicant was not entitled to the relief given by the judgment.

11. Judgment 🔑702—Judgment on mandamus against surveyor general, requiring approval of application to purchase state lands, was binding on the state.

Under Pol. Code, §§ 497, 3395–3573, inclusive, relative to the duties of the surveyor general, a judgment in a mandamus proceeding, requiring him to approve an application for the purchase of state lands, was binding and conclusive against the state to the same extent that it bound the surveyor general.

12. Mandamus 🔑178 — Judgment, requiring approval of application to purchase lands, relates back to beginning of proceeding.

A judgment in a mandamus proceeding, requiring the surveyor general to approve an application for the purchase of state lands, related back to the beginning of the proceeding, and fixed the respective rights of the parties and of the state as of that time, based on the conditions then existing.

13. Vendor and purchaser 🔑239(6) — Innocent purchaser from apparent record owner takes title free from undisclosed and unrecorded title of third party.

Under Civ. Code, § 1214, where land is unoccupied and a person holds title thereto by an unrecorded contract or deed, and a third person, in ignorance thereof, and in good faith, and for value, buys the land from the apparent record owner, he takes the title free from the prior, but undisclosed and unrecorded, title of such other party.

14. Vendor and purchaser 🔑223—Rule as to rights of innocent purchaser inapplicable where his deed or patent is void.

The rule that an innocent purchaser of land for value from the apparent record owner takes title free from the undisclosed and unrecorded title of another does not prevail where the innocent purchaser holds under a deed or patent which is absolutely void.

15. Public lands 🔑54(10) — Rejected application to purchase state lands held not to give applicant equity superior to that of subsequent innocent purchasers.

Where the surveyor general refused to receive or file an application for the purchase of state lands, but was subsequently compelled to do so by mandamus, the mere rejected offer did not withdraw the land from sale to other applicants, or put the applicant in privity with the state so as to give him an equity superior to that of innocent purchasers, paying for the land on the faith of the record title, during the pendency of the mandamus proceedings.

16. Judgment 🔑702 — Innocent purchasers held not represented by surveyor general in mandamus suit so as to render judgment conclusive on them.

Where the surveyor general refused to receive or file an application for the purchase of state lands and pending a mandamus proceeding to compel approval of the application accepted the application of third persons and issued patents to them, innocent purchasers from such patentees were not represented in the mandamus proceeding by the surveyor general so as to be bound by the judgment.

17. Lis pendens 🔑18 — Innocent purchasers held not charged with constructive notice of mandamus proceeding not filed.

Where notice of the pendency of a mandamus proceeding against the surveyor general to compel approval of an application for the purchase of state lands was not filed under Code Civ. Proc. § 409, innocent purchasers were not charged with constructive notice of the pendency of the proceeding, whether or not such section applies to such a proceeding.

18. Vendor and purchaser 🔑220 — Innocent purchaser need not allege and prove grantor's possession.

As, in California, a deed by a person out of possession passes all the title of the grantor, one claiming to be an innocent purchaser for value without notice need not aver and prove that at the date of his deed his grantor was in possession of the land.

In Bank.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Peter D. Bernhard against J. H. Wall. From a judgment for defendant, plaintiff appeals. Affirmed.

A. E. Bolton, of San Francisco, and Pardee & Pardee, of Susanville, for appellant.

L. T. Hatfield, V. L. Hatfield, and W. H. Hatfield, all of Sacramento, and R. M. Rankin, of Orland (Devlin & Devlin, of Sacramento, of counsel), for respondent.

SHAW, J. The appeal is from the judgment. The objects of the action, as expressed in the prayer of the complaint, were to obtain a decree declaring void certain state land patents issued to Robert M. Rankin and Thomas J. Dunlap, respectively, or, in case the patents should be held legal, to declare that defendant holds title to the lands described therein in trust for the plaintiff, and that he be compelled to convey said lands to plaintiff, and for general relief. The findings are within the issues, and the principal, if not the only, points urged in support of the appeal are that the findings do not support the judgment, and the facts will be stated as we proceed with the argument.

The land in controversy is the south half, the northwest quarter, and the south half of the northeast quarter of section 36, township 34 north, range 9 east, Mt. Diablo meridian, situated in Lassen county. Said section is one of the school sections granted to the state by the United States. On May 11, 1903, Peter D. Bernhard, the plaintiff, offered to the surveyor general an application and affidavit, in due form, to purchase said land, and also offered to pay the fee and make the deposit required by law on the filing of such an application. The surveyor general refused to receive or file said application and affidavit or accept the money tendered, claiming that the land was subject to certain taxes assessed against it while it was held under a previous purchase from the state, after the purchase and before said purchaser's right became extinguished by foreclosure, and that Bernhard was required to pay the taxes, penalties, interest, and costs so assessed, as a condition of making his entry. Bernhard on the same day began an action in the superior court of Sacramento county against the surveyor general for a writ of mandate to compel him officially to accept said fee and receive and file said application and affidavit as of the date of May 11, 1903. An alternative writ of mandate was issued in said action on May 14, 1903, and was duly served on the surveyor general on May 15, 1903.

Notwithstanding this offer to purchase and the pendency of the action and service of the writ upon him, the surveyor general, on May 27, 1903, accepted from Dunlap an application and affidavit to purchase the south half of said section (Dunlap then paying the fees, the deposit, and also the taxes claimed by the surveyor general, assessed as aforesaid), and thereafter issued a certificate of purchase, in pursuance whereof a state patent was issued to Dunlap on November 29, 1904. On May 27, 1903, Rankin also applied in like manner to purchase the remainder of the land in controversy, paying the deposit, the fee and the taxes. His application and affidavit were accepted, and in pursuance thereof a state patent was issued to him on November 29, 1904. At the time these patents were issued there had been filed in the proceeding in mandamus, a demurrer to the amended complaint therein, and said demurrer had not been disposed of by the court. Afterwards, and before the present action was begun, the mandamus suit was decided, resulting in a final judgment commanding the surveyor general to receive the said application of plaintiff to purchase said land, on payment of the fees and deposit provided by law, and to file the same in his office as of the 11th day of May, 1903. The payment was made, the surveyor general thereupon complied with the judgment, received and filed the application, and thereafter in pursuance thereof, full payment having been made, a state patent was issued to the plaintiff, purporting to convey to him the lands described in the complaint herein. This patent bears the date of August 29, 1913.

Upon the facts above stated, considered apart from the other findings of the court, it is clear that the plaintiff was entitled to the relief asked. Section 1 of the act of 1889 (St. 1889, p. 434) provides that applications to the surveyor general to purchase school lands must be accompanied by a deposit of $20, and that the surveyor general should give the applicant a receipt therefor, and that the receipt should be accepted by the county treasurer as part payment of the purchase price. Section 2 provided:

> "Any number of filings on any section of land is hereby permitted and allowed under the provisions of this Act. Should the first filing be abandoned by the applicant, the next filing on such section, in order, shall have the same right as if it had been the first filing."

[1-4] Section 3499 of the Political Code then provided that "if two or more claim the same land," the contest must be determined as provided in section 3414. That section provides that when "a question of law is involved," the contest must be referred to the superior court of the county in which the land lies. Under section 3498, as it read at that time (St. 1885, p. 139), an unapproved application to purchase land from the state could not be considered void, although on file for more than six months, if approval thereof had been demanded by the applicant. The proceeding in mandamus was, in effect, a continuing demand for such approval and it kept alive the application of Bernhard. When the applications of Dunlap and Rankin were made for the same land, it made a case where two or more persons claimed the same land. The determination of their respective rights, as will be seen, involved a question of the validity of the previous deeds to the state for the taxes above mentioned, which was a question of law. Consequently, it was then the duty of the surveyor general to refer the applications to the proper superior court, or to present the matter of the conflicting claims to the court having jurisdiction of the mandamus proceeding, instead of accepting the later applications and issuing unqualified certificates thereon to the said applicants. With respect to the rights of the persons in this situation, in Hinckley v. Fowler, 43 Cal. 63, where Fowler's application antedated that of Hinckley for the same land, the court said:

> "The application of Fowler, thus made in accordance with law, gave him, as against the state, and, so long as the statute remained in force, a privilege to purchase the land he applied for. As against the officers of the state, and all applicants for the same land subsequent in point of time, it conferred upon him a right to purchase, which could only be lost by his own failure to pursue the further steps which the statute had prescribed. The malfeasance or misfeasance of any of the officers could not deprive him of the benefit of his application, nor operate to postpone him to the claim of a subsequent applicant."

See Pollard v. Putnam, 54 Cal. 630; Sherman v. Winkle, 121 Cal. 503, 53 Pac. 1090, 54 Pac. 270; Smelting Co. v. Kemp, 104 U. S. 647, 26 L. Ed. 875, to the same effect. Upon these principles, and under the provisions of the act of 1889, above quoted, it is plain that if Bernhard had the right to purchase on the terms he proposed, his claim was paramount to that of Dunlap or Rankin, and that the surveyor general had no right or power to postpone his claim to that of a subsequent applicant. With reference to the rights of the parties in such circumstances, when the land department of the state has proceeded, notwithstanding the law, to issue certificates and patents to different persons for the same land, this court said:

> "In cases of conflicting patents from a paramount source of title, it is well settled that, even at common law in actions of ejectment, the court will look behind the patents and ascertain which party had the prior equity. When this is ascertained, the equity will attach itself to the legal title, which will take effect by relation at the time when the equity accrued. Thus it often happens that a junior patent, founded on a prior equity, is held, even in a court of law, to prevail over an eider patent founded on a junior equity." Smith v. Athern, 34 Cal. 511.

Other cases to the same effect are Yates v. Smith, 38 Cal. 65; Poppe v. Athearn, 42 Cal. 615, and Young v. Shinn, 48 Cal. 28.

It follows that the right of the plaintiff, under his patent, would relate back to the time when he made his application and offered the necessary deposit to make the same good, and that as this was prior to the applications of the other patentees, the plaintiff's patent would prevail.

In the court below the defendant contested the priority of the plaintiff's patent upon substantially the same grounds that were presented by the surveyor general in opposition to the writ of mandate in the mandamus proceeding. The court below held that the judgment in the mandamus case was not binding on the defendant as an adjudication of his right or title, and on the defense set up it made findings in favor of the defendant. We proceed to consider the points arising from these findings.

In 1873 one George Foster obtained a certificate of purchase from the state for the south half of the section, upon a partial payment of the price. On January 24, 1881, his right to purchase was forfeited by the filing of a certified copy of a foreclosure decree against him in the surveyor general's office, and the land thereupon again became subject to entry and sale. Pol. Code, §§ 3458 to 3554; Directors v. Abila, 106 Cal. 355, 39 Pac. 794. In 1886 Lawrence J. Parkinson obtained from the surveyor general a certificate of purchase for the whole of section 36, and made a partial payment thereon. He afterwards transferred his right thereunder to Boggs & Champlain. The deferred payments to the state were not made, and on June 20, 1896, a foreclosure decree, purporting to forfeit the said right, was entered in the superior court, and was filed in the surveyor general's office on July 6, 1896. The court below found that the summons in the action was never served, and that consequently the court did not have jurisdiction to make said decree. In 1895 the land was assessed for taxes in the name of Boggs & Champlain, and on September 13, 1901, a tax deed to the state, in pursuance of a sale based on said assessment, was filed in the surveyor general's office. In 1896 the south half of the section was assessed for taxes in the name of George Foster, and on August 26, 1902, a tax deed to the state, made in pursuance of a sale based on the Foster assessment, was filed in the surveyor general's office. When Bernhard applied to purchase the land in 1903 he did not offer to pay the sums due under these tax deeds. The court below held that he should have made such payments, and that his application was ineffectual because of his omission to do so.

[5] The court below was in error in holding that the record in the Parkinson foreclosure did not show jurisdiction. Its decision on that point was based on the fact that in a copy of the summons attached to the proof of publication included in the judgment roll the description of the land described the section as "section 16," instead of section 36. No other form of proof of service was on file, nor was the original summons among the papers. The decree itself, however, contained the following recital:

> "In this action the defendant Lawrence J. Parkinson having been regularly served with process, as required by law, and having failed to appear and answer the complaint of the plaintiff herein, and the legal time for answering having expired, and the default of said defendant Lawrence J. Parkinson having been duly entered according to law."

It further recited that the case was legally brought on for hearing, and duly submitted to the court, and that the court heard "the proof necessary to enable it to render judgment herein." The defect in failing to correctly state the number of the section in the description of the land was not fatal to the jurisdiction. Where there is a recital of service, such as that contained in the present decree, the fact that there appears among the papers what purports to be a copy of the summons which incorrectly describes the land is not sufficient to overcome the recital in the decree. "It will be presumed that other proof than that contained in the judgment roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it." Hahn v. Kelly, 34 Cal. 408, 94 Am. Dec. 742; McCauley v. Fulton, 44 Cal. 361; Reiley v. Lancaster, 39 Cal. 354; People v. Davis, 143 Cal. 678, 77 Pac. 651; People v. Harrison, 84 Cal. 609, 24 Pac. 311. The result of these decisions is that where the judgment itself recites service, as in this case, and the original summons is not on file, nor any other evidence of service except the affidavit of publication with the defective description in the copy of summons, it will be presumed from the recital, that there was a summons actually published, or actually served, which did correctly describe the land, if any description was required. We are not to be understood as holding that any description of the land was necessary under section 407, Code of Civil Procedure, as then existing. It follows, therefore, that the court had jurisdiction, the decree was valid, and the right to purchase under the Parkinson certificate became extinguished on July 6, 1896, when the copy of the decree was filed in the office of the surveyor general.

[6, 7] The conclusion of the court that it was necessary for a purchaser, in order to make a legal application to purchase these lands, to pay the taxes assessed against the land while it was under the Parkinson purchase, is also erroneous. This conclusion was founded upon the provisions of section 3788 of the Political Code that, when land purchased from the state, and not fully paid for, has been sold to the state for delinquent taxes assessed thereon against the purchaser or his successor in interest, and a tax deed has been issued to the state upon such sale, and has been filed with the surveyor general, the land "shall again become subject to entry

and sale" in the same manner as before, except that the applicant must, as a condition to purchasing, pay into the state treasury, in addition to the price fixed for such lands, a sum equal to the delinquent taxes, penalties, costs, and accruing costs, by virtue whereof the state became a purchaser of the land at the tax sale and also the taxes subsequently accrued on the land prior to the date of the application. These provisions necessarily imply a valid sale to the state upon the tax assessment. They have no application where a deed has been made which is void on its face. In the present case both the deed executed upon the Foster assessment and that on the Boggs & Champlain assessment recited that the notice of publication of the delinquent sale was first published on a day which was more than 28 days prior to the day fixed therein for the delinquent sale. The statute on the subject (Pol. Code, § 3767) provided that the notice published must designate the day and hour when the property will be sold to the state, which sale "must not be less that twenty-one nor more than twenty-eight days from the time of the first publication" of the notice. It necessarily follows that the publication was not sufficient to authorize the sale and that the deed based thereon was void.

[8, 9] Section 3787, which makes the tax deed "conclusive evidence of the regularity of all other proceedings," from the assessment down to the deed does not apply to or cure this defect. Sections 3786 and 3787 must be read and construed together. The phrase "all other proceedings," in section 3787, refers back to section 3786, and therefore includes only such proceedings as are not included in section 3786. The presumption as to the proceeding which fixes the time for the sale is prescribed by section 3786. It declares that the tax deed is "primary," meaning prima facie, evidence of the fact that the property was sold "at a proper time." Subdivision 5. The statement in Warden v. Broome, 9 Cal. App. 175, 98 Pac. 252, to the effect that this matter was covered by section 3787, is inaccurate, and this was evidently overlooked or considered unimportant by this court in denying a rehearing in that case. The "proper time" here referred to is the time designated in the published notice, as provided in section 3767. That time is to be fixed by the tax collector when he prepares the notice and publishes it with the delinquent list. Sections 3764, 3765. The tax deeds here in question were therefore only prima facie evidence that the tax sales on which they were founded were made "at a proper time." This prima facie proof was completely refuted by recitals in the deeds to the effect above stated, showing that the sales were not made at "a proper time," but were made at a time when any lawful proper time had expired. Each tax deed was therefore void on its face. It is proper here to explain that the phrase "such deed," with which both sections 3786 and 3787 begin, must, in the present condition of the Code, be understood to refer both to the deed authorized by section 3785 and to that authorized by section 3785b. When the Code was first enacted, and until the year 1909, the three sections, 3785, 3786, and 3787, appeared therein in regular consecutive order, with no intervening sections. The phrase "such deed" in sections 3786 and 3787 then necessarily referred only to section 3785, it being then the only section authorizing a tax deed. In 1909 section 3785a, and in 1913 section 3785b, were interpolated between section 3785 and section 3786, thus giving rise to some uncertainty as to the particular deed or deeds to which the phrase "such deed" applied. We are satisfied that it now refers both to section 3785 and section 3785b, and applies to the deeds authorized by both sections.

The result is that the surveyor general was not authorized to demand payment of any taxes by the plaintiff as a condition of accepting and approving plaintiff's application to purchase the land in controversy, and that he should have accepted and approved the same upon plaintiff's tender of the necessary amount of money.

[10-12] The validity of the foreclosure decree against Parkinson and the validity of the tax deed filed in the surveyor general's office based on the assessment to Boggs & Champlain were questions directly put in issue in the mandamus proceeding of Bernhard against the surveyor general. That judgment was an adjudication that the Parkinson foreclosure was valid, and that the tax deed was invalid. It was conclusive, not only of the matters actually alleged in opposition to the writ, but also of any fact which might have been alleged and proven in that proceeding to show that Bernhard was not entitled to the relief given by the judgment. Crew v. Pratt, 119 Cal. 149, 51 Pac. 38. It follows, therefore, that if the tax deed on the Foster assessment would have been a defense to the mandamus proceeding, it would have been the surveyor general's duty to plead it therein, and, failing to do so, he would be forever estopped to claim that it was a defense. Unquestionably that judgment was a final adjudication of the right of Bernhard, binding on the surveyor general in his official capacity. He is the state official in charge of all matters pertaining to the disposal of the public lands of the state. He is ex officio register of the state land office. Pol. Code, § 497. His duties in relation to public lands are prescribed in sections 3395 to 3573, inclusive, of the Political Code. In any proceeding against him to compel him to perform an official duty in disposing of the public land, he represents the state, and the judgment rendered in such proceeding is in all respects binding and conclusive against the state to the same extent that it binds the officer in his official conduct with respect to the matter decided. Such a judgment bars the state from afterwards setting up to the contrary of what is there adjudicated. Furthermore, it related back to the beginning of the proceeding, and fixed the respective rights of the parties and of the state as of that time, based upon the conditions then existing. It therefore follows that the right of Bernhard to have his application to purchase and his deposit of money accepted on the 11th day of May, 1903, was conclusively determined by that judgment, not only as against the surveyor general, but also as against the state. The state and all its officers were thereby estopped to deny such right, or to claim that thereafter in disregard of that right, it had regularly or lawfully disposed of the land to other and subsequent applicants, or that it could so dispose of it, so long as Bernhard's right continued.

But, although the Attorney General and the state were both precluded from claiming any right or title to the land adversely to Bernhard's title under his patent, or from disposing of the land contrary to the decision in the mandamus proceeding, the defendant, Wall, claims that he occupies a different position in regard to the matter. The surveyor general made no entry or memorandum whatever in the records of his office concerning the making of the application by Bernhard or the service of the alternative writ of mandate against him or the pendency of those proceedings. The records and files of his office disclosed nothing relating thereto. After Dunlap and Rankin obtained their patents in 1904, their titles by mesne conveyances became vested in one Burgess. The land never was occupied. Wall desired to purchase the land, and with that in view he had the records of Lassen county searched to ascertain the condition of the title. Bernhard had not caused any notice of the action to be filed in the recorder's office of that county, as provided in section 409 of the Code of Civil Procedure. Wall found nothing in the records to show any interest, right, or title of Bernhard in or to the land, but ascertained that the record showed that the title was vested in Burgess under state patents, and, being wholly without knowledge that Bernhard had any right or title to the land or made any claim thereto, the land itself being unoccupied, Wall thereupon purchased the land from Burgess, paid him $8,000 therefor, and, on November 21, 1907, received from him a deed therefor, which he duly recorded. He stands in the position of an innocent purchaser for value without notice of any adverse claim, and he contends that thereby he holds the title free from any claim of Bernhard under his previous application and subsequent patent.

[13, 14] The rule is well settled that where land is unoccupied and a person holds title thereto by a contract or deed which is not recorded, and a third person in ignorance thereof, in good faith and for value, buys the land from the apparent record owner thereof, he takes the title free from the prior, but undisclosed and unrecorded title of the other party. Civ. Code, § 1214. The plaintiff claims that this rule does not prevail where the party claiming to be an innocent purchaser holds under a deed or patent which is absolutely void. The proposition cannot be denied. It applies as well to private conveyances as to patents issued for public lands of the state or of the United States. If the land in question never were public property, or if it had previously been disposed of or withdrawn from sale or disposition, or if the law had not made any provision for the sale thereof, or had reserved it from sale temporarily at the time the initiatory steps for its acquisition were taken and the proceeding initiated had not been subsequently ratified or authorized, a patent issued to a claimant would be absolutely void, at least as against a prior valid claim, although regularly obtained in form as provided by law. Lake Superior, etc. Co. v. Cunningham, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. Ed. 183; Parker v. Duff, 47 Cal. 554; McGarrahan v. New Idria, etc., Co., 49 Cal. 335.

[15] The plaintiff claims that the land was withdrawn from sale the moment Bernhard made his application to purchase, accompanied with the legal tender of the fees and the required deposit of money. The argument is that this application, although not accepted or approved, was the first initiatory step in his proceeding to obtain the state patent, that it has been diligently followed up to patent, and that, under the decisions of this court and of the United States Supreme Court, his patent is founded on a prior equity, and, though later in date, must prevail over the patents issued upon the subsequent applications of Dunlap and Rankin, even if the land has passed into the hands of an innocent purchaser for value. The general rule invoked is that—

> "The party who takes the initiatory in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises." Shepley v. Cowan, 91 U. S. 337, 23 L. Ed. 424.

The patent afterwards issued, it is said, relates back to the date of the initiatory act, and cuts off intervening claimants. Id. There are many decisions to this effect. For the most part, however, the facts upon which the status of an innocent purchaser for value must depend did not exist in those cases, and the question was not discussed or mentioned. The cases in which the first pre-emption claimant has been held to have the prior equity as against a subsequent entryman whose patent was first issued could not come within the conditions necessary to raise the question, for in order to obtain any right at all under the pre-emption laws, the claimant must have first settled upon and improved the land claimed, and must have thereafter personally and continuously resided upon it. Bohall v. Dilla, 114 U. S. 51, 5 Sup. Ct. 782, 29 L. Ed. 61. Such continuous residence and improvements would constitute possession and occupancy, and would impart constructive notice to all subsequent claimants of the land. All such cases may therefore be excluded from consideration. The following cases, cited and relied on by plaintiff, come within this category: Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Weeks v. Bridgman, 159 U. S. 541, 16 Sup. Ct. 72, 40 L. Ed. 253.

The same reasoning applies to the cases wherein the initiatory step which created the prior equity was the filing of some paper in the public land office, or the making of some entry in the books thereof, showing the claim of such first claimant and constituting a part of the public record and files of the office. Such writings would impart notice to a subsequent claimant, and would prevent him from occupying the position of an innocent purchaser. The following cases, cited by the plaintiff, are of this class: Smith v. Athern, supra; People v. Carrick, 51 Cal. 325; Stoddard v. Chambers, 43 U. S. (2 How.) 284, 11 L. Ed. 269; McCreery v. Haskell, 119 U. S. 327, 7 Sup. Ct. 176, 30 L. Ed. 408; Webster v. Clear, 49 Ohio St. 397, 31 N. E. 744; Hinckley v. Fowler, supra; Williamson v. Berry, 8 How. (49 U. S.) 531, 12 L. Ed. 1170; Moyer v. McCullough, 1 Ind. 340; Kempner v. State, 31 Tex. Civ. App. 363, 72 S. W. 888; Roseberry v. Hollister, 4 Ohio St. 297; Huntington v. Donovan, 192 Pac. 543.

The only other case cited by plaintiff on this point is Boyles v. Kelly, 10 Serg. & R. (Pa.) 217. The facts in that case occurred before, during, and immediately after the War of the Revolution, and it concerned land subject to sale under the laws of Pennsylvania, to which we have not access. It appears from the opinion, however, that the prior settler whose successors finally prevailed had, in regular form, made application to the public land officers to buy the land, and that the only defect in his proceeding was the failure of the public surveyor to return the survey he had made for that settler. As to that, the court held that such misconduct of the officer could not prejudice the claimant, who was in no default, that the survey must "be considered as if it had been actually returned," and that the person who bought bona fide from a subsequent claimant who had secured a patent "was bound to take notice of the survey at his peril," and for that reason did not stand in the position of an innocent purchaser for value. The case is somewhat similar to the class of cases last mentioned. At all events, the first claimant was in actual privity with the state as a purchaser, and was shown to be so by the record, at the time the second claim was initiated.

In all cases where a prior equity has prevailed over a patent issued upon a subsequent claim, it appeared that the first applicant had done some act which had the effect, under the law, of bringing him into privity with the state as a purchaser of the land. He had been recognized, both by the law and the officers who were administering it, as an eligible purchaser. In the case of a preemption claimant, his settlement and residence on the land and the improvement thereof, with intent to purchase, were sufficient to bring him into privity with the United States as a purchaser. In the case of land which could be purchased without a previous entry thereon, the making of a proper application by one qualified under the law to purchase it, accompanied with the payment of the legal fees and the deposit of the required part of the purchase price, and the acceptance and filing thereof, would bring the applicant into privity with the state as a purchaser, even before the officer approved the application. But we know of no case which holds that the mere offer of such application, fees, and deposit, and the refusal of the officer to receive them, will give the applicant privity with the state, and enable him to resist the claims of third persons. The decisions are to the contrary. In Burling v. Thompkins, 77 Cal. 261, 19 Pac. 429, the court said that only one in privity with the paramount title of the United States can attack collaterally a patent issued for lands listed to the state as lieu lands, and that—

> "The refusal of the register of the United States Land Office to allow him [the defendant] to make proper application, and pay the fee required, does not, under the circumstances, establish any privity with the United States."

To the same effect see Kentfield v. Hayes, 57 Cal. 411; Dreyfus v. Badger, 108 Cal. 64, 41 Pac. 279; Youle v. Thomas, 146 Cal. 543, 80 Pac. 714; Doll v. Meador, 16 Cal. 326; Burrell v. Haw, 40 Cal. 377; Damrell v. Meyer, 40 Cal. 170.

The terms of the statute do not sustain the claim that the mere rejected offer of Bernhard operated to withdraw the land from sale to other applicants, or to put him in privity with the state. It is the making of a filing which establishes the status of the applicant and gives him preference over subsequent filings, unless his filing is abandoned. It is therefore clearly apparent that so far as third persons are concerned, who acted without knowledge of his offer and paid money for the land on the faith of the record title, the plaintiff has no prior equity. He paid nothing for the land until long after the defendant purchased it. The delay of nearly seven years in bringing to judgment the action in mandamus indicates that he used little diligence in prosecuting the same. There was ample time before the Dunlap and Rankin applications were approved for him to have had them brought in as defendants to the action, and thus have concluded them by that judgment. Plaintiff's case does not present as strong an appeal to the principles of equity as that of the defendant.

[16] The plaintiff claims, however, that the surveyor general, as a public officer in charge of the land department of the state, represented the state in the mandamus proceeding and all persons thereafter coming in privity with it, and consequently that the judgment in mandamus concluded the subsequent patentees and all persons claiming under them, citing Lyman v. Faris, 53 Iowa, 498, 5 N. W. 621; Ashton v. Rochester, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619; and similar cases. These are cases where in an action by or against a public officer the validity of a tax levy or local assessment and the duty of the officer relating thereto were involved and determined. They establish the rule that in such cases the officer represents all persons whose property is affected by the tax or assessment, and that the judgment therein finally determines the validity or invalidity of the tax, and is binding on the entire class of persons interested, although not parties to the action and having no knowledge thereof. We do not think this principle is properly applicable to the case where an officer is dealing officially with a specific parcel of land which he is authorized by the state to sell, and is compelled by mandate to perform a particular duty respecting the same to a person desiring to purchase it.

> "This doctrine, tersely stated, is to the effect that where it appears that a particular party, though not before the court in person, is so far represented by others who are before the court that his interests receive actual and efficient protection, his actual joinder may be dispensed with, and the decree may be held to be binding upon him." 15 Ency. of Pl. & Pr. 627.
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> "Like most of the other exceptions to the general rule, the doctrine of virtual representation rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice." Id. 629.

One of the conditions to which the doctrine applies is where the parties are too numerous to be conveniently brought before the court in the action. The cases cited are of this class. This condition does not exist here. No person was or could be interested in the proceeding in mandamus until he had himself applied to purchase the identical land, in which event, as we have said, the law provides a mode for settling the respective rights of the several claimants. Pol. Code, § 3414. We know of no case in which the doctrine of representation has been enforced against a person who was not a party to the action and who, during its pendency, purchased the property involved therein without notice and for value, from one who also was not a party. The reasons upon which the doctrine rests do not exist in such a case, and its application would produce manifest injustice.

[17] No notice of the pendency of the action in mandamus as provided in the Code was filed either in Sacramento county, or in Lassen county, where the land lies. It is at least doubtful if section 409, Code of Civil Procedure, applies to such actions. If it does, the terms of that section, in effect, declare that, if there is a failure to comply with it, there can be no constructive notice of the pendency of the action. If that section does not apply to such action, it then comes within the rule stated in MacDermot v. Hayes, 175 Cal. 108, 170 Pac. 616, and other decisions there referred to, to the effect that section 409 is exclusive, and that an action of any other character than is there provided for does not constitute constructive notice of its pendency.

[18] Finally the plaintiff claims that the defendant cannot assert his title as an innocent purchaser for value without notice, unless he avers and proves that, at the time of the execution of the deed from Burgess to him, Burgess was in possession of the land. He supports this claim by the following quotation from Eversdon v. Mayhew, 65 Cal. 167, 3 Pac. 644:

> "To entitle a party to protection as such a purchaser he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment, for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser."

This passage is a part of the argument to support the proposition that one claiming as an innocent purchaser must show that he took without notice of the adverse claim. The question of possession was not involved. Several later decisions of this court are cited, each of which either paraphrases or quotes the passage in Eversdon v. Mayhew. All of them, however, were directed to the subject of notice and the question of possession was not involved. The rule there stated is substantially that enunciated by the Supreme Court of the United States in Boone v. Chiles, 10 Pet. (35 U. S.) 210, 9 L. Ed. 388. That case related to transactions which took place near the beginning of the last century. The law applying to such transactions of that period was the common law of England, and the rule regarding bona fide purchasers was the rule obtaining under the old common law. The reason for the insertion of the statement in the rule that the one claiming as a bona fide purchaser must show that his grantor was in possession is readily perceived when we consider the common-law rule that a deed for land then in the adverse possession of another was inoperative and void, excepting against the grantor and persons claiming under him. Steeple v. Downing, 60 Ind. 486; Patterson v. Nixon, 79 Ind. 251; 1 Jones on Real Property, § 121. It is but a variation of the rule already stated that the innocent purchaser cannot claim as such if his deed is void. It being necessary for him to aver and prove that he holds under a valid deed, it was, of course, necessary under the common law for him to allege that his grantor was then in possession, for otherwise his deed would be void. This is the foundation of that part of the rule, and this is the effect of all the decisions on the subject. It has no application in this state, where a deed by a person out of possession is effective to pass all the title of the grantor both as against the person in adverse possession and all others. Consequently, the foundation of the rule invoked by the plaintiff does not exist. The patents from the state to Dunlap and Rankin operated to transfer the title of the state to them, and the subsequent conveyances transferred it to the defendant. If all the purchasers had had notice of the claims of Bernhard, it may be that they would be bound to hold the land in trust for him. But inasmuch as Wall did not have such notice, the title has passed, notwithstanding the fact that the land was at the time unoccupied.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

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50 Cal. App. 176

CURTIN v. MORAN & CO. (Civ. 2184.)

(District Court of Appeal, Third District, California. Nov. 26, 1920.)

1. Evidence 🔑450(8)—Sale agreement held ambiguous, justifying admission of parol testimony.

In a contract for the sale of a specific number of cows at a price per head, a provision that "all stock for delivery are to be selected by a representative of the buyer" *held* obscure as to whether the buyer was to select 75 head, or to select such number at fixed price as representative might desire, so that parol testimony was admissible, not to modify the agreement, but to explain its language.

2. Appeal and error 🔑1011(1)—Finding on conflicting evidence conclusive.

Where a conflict in evidence has been resolved by the trial court in favor of plaintiff, that finding is binding on the District Court of Appeal.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by John B. Curtin against Moran & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

Snyder & Snyder, of San Andreas, for appellant.

J. B. Curtin and J. T. B. Warne, both of Sonora, for respondent.

HART, J. This is an appeal by the defendant from a judgment rendered and entered in favor of the plaintiff and against the defendant. The action arises out of a written contract entered into by and between the parties on June 1, 1919, for the sale of 90 head of cattle by the plaintiff to the defendant.

The said contract provided that the plaintiff would sell to the defendant and that the latter would purchase and receive 90 head of "fat cattle" as follows: Seventy-five head of cows at $75 per head, five bulls at $75 per head, 1 bull at $20, and nine head at a price to be later agreed upon or at the time of the selection of the cattle by defendant or its agent. Upon the execution of said contract, the defendant paid to the plaintiff the sum of $2,000 on the purchase price. The contract further provided:

> "All of said cattle to be selected by a representative of the buyer, and the prices hereinbefore stated include delivery f. o. b. cars at Warnerville. All stock for delivery are to be selected by a representative of the buyer in time for delivery as aforesaid. Said seller agrees that he will maintain, feed, and water and care for said stock, and deliver them as herein provided, in a fat and merchantable condition, and that he will not deliver any swaybacks, big jaws, dwarfs, or otherwise deformed or unhealthy stock, on this contract, and same shall be free and exempt from state and federal quarantine regulations, and free from all liens and incumbrances whatsoever; also that no stock shall be removed or sold from the above-described live stock until after the delivery of all the stock included in this contract, without the written consent of the buyer; all stock to be shrunk per cent. and * * * stood hours in a dry pen without feed or water before weighing, and all stock to be dry and free from any foreign matter when weighed. These cattle are to be from 84 head at Jewel Ranch."

The specific controversy between the parties is as to the 75 head of cows which were delivered to the defendant, there being no dispute as to the bulls delivered under the contract. It appears that the plaintiff is an attorney at law, and that at the time the cattle were selected (on the 24th day of June, 1919) he was engaged in the trial of a case in the superior court of Alameda county. Because of being so engaged, the plaintiff, by his request, was represented, at the time of the selecting by and delivery of the cattle to the defendant, by his brother, Robert A. Curtin. The testimony shows that on that occasion the representative of the defendant selected 65 cows from the 84 head of cows at $75 per head, and 10 of the cows of the 84 at $40 per head. The 9 head at any "agreed price" were not taken by defendant.

The plaintiff claims that the contract expressly and without qualification called for the payment of $75 per head for 75 head of cows, and testified that it was understood that the 75 head were to be picked by defendant from the 84 head of cows owned by plaintiff and inspected by defendant; that the agreement by his brother to accept $40 per head for 10 of that number of cows was contrary to the terms of the contract and wholly without authority from him.

The defendant, in his brief, expressly concedes that Robert A. Curtin was without authority to change or modify the terms of the contract, or enter into a new one respecting the sale or to agree to receive less for any of the cattle than the amount agreed upon in said contract, but declares that respondent is seeking to read into the contract "a provision that appellant was to pay $75 per head for a pick of 75 cows out of the 84 head in the pasture, and that the remaining 9 cows were to be paid 'at agreed price,'" and contends that such is not the contract, and that no such construction can be placed upon the contract. It adds, quoting from the brief:

> "When Mr. Mitchell (the agent and representative of the defendant in this transaction) and Robert A. Curtin (brother of plaintiff) agreed upon the price of $40 per head for the 10 head, this became as much a substantive part of the contract as the provision for the payment of $75 per head for the 75 cows."

[1] The contract in the main appears upon its face to be clear enough, and seems plainly to provide for the sale of 75 cows at $75 per head; yet the provision that "all stock for delivery are to be selected by a representative of the buyer," etc., throws some obscurity around it, and it is by reason thereof not certain whether the buyer was to select 75 head of cows at the price named, or to select such number at that price as the representative of the buyer might desire to accept. It was therefore proper for the court to receive, as it did, parol testimony, not, of course, for the purpose of varying or modifying the terms of the agreement, but to throw some light on what was meant by the language of the contract above quoted. The plaintiff testified that, at the time the written contract was executed, he exhibited to the representative of defendant, among other cattle, 84 head of cows; that it was then and there agreed between them that the defendant might purchase its pick of 75 cows out of the 84 head in the pasture, and that the price would be $75 per head for the 75 head of cows so picked or selected; that the defendant selected 75 head, which were delivered to its representative as agreed, but that, when he received the check for the balance assumed by defendant to be due on the purchase price of the entire lot of cattle sold, he found that the check was short of the amount actually due under the contract in the sum of $350.

The court below found the facts in accordance with the testimony of the plaintiff, and that testimony is, of course, sufficient to support the findings as to the transaction. The contention of the defendant that the agreement by Robert A. Curtin to accept $40, instead of $75, per head for 10 of the cows accepted by defendant, "became a substantive part of the contract," is obviously untenable. Not only so, but the contention is plainly inconsistent with the concession of counsel for the defendant, made in their brief, that Robert A. Curtin was without the authority as agent of his brother to change the contract, or to make any different or other arrangements regarding the sale of the cattle than those provided by the contract. Obviously, an agreement by an agent unauthorized by his principal, or having no implied or ostensible authority to make it, changing the terms of a contract previously made and entered into by the parties, cannot become a "substantive" or any part of the contract as it was originally made.

It is not disputed but that the defendant selected and accepted 75 head of cows. It is, indeed, directly so admitted by the defendant, and manifestly, if the representative of the latter concluded, when making the selection, that there were any of the 75 head so selected not of the value of $75 each, or for any reason did not measure up to the provisions of the contract as to the character or quality or condition of the cattle, he should either have refused for that reason to accept such cattle, or, desiring to take them, have negotiated any new agreement or arrangement which he might have thought justly should be made with the plaintiff himself, or some other person vested with authority by the plaintiff to change or modify the contract as it was originally made and subscribed to.

[2] Robert A. Curtin was not called as a witness by either side, and the only witness testifying for the defendant was Mills Mitchell, who represented the defendant in the transaction. It is true that Mitchell, in testifying, gave a different version of what was said and the understanding that was had by and between the parties immediately preceding the execution of the written agreement; but thus there was merely produced a conflict in the evidence which, having been resolved by the trial court in favor of the plaintiff, is binding upon this court.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

50 Cal. App. 150

RANSOME-CRUMMEY CO. v. COULTER.

(Civ. 3406.)

(District Court of Appeal, First District, Division 1, California. Nov. 26, 1920.)

1. Appeal and error 🔑1099(3) — Determination on former appeal as to validity of lien law of case on subsequent appeal.

In action to foreclose street assessment lien under the Vrooman Act, determination on former appeal as to validity of lien notwithstanding city's acceptance of roadway with agreement to make repairs out of city's general fund instead of by assessment *held* the law of the case on subsequent appeal, where the findings on retrial were almost identical with those under review on the first appeal.

2. Municipal corporations 🔑487 — Successor of owner making discriminatory agreement with contractor cannot avoid assessment.

A charter provision making street contractor's agreement with owner liable to be assessed to accept less than the price specified in the contract with the city, a fraud on all persons assessed other than parties to such contract, *held* not available to the successor in interest of a party to such a contract to defeat assessment lien, since successor in interest merely stands in the shoes of his predecessor.

3. Municipal corporations 🔑444 — Preparation of resolution of intention by street contractor does not invalidate assessment.

That resolution of intention to order street work adopted by the mayor and city council was prepared by the street contractor and presented by the contractor to the city for passage *held* not to affect the validity of the assessment lien.

Appeal from Superior Court, Santa Clara County; J. R. Welsh, Judge.

Action by the Ransome-Crummey Company against William A. Coulter. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

R. M. F. Soto, of San Francisco, for appellant.

Wm. A. Coulter, for respondent.

WASTE, P. J. The plaintiff brought this action to foreclose a street assessment lien. The lower court held that the assessment was a nullity, and that the plaintiff had no lien or right of action. Judgment was entered for the defendant, and the plaintiff appeals after the denial of its motion for a new trial.

The proceedings were taken under the Vrooman Act (St. 1885, p. 147), incorporated in, and thereby made a part of, a former charter of the city of San Jose. They relate to regrading and paving the roadway of the crossing of Santa Clara and Twelfth streets in that city. Two trials have been had. Judgment was entered in favor of the defendant on the first trial. On appeal the judgment was reversed, and the cause remanded for further proceedings consistent with the court's decisions. Ransome-Crummey Co. v. Coulter, 177 Cal. 574, 171 Pac. 308; Ransome-Crummey Co. v. Bennett, 177 Cal. 560, 171 Pac. 304. On the going down of the remittitur, the plaintiff filed an amendment to its complaint, and the defendant, Coulter, filed an amended answer consisting of denials and separate defenses. The lower court found the allegation of the complaint to be true, except the general averment of adverse claims on the part of certain defendants, which was found to be untrue. The regularity of the proceedings is not challenged, and the plaintiff is entitled to a reversal of the judgment, unless its right to a lien is destroyed by the effect of the court's finding on the separate defenses set up by the defendant.

The respondent claims that his property is exempt from the assessment by reason of a previous acceptance of the roadway by the city. He alleged, and the court found, that by an ordinance passed long before the present proceedings were initiated the city of San Jose had accepted the roadway of Santa Clara street, with an agreement on its part that thereafter it should be kept open and in repair by the city, the expense to be paid from the city's general fund. This ordinance, it appears, was declared valid by the superior court of Santa Clara county, in an action between other parties, in July, 1893. The same contention was directly passed upon and the point completely disposed of on the former appeal. The freeholders' charter of the city of San Jose, in force at the time of these proceedings, adopts, and makes part of itself, when not inconsistent with its express provisions, the general street law, commonly known as the Vrooman Act (Stats. 1885, p. 147), as the said law was at the time of the adoption of the charter, and as such law should be thereafter amended. It was pointed out on the former appeal that section 20 of the Vrooman Act was the only legal basis for such an acceptance as claimed by respondent. As that section had been repealed on April 5, 1911 (St. 1911, p. 635), and there was not, when the proceeding for the street work here involved was subsequently commenced, any such provision, either in the Vrooman Act or the freeholders' charter of the city of San Jose, the court held that the facts embraced in the former findings as to the acceptance of the street by the city constituted no defense to plaintiff's action. Ransome-Crummey Co. v. Coulter, supra, 177 Cal. 575, 171 Pac. 308; Ransome-Crummey Co. v. Bennett, supra, 177 Cal. 566–568, 171 Pac. 304.

[1] The findings on this point made on the retrial of the case are almost, if not quite, identical with those under review on the first appeal, and we regard the question as settled by the former decision, with the possible ex-

ception that it is now made to more clearly appear that the ordinance of acceptance has never been amended or repealed and is (at the time of the trial) in full force and effect. Respondent urges that this last-noted fact constitutes an important and material addition to the findings which he claims was not considered by the Supreme Court on the former appeal. His argument is, in brief (although the findings do not show the facts), that the freeholders' charter of the city of San Jose, adopted in 1897, by apt provision, continued the ordinance of acceptance in force, and it, not having been repealed, constituted a contractual relation between the city and the property owners along Santa Clara street which could not be interfered with by the repeal of section 20 of the Vrooman Act. We think respondent is incorrect in his estimate of the weight of the decision on the former appeal, and what was there considered. The Supreme Court said:

> "We shall assume that the facts were such as to authorize the enactment of this ordinance under this section, and that it was a valid enactment precluding further repair and improvement of the roadway at the expense of the property fronting thereon for so long as it remained effective. * * * 'Appellant contends that the repeal [of section 20 of the Vrooman Act] struck dead the ordinance of acceptance.'"

The court, after giving fully its reasons, then held "that the legislative repeal of section 20 of the Vrooman Act operated to repeal the power conferred upon the city of San Jose in the matter under consideration," and that the effect of that repeal was to revoke the privilege of exemption theretofore enjoyed by the property owners along Santa Clara street. Ransome-Crummey Co. v. Bennett, supra.

A provision of the charter of the city of San Jose requires the contractor for street work, before any assessment can be made, to file an affidavit to the effect that he has not entered into any private agreement with any person liable to be assessed for such street work to accept less than the price named in the contract, nor to make a rebate or reduction to him from such price. Any such agreement, the charter provides, shall be deemed a fraud upon all persons liable to be assessed, other than property owners who were parties to the contract, and operates to void as to such persons so defrauded any assessments made for the work done under the contract. Such an affidavit was filed in this proceeding. Respondent contends that its statements do not conform to the facts, and that by reason of an agreement entered into by the plaintiff, and respondent's predecessor in ownership of the lot, and to which compact respondent was not a party, he (respondent) was defrauded, and that the property is not now liable for the assessment.

In this connection the trial court found that a private agreement was entered into June 21, 1909, by the plaintiff with the owners of lots fronting on Santa Clara street (to which contract the defendant, Coulter, was not a party, but to which his predecessor in interest, Walter, was) for the paving and improvement of that street, including the crossing of Santa Clara and Twelfth streets. The agreed prices for doing this work were 16 cents per square foot for asphalt paving, including grading, $35 each for catch-basins, and 65 cents and 75 cents for specified pipe drains. So much was considered on the former appeal, and it was held that the lower court's finding made it clear that such private contract had no reference to any contemplated street improvements by the city, and did not constitute a defense to plaintiff's claim. Ransome-Crummey Co. v. Coulter, supra. On this appeal, however, additional facts are presented, the effect of which, respondent contends, is to bring the lien now sought to be foreclosed within the ban of the charter provisions.

The court now finds that work under this private agreement of June 21, 1909, was commenced by the plaintiff and carried on until the roadway of Santa Clara street was improved as far as the intersection of that thoroughfare with Twelfth street. Plaintiff then presented a bill to Walter, then in possession of the lot now owned by defendant, which is adjacent to the crossing named, for the amount due under the private agreement for the frontage work on Santa Clara street. Walter demurred to the bill, claiming that under the agreement the intersecting crossing of Santa Clara street and Twelfth street should have been improved by plaintiff before the work could be considered completed. By way of settlement Walter paid to plaintiff the sum of $232.24, and took in return the following agreement:

> "San Jose, Cal., July 30, 1910.
>
> "Received of Dr. C. H. Walter $232.24, said sum being in full payment for paving and constructing concrete gutters on Santa Clara St. on frontage of 63.98 ft., beginning at the southeast corner of Twelfth and Santa Clara Sts. and running easterly said distance of 63.98 ft., said sum being in full payment for 1311.98 sq. ft. of asphalt paving including grading at 16c per sq. ft. and 160 sq. ft. of concrete gutter at 14c per sq. ft., and said sum being paid pursuant to the agreement made and entered into on the 21st day of June, 1909, between ourselves and certain property owners on E. Santa Clara St. In consideration of having received said sum of $232.24 on this date, we hereby agree that, should you be required to pay said sum or any other sum to any other person or corporation for said work, to protect you against, and to assume, any assessment that should be levied for said work against your property.
>
> "Nothing herein contained shall in any wise release us from our liability under said con-

tract of June 21, 1909, to do such work as may be required to be done on the crossing and intersection of Twelfth and Santa Clara Sts. and for which said work you agree to pay for asphalt paving at the rate of 16c per sq. ft. according to the portion for which you are liable according to the street law.

"Ransome-Crummey Company,
"By Henry W. Whipple."

Some 15 months after the giving of this receipt by plaintiff to Walter the public proceedings for the improvement of the Twelfth street crossing on Santa Clara street were initiated by a resolution of intention adopted by the city council October 9, 1911. The plaintiff entered into the public contract for doing the work, under which the present lien arose, February 28, 1912, at a price of 25 cents per square foot for constructing asphalt pavement, including concrete foundation, and regarding, $75 each for catch-basins, and $1 per foot for pipe drains. These prices are in excess of those named in the private contract entered into with all the property owners for the improvement and the price for the crossing work named in the receipt of July 30, 1910.

While the agreement entered into by plaintiff and Walter in July, 1910, appears to be but little more than a receipt for money paid for work already done under the private contract with all the property owners along Santa Clara street, and a reaffirmance of that agreement by the plaintiff so far as it related to the further work demanded by Walter, the trial court found that it "was made and entered into by plaintiff with full knowledge on its part of an intention to apply for, and improve said Twelfth street crossing under a public contract with the city."

[2] On these facts the respondent argues that he was a party defrauded by the transaction, and that the assessment against the lot he now owns is void. We seriously doubt if the additional matter now presented for consideration is sufficient to remove the private contract of June, 1909, and the settlement thereunder arrived at by plaintiff and Walter, from the holding on the former appeal. The trial court was of the opinion that it did, and the respondent so argues. Whether it did or did not seems to us immaterial, for the respondent is not "one of the persons liable to be assessed for such work" who is protected from fraud by the charter inhibition against private contracts between the street contractor, and some of the other property owners. He stands in the shoes of his predecessor, Walter, who was a party to the alleged unlawful agreement, and who is accorded no protection by the charter provision. Respondent asserts that, as the successor of Walter, who made the private agreement with plaintiff, he is by virtue of his assignment of Walter's contract to purchase the lot, and his assignment of Walter's contract with the plaintiff, entitled to all defenses Walter might have in the premises against plaintiff's claim. But Walter was directly excepted from the beneficent provision of, and was given no right of defense by, the charter provision. Neither is the respondent.

Respondent asserted as another defense to plaintiff's claim and the court found that he saw and read the agreement between plaintiff and the lot owners on Santa Clara street, and the subsequent agreement with Dr. Walter, and knew that a permit had been issued by the city to plaintiff to do the street work referred to in the former contract, and that, being deceived by the guaranty of plaintiff, he was deceived and induced into purchasing the lot "to his damage and loss from the expenses imposed in litigation, loss of time," etc. What his losses were does not appear but that is immaterial here, for the facts embraced in the findings do not avail as a defense in this action.

[3] The fact that the resolution of intention to order the street work adopted by the mayor and city council was prepared by the plaintiff, and presented by it to the city for passage requires but little notice. There is nothing in the record to indicate that such action was the result of corruption or fraud. Of like import is the contention of respondent that the plaintiff was guilty of constructive fraud, in that it entered into a private agreement to do the work upon certain terms, and then induced the city to award it a contract to do the work at greatly increased prices. He insists, therefore, that plaintiff is estopped from enforcing its alleged lien upon the lot. This contention has no support in the findings.

On the record brought here, and under the law of the case so well established on the former appeal (Ransome-Crummey Co. v. Coulter, supra; Ransome-Crummey Co. v. Bennett, supra), the lower court should have found for the plaintiff.

The judgment is reversed, and the cause is remanded to the lower court, with the direction that it enter judgment upon the findings in accordance with the prayer of the complaint.

We concur: RICHARDS, J.; BEASLEY, Justice pro tem.

50 Cal. App. 125

SACRAMENTO SUBURBAN FRUIT LANDS CO. v. WHALEY et al. (Civ. 2194.)

(District Court of Appeal, Third District, California. Nov. 24, 1920.)

1. Covenants 🔑61—"Direct benefit of property" as used in statute relating to covenants running with land defined.

The words "direct benefit of the property," as used in Civ. Code, § 1462, providing that covenants made for the direct benefit of the property run with the land, means any covenant which affects the title to real property or any interest or estate therein of the covenantee, and such covenant, is one which is intended to restore to the covenantee or the owner of the land some right with respect thereto which he has parted with pro re nata or for a special purpose; in other words, a covenant for the direct benefit of the estate or interest of the covenantee in the land mortgaged.

2. Mortgages 🔑310—Covenant for removal of lien from certain portion of property is for "direct benefit of the property" under statute.

While under the statutory law of the state a mortgage does not vest in the mortgagee an estate or interest in the mortgaged land, yet the mortgage affects the mortgagor's title, and a covenant in a mortgage providing for the removal of the lien of the mortgage from certain specified portions of the land mortgaged is a covenant for the unfettering pro tanto of the title, and is therefore a covenant for the "direct benefit of the property," within the meaning of Civ. Code, § 1462, providing that such covenants run with the land, in view of section 1463.

3. Mortgages 🔑310—Covenant of release pro tanto held not too indefinite for enforcement.

Provision in mortgage, "Said mortgagee shall release any 10-acre lot or more from the lien of this mortgage upon the payment by the said mortgagor to the mortgagee of $125 per acre for each acre so released," was not unenforceable because of indefiniteness and uncertainty as to the particular 10-acre lot upon which the release was to operate; it being evidently the intention of the parties that the mortgagor was at liberty to select any particular 10-acre tract or more that he desired to select.

4. Mortgages 🔑310—Right of mortgagor to release pro tanto inured to subsequent mortgagee.

If mortgagor had right to have fractions of land released upon payment to mortgagee of a specified amount per acre, such right inured to his grantee under a subsequent trust deed.

5. Mortgages 🔑310—Right to partial release available after default in payment.

Under a mortgage providing that 10 acres or more would be released from the lien of the mortgage on payment of a specified amount per acre to the mortgagee, the mortgagor could exercise his right even after default in payment of mortgage and commencement of a foreclosure suit, where the release clause contained no provision specifying a particular time at which such right might be exercised.

6. Mortgages 🔑310—Offer to pay whatever sum was due held sufficient tender under partial release clause.

Under a clause in a mortgage providing for a release of any 10-acre lot or more upon payment of $125 per acre for the lot selected by mortgagor, an offer to pay $125 per acre. "together with such further sums as said * * * company may have expended for taxes, or other charges against said property," was a sufficient tender by reason of the fact that the total sum of the taxes paid by the mortgagee on the lots and interest was presumably known to the mortgagee, but probably not known to the mortgagor.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Sacramento Suburban Fruit Lands Company against Martha M. Whaley and others. From an adverse judgment, plaintiff appeals. Affirmed.

J. W. S. Butler and B. F. Van Dyke, both of Sacramento, for appellant.

William M. Brown, of Los Angeles, for respondents.

HART, J. The defendants Martha A. Whaley and A. O. Whaley (whose middle initial is printed in the transcript both "G." and "C." by mistake), husband and wife, executed on February 19, 1914, a mortgage to appellant upon seven lots in Rio Linda subdivision No. 2, a portion of the Rancho Del Paso in Sacramento county, Cal., to secure the payment of a note for $6,748 due on or before February 19, 1919, with interest at 6 per cent. per year, payable yearly. Said mortgage contained the following provision:

> "Said mortgagee shall release any ten-acre lot or more from the lien of this mortgage upon the payment by the said mortgagors to the mortgagee of one hundred and twenty-five ($125.00) per acre for each acre so to be released."

Said covenant, it will be noticed, did not run to heirs and assigns.

The seven lots so mortgaged ranged in area from 5.689 acres to 13.309 acres, and the total area was 59.889 acres. Subsequent to the execution and delivery of said mortgage the said mortgagors executed and delivered a trust deed to J. R. Hicks, a trustee for Los Angeles Finance Company, and said Whaley and husband, covering the land described in said mortgage, which trust deed recited that it was made to secure a note for $1,000 and was subject to said mortgage for $6,748. Thereafter said note and trust deed were assigned to cross-complainant, First National Bank of Orange county, Cal. Defendants failed to pay interest or taxes after February 19, 1917, and in March, 1918, plaintiff announced its intention to consider the whole sum of principal and interest due, and so notified the mortgagors and J. R. Hicks, trustee, and defendant First National Bank of Orange. Thereafter, said interest, taxes, and principal being due, unpaid, and in default, on May 24, 1918, defendant J. R. Hicks, as trustee, and defendant First National Bank of Orange, tendered to plaintiff the sum of $4,375, being a sum in excess of $125 per acre for the acreage contained in said five lots, to wit. lots 97, 98, 99, 100, and 101 (amounting to 34.86 acres), but not sufficient to cover the delinquent taxes on these lots paid by the plaintiff for the mortgagors, and leaving out of consideration the interest then due on said mortgage note.

The answer and the cross-complaint of defendant First National Bank of Orange county and defendant R. J. Hicks, trustee, contain the following allegation, which is undenied by the plaintiff in its answer to said cross-complaint:

> "That on or about the 24th day of May, 1918, these cross-complainants duly tendered to the said Sacramento Suburban Fruit Lands Company the sum of $4,375, together with such further sum as said Sacramento Suburban Fruit Lands Company had expended in taxes or other expenses for the lands next hereinafter described, and requested said company to release from the lien of said mortgage the lands described in said mortgage as lots numbered 97, 98, 99, 100, and 101 of Rio Linda subdivision No. 2, that said lots contain 34.86 acres, but that said company refused to release said property from the lien of said mortgage."

Paragraph XII renews the above offer.

The court made its interlocutory decree, which also embraced findings harmonizing with the allegations of the cross-complaint of defendant First National Bank of Orange, etc., and R. J. Hicks, as trustee, etc., as to the execution and delivery of the promissory note and the trust deed to secure said note above referred to, and the offer of the cross-complainants—

> "to pay plaintiff the sum of $125 per acre for the release from the lien of plaintiff's said mortgage of said lots Nos. 97, 98, 99, 100, and 101 aforesaid, containing in the aggregate 34.86 acres of land, together with all sums previously paid by the said plaintiff for taxes on said lots since the 19th day of January, 1916, the same being the date of said note and deed of trust, as aforesaid (which said taxes so paid to this date the court now finds amount to the sum of $134.93), with interest on said payments from the date of the payment thereof to the date of repayment at the rate of 7 per cent. per annum; * * * that at the time the said offer was made by defendants as aforesaid, the said mortgagors, to wit, the defendants Martha M. Whaley, A. C. Whaley, John L. Whaley, Theophile Giraud, and Los Angeles Finance Company, a corporation, were in default to the said plaintiff in the performance of the terms of said promissory note and mortgage, and that said plaintiff had prior to said time elected to treat all sums of principal and interest under said promissory note as due and payable, and that notice of such election and also notice of such default had prior to the making of said offer been served by said plaintiff on the said defendants, and also upon First National Bank of Orange, Cal., a corporation, and upon R. J. Hicks, trustee, as aforesaid; that no sale of the property secured by said deed of trust under the power contained in said deed of trust given has ever been had, and that, subject to plaintiff's mortgage and to said deed of trust and the power of sale therein contained, the defendant John L. Whaley is now, and at all times herein mentioned has been, the owner of said property described in plaintiff's mortgage."

The operative terms of the decree are as follows:

> "Now, therefore, it is ordered, adjudged, and decreed that if the defendants First National Bank of Orange, Cal., a corporation, and R. J. Hicks, trustee as aforesaid, shall, within ten days from the date of service of notice of the entry of this order upon them or upon their said attorney, pay into the court for the use of plaintiff the sum of $4,357.50, together with the sum of $134.93 taxes paid by plaintiff on said land prior to this date with interest thereon as aforesaid, then they shall be entitled to final judgment that said lots Nos. 97, 98, 99, 100, and 101 are released from the lien of said mortgage, and that as to said lots no sale shall be made under the foreclosure of said mortgage. The plaintiff shall, in that event, be entitled to final judgment foreclosing said mortgage as to the remainder of the property described in said mortgage and in plaintiff's complaint, and hereinabove described, and directing sale thereof in the manner provided by law. If said sum be not so paid within the time limited as above, then plaintiff shall be entitled to final judgment foreclosing said mortgage as to all of said property in said mortgage described and hereinabove described, and adjudging that a sale be made thereof in the manner provided by law, and further adjudging that defendants and cross-complainants First National Bank of Orange, Cal., a corporation, and R. J. Hicks, trustee as aforesaid, take nothing by reason of their answer and cross-complaint herein, and that they be forever restrained and enjoined from asserting any right, title, claim, or interest of, in, or to said property or any part thereof."

This is an appeal by the plaintiff from the said interlocutory decree.

In support of his appeal the plaintiff contends: (1) That the covenant to release from the lien of the mortgage any 10-acre lot or more of the tract upon which the mortgage lien exists upon payments made by the mortgagor as provided in said covenant does not inure to the benefit of subsequent incumbrancers; (2) that the release clause of the mortgage is indefinite and uncertain as to the particular 10-acre lot from which the mortgage burden may be removed upon the compliance by the mortgagor with the condition therein specified, inasmuch as the interlocutory decree shows "that there was no 10-acre lot in the mortgaged tract"; (3) that, conceding that said release clause is under any circumstances enforceable as in favor of a subsequent incumbrancer, the defendant in this case is not entitled to its enforcement in his behalf for the reason that "the mortgagor was in default for interest and taxes," and the mortgagee had, for such default, and previously to the demand by the defendant for the release of 10 acres of the mortgaged tract, with an offer to pay for the same, including taxes and interest, as required by the release clause, declared the whole amount of principal, interest and taxes due and payable.

The first proposition to which attention is invited involves the question whether the release clause of the mortgage may be taken advantage of by a subsequent incumbrancer, and this question must find its solution in the determination of the further question whether said release clause involves a covenant running with the land subject to the lien of the mortgage or is a mere personal privilege running alone to the benefit of the mortgagor.

[1, 2] Covenants running with the land are those only that are specified in title 3, third division, of the Civil Code (Civ. Code, § 1461), and section 1462 describes generally such covenants as follows:

> "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land."

Section 1463, Id., provides:

> "The last section [1462] includes covenants 'of warranty,' 'for quiet enjoyment' or for further assurance on the part of the grantor, and covenants for the payment of rent, or of taxes or assessments upon the land, on the part of the grantee."

Unless, however, the covenant comes clearly within the description of those specifically mentioned in section 1463, the general test determinative of the question whether a certain covenant runs with the land would seem to be whether it is for the direct benefit of the land. And this naturally opens up an inquiry as to the scope or meaning of the phrase "for the direct benefit of the land."

We do not understand that that phrase or expression, as it is used in section 1462, was intended to be or is restricted in its meaning to such physical benefit only as may directly accrue to the land from the covenant, but that it means also any covenant which affects the title to real property or any interest or estate therein of the covenantee. A covenant made for the direct benefit of the land is one which is intended to restore to the covenantee or the owner of the land some right with respect thereto which he has parted with pro re nata or for a special purpose. It is, in other words, a covenant for the direct benefit of the estate or interest of the covenantee in the land mortgaged. Standard Oil Co. v. Slye, 164 Cal. 435, 442, 129 Pac. 589. While under the statutory law of this state a mortgage does not vest in the mortgagee an estate or interest in the mortgaged land, yet the mortgage affects the mortgagor's title. A covenant in a mortgage providing for the removal of the lien of the mortgage from certain specified portions of the land mortgaged is a covenant for the unfettering pro tanto of the title, and is therefore for the direct benefit of the land.

Section 1463 of the Civil Code lends support to the foregoing views, for, as will be observed, it is by said section declared that the "last section (1462) includes covenants of warranty, for quiet enjoyment," etc. In other words, the Legislature has itself, by section 1463, interpreted or given us the meaning, to an extent, of the phrase, as used in section 1462, "direct benefit of the property," and it seems to be clear from said section 1463 that, if the covenant is one which concerns the land itself, or in any manner or measure affects its title or any interest therein, then it is, within the meaning of that phrase as it is employed in section 1462, "made for the direct benefit of the real property" to which it relates.

Mr. Washburn, in his work on Real Property (volume 2, § 1205), states the rule as follows:

> "Such covenants, and such only, run with the land as concern the land itself, in whosesoever hands it may be, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, between the covenantor and covenantee."

In Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75, the action was to recover damages for the breach of a covenant in a lease, whereby the lessee covenanted to surrender the demised premises, with the improvements thereon, at the expiration of the term. The Supreme Court held said covenant to be one running with the demised land, and said:

> "It is claimed that these four defendants, if liable at all under the covenant to surrender (which is denied), are liable only in respect of their privity of estate, and that such liability is several and proportionate to the interest acquired by each of them. To this proposition we cannot assent. There are some authorities to that effect, but the weight of opinion, we believe, is contrary thereto, and with better reason it is held that, while assignees of a lease hold as tenants in common, they are jointly and severally liable on covenants to repair and to deliver up at the end of the term. These covenants, which are connected with the estate, run with the land, and vest in point of benefit and liability in the assignee, while the personal privity of contract between the lessor and lessee remains unaffected by the transfer. 1 Washburn on Real Property, 435, 329; 2 Platt on Leases, 351; Taylor on Landlord and Tenant (7th Ed.) § 530, note; Hayes v. Morrison, 38 N. H. 95; Fitch v. Johnson, 104 Ill. 117."

In the present case the covenant, as we have seen, provides for a release from the mortgage lien of any 10-acre lot or more for which the sum of $125 per acre, together with interest and taxes, has been paid. This in effect is a provision that any 10-acre lot of the tract under mortgage as to which the payment terms of the covenant were complied with would be surrendered to the mortgagor free from the mortgage lien; in other words, to restore to the mortgagor an unqualified dominion over the property which he would not enjoy with the title to the fee incumbered by a lien to secure a debt. And manifestly it constituted a part of the consideration for which the mortgagor or covenantee surrendered such dominion by the execution of the mortgage on the land.

While the precise question here has never been, so far as we are informed upon the subject, passed upon by the appellate courts of this state, there is direct authority for the conclusion that such a covenant as we are now considering runs with the land.

Mr. Jones, in his work on Mortgages (volume 1, § 79), says that—

> "Whether such a covenant [for the partial release of lots embraced in the mortgage upon the payment of a stipulated sum] running only to the mortgagors, without mention of his assigns, is personal in character, and cannot be enforced by a purchaser from him, is a question upon which the authorities are not agreed, but the better view is that such a covenant runs with the land."

In Vawter v. Crafts, 41 Minn. 14, 42 N. W. 483, the mortgage contained a covenant for partial releases of the mortgage lien upon platted lots of the mortgaged land upon the payment by the mortgagor of certain stipulated sums of money, equal to the value of the lots. This covenant did not run to the assigns of the mortgagor. Foreclosure proceedings against the entire tract were brought by the mortgagee after the mortgagor had sold some of the lots. The mortgagee having refused to accept the price of the lots so sold, together with interest and cost of foreclosure, tendered to him by the grantee of the mortgagor, action was brought by said grantee against the mortgagee to compel a release; the former offering to pay the amount due on the lots. The principal question there was as to the nature of the covenant for partial release, and, in holding that said covenant was one running with the land, the court said so much that has cogent application to the present case that we feel justified in quoting from the opinion in extenso as follows:

> "Defendant's first contention is that this covenant as to releases is a purely personal one with the mortgagors, and did not pass with the land to their grantees. Much abstruse and technical learning has been wasted in discussing the question what are and what are not covenants running with the land. But we think it will be found, by considering the principle underlying the subject, that, according to the best-considered modern authorities, the law corresponds with common sense, and annexes a covenant to the land when the subject of it has something to be done or refrained from, about or touching, concerning or effecting, the covenantee's land (though not upon it), which would benefit the same, or increase its value in the hands of the holder. Shaber v. Water Co., 30 Minn. 179, 14 N. W. 874. It is not necessary here to enter into a consideration of the distinction in certain respects that may exist between a transfer of the burden of a covenant running with the land and of the benefit of the covenant; in other words, of the liability to fulfill the covenant, and of the right to exact its performance. The rule, we think, is universal that the benefit passes with the land to which it is incident. In the case at bar the agreement or covenant is one relating to the rights of the parties in the land. It affects the title, and hence affects the value of the estate of the holder. The release is for the benefit of the owner; in fact, no one but the owner could be benefited by it. It would be against reason if it did not inure to the grantee of the covenantee. This provision was manifestly inserted in the mortgage with reference to the sale of these lots, when platted, to different parties, and to facilitate such sales. These sales could be made in two ways: First, by the mortgagors paying the sum or sums stipulated, and obtaining a release, and then conveying clear title to the purchaser; or, second, selling subject to the mortgage, and leaving it to the purchaser to pay and obtain the release. It is argued, from the fact that the covenant does not contain the words 'or assigns,' it was intended as a personal one with the mortgagors. We do not think that fact is entitled to any weight. The question must be determined from the nature and subject-matter of the covenant itself."

See also, Gammell v. Goode, 103 Iowa, 301, 72 N. W. 531.

[3] 2. There is no legal force to the contention that the release cannot be enforced because it is indefinite and uncertain as to the particular 10-acre lot upon which the release was to operate. This contention would be as tenable against the mortgagor as it would be as against his assignee or grantee, and, as it would not be maintainable as against the former, it certainly cannot be as against the trustee under the trust deed who stands in the shoes of the mortgagor with respect to any rights created by the release clause.

[4] The appeal here is supported alone by the judgment roll, and, if there was evidence received extrinsic to the mortgage itself, disclosing a particular purpose for the insertion in the mortgage of the covenant of release, it is not here. But it is to be remarked that such covenants in mortgages covering tracts of land are not uncommon, and very often, if not generally, are in furtherance of a scheme whereby the mortgagor has purchased a tract of land for the purpose of subdividing it into smaller lots and selling the subdivisions, has borrowed money to pay the

purchase price of the whole tract, and mortgaged the land to secure the debt so incurred, or perhaps has purchased the land from the mortgagee and given the latter a mortgage on the same to secure the purchase price, and for the purpose of enabling the mortgagor to sell the subdivisions and give to his grantee a title free from the mortgage lien a release clause such as the one here is inserted in the mortgage. But, whether or not this was in fact the scheme involved in the transaction resulting in the execution of the mortgage in this case, the fact remains that it was the evident intention of the parties that, under the release clause, the mortgagor was at liberty to select any particular 10-acre tract or more that he desired to select, pay the stipulated amount per acre therefor to the mortgagee, and thereupon be entitled to receive a release of the mortgage lien from the lot thus selected. And, as above suggested, if this was his right under the release clause, so it was his grantee's right, since, as we have held, the said clause inured to the benefit of the latter.

The cases of McComber v. Mills, 80 Cal. 111, 22 Pac. 55, and Ontario Land Co. v. Bedford, 90 Cal. 181, 27 Pac. 39, dealt with mortgages containing release clauses substantially like the one in this case, and, while no point was made therein of the indefiniteness of the clause by reason of the fact that no specifically designated or described lot was therein referred to, it was nevertheless held that the release clauses were sufficient and binding on the mortgagee. See, also, Gammell v. Goode, 103 Iowa, 301, 72 N. W. 531, supra. But in Lane v. Allen, 162 Ill. 426, 44 N. E. 831, the Supreme Court of Illinois held that, under a release clause in a mortgage to the effect that the mortgaged premises might be subdivided and that "on payment of $500 or more, at any time or times, on the indebtedness secured hereby, a part or parts of said premises shall be released" from the lien of the mortgage, the contention that the subdivision must precede the payments, in order to entitle the party paying to a partial release, was not in harmony with a rational construction of the release clause. See, also, Clark v. Fountain, 135 Mass. 464. The larger number of the cases relied upon by the appellant to sustain its position as to the nonenforceability of the clause in question because it does not contain a specific or some sufficient description of the 10-acre lot or more for which a release might be had upon payment therefor have to do with actions involving conveyances of property which did not contain such a description of the real property sought to be conveyed as to facilitate a ready identification of the property from the deeds themselves, and the instruments of conveyance were held void because of patent ambiguities in the descriptions. Two of those actions were in ejectment, and one to reform a mortgage by correcting the description of the land. But in McCormick v. Parsons, 195 Mo. 91, 92 S. W. 1162, cited here by appellant, it was held that (quoting from the syllabi)—

> "When a deed of trust contains a provision that for every $600 paid one acre of the tract conveyed shall be released from the lien of the * * * trust, the provision is void for indefiniteness of description of the part to be released."

It was further held that—

> Such a release provision in a trust deed "cannot be aided by the demand of the parties giving the deed that a certain part of the tract which they definitely described be released on account of the payments made by them."

The above case is the nearest approach to the appellant's position here of any other to which our attention has been called. The conclusion reached therein is expressly based upon the rule applicable to cases of conveyances of real property heretofore referred to. There is, however, a distinction which, we think, is substantial or does not involve a mere refinement in logic between the release clause in McCormick v. Parsons and the release clause in this case. It will be noted that in the former case the clause reads "for every $600 paid one acre of the tract conveyed shall be released," etc., whereas, the clause in this case is that the release shall be upon "any 10-acre lot or more * * * upon the payment," etc. In other words, while in McCormick v. Parsons the mortgage provides for the release upon some one acre of the tract, in the present case the provision is for the release of any 10-acre lot or more, which, as that language clearly implies, may be selected by the mortgagor himself, and that such was the intention of the parties is plainly evidenced by the fact that there is no provision in the release clause or anywhere in the mortgage for the platting or subdivision of the tract into lots of any size or dimensions.

Moreover, it seems to us (and this suggestion is with the utmost deference to the court deciding the case) that if, in McCormick v. Parsons it was made to appear that the grantee of the trustee had actually paid the required amount for one acre of the tract, the court, exercising its extraordinary equity powers, could well have so framed its decree as to have prevented so unjust and inequitable a result as the court seems to have been compelled to arrive at in that case. But, however that may be, we still think the distinction between the two cases pointed out above is sufficient to deprive the McCormick-Parsons Case of its force as an authority in support of the position of the appellant here.

[5] 3. No California cases are cited upon the point involving the question whether the right to an enforcement of the release clause still subsisted after default in the payment of interest and taxes and after the mortgage

holder had declared the whole amount of principal, interest, and taxes due and payable because of such default. The following cases from other jurisdictions, however, hold that the right to a partial release, by the payment of the stipulated sum, is available after default in payment and the commencement of a foreclosure suit: Vawter v. Crafts, 41 Minn. 14, 42 N. W. 483, supra; Gammell v. Goode, 103 Iowa, 301, 72 N. W. 531, supra; Nims v. Vaughn, 40 Mich. 356; Chrisman v. Hay (C. C.) 43 Fed. 552.

In Gammell v. Goode, it is said:

> "It is thought that the right is not available after default in payment and the commencement of suit to foreclose. There is no such limitation in the covenant. The right seems coextensive with the existence of the mortgage. We do not see how the doctrine of laches can affect this right of release, under the terms of the stipulation. The only laches claimed is the default in payment. When E. J. Goode purchased the lot in question, he had the right to understand that, upon the payment of so much, he would be entitled to a release. The stipulation in the mortgage does not say upon payment of so much in a particular time, or without default, but on payment of so much 'at any one time.'"

It will be observed that the release clause with which we are directly concerned contains no provision specifying a particular time at which payments may be made.

[6] 4. Another point made by the appellant (not included in the points as they are above stated) is that the defendant failed to tender the amount due on the lot. We think the tender was sufficient. The cross-complaint alleges, as we have shown, and the court found, that the cross-complainant (defendants in plaintiff's action) on or about the 24th day of May "tendered to the said Sacramento Suburban Fruit Lands Company the sum of $4,375, together with such further sum as said * * * company had expended in taxes or other expenses for the lands," and further alleges that "these defendants now renew said offer to said * * * company in gold coin of the United States the sum of $125 per acre for every acre contained in the lots described in * * * this cross-complaint, together with such further sums as said * * * company may have expended for taxes or other charges against said property."

What the total sum of the taxes paid by the plaintiff on the lots and the interest was was presumably known to the plaintiff, but probably not known to the defendants, and in that case the offer to pay whatever that sum was, with the offer to pay the exact amount due upon the principal, constituted, under the circumstances, a sufficient tender.

The decree appealed from appears to provide for an equitable adjustment of the controversy between these parties. The plaintiff will receive precisely what its contract calls for and what it agreed to take for the lots, and there is nothing to indicate that in the selection of the particular lots involved herein that plaintiff will suffer any loss or disadvantage. To the contrary, the release clause itself clearly indicates that it was a matter of indifference to the plaintiff what particular portions of the tract might be selected upon payment therefor, so long as the lots were 10 or more acres in size.

The decree is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

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50 Cal. App. 170

ROSS v. SAN DIEGO GLAZED CEMENT PIPE CO. (Civ. 3154.)

(District Court of Appeal, Second District, Division 1, California. Nov. 26, 1920.)

1. Judgment 🔑137 — Court may on terms relieve party from default.

As provided in Code Civ. Proc. § 473, a court may on such terms as may be just relieve a party or his legal representatives from a judgment order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; the application being made in the time and in the manner provided.

2. Judgment 🔑155 — Notice of motion to open default should state the grounds.

Under Code Civ. Proc. § 1010, a notice of motion to open a default judgment should state the grounds on which it will be made.

3. Judgment 🔑158—To open default affidavit of merits necessary.

An affidavit of merits is essential to a motion to open a default judgment.

4. Judgment 🔑160 — Affidavit that defendant stated his defense to counsel insufficient.

On motion to open a default judgment, an affidavit of merits stating that defendant has fully and fairly stated his defense to his attorney is insufficient as it is the case, and not the defense, that must be disclosed.

5. Judgment 🔑160 — Affidavit that defendant stated to attorney facts on which cross-complaint is based insufficient.

On motion to open a default judgment given to a defendant on a cross-complaint, an affidavit of merits showing that cross-defendant fully and fairly stated the facts on which the cross-complaint herein is based to her attorney, and she was advised that she had a good defense to the cause of action alleged in the cross-complaint is insufficient.

6. Judgment 🔑151 — Inadvertence in the abstract no cause for opening a default.

Inadvertence in the abstract is no plea upon which to set aside a default, as the court must be made acquainted with the reasons for the inadvertence.

7. Judgment ⚷143(12) — Negligence of attorney in failing to answer cross-complaint not ground for opening default.

The negligence of attorney for plaintiff who after receiving cross-complaint made no notation with stenographer as to answering it and failed to pay any further attention to it, and default judgment was thereafter taken on the cross-complaint on the day that attorney died, there is no ground for opening the default; there being no showing of any previous disability of the attorney.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Trix Ninde Ross against the San Diego Glazed Cement Pipe Company. From an order setting aside a judgment on the cross-complaint and setting aside plaintiff's default, defendant appeals. Order reversed.

John H. McCorkle, of San Diego, for appellant.

C. O. Whittemore, of Los Angeles, for respondent.

CONREY, P. J. This is an appeal by the defendant and cross-complainant from an order setting aside the judgment rendered on the cross-complaint and setting aside the default of the plaintiff and cross-defendant for failure to answer the cross-complaint of defendant, and allowing plaintiff and cross-defendant to file an answer to the cross-complaint.

[1-3] As provided in section 473, Code of Civil Procedure, a court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; the application therefor being made within the time and in the manner provided. The notice of such a motion or application should state the grounds upon which it will be made. Code Civ. Proc. § 1010. An affidavit of merits is essential to such a motion for relief from a judgment. Parkside Realty Co. v. MacDonald, 167 Cal. 342, 345, 139 Pac. 805. In this case the record shows that the notice of motion did not purport to state the grounds upon which the application would be made, but merely stated that it would be based upon two certain affidavits, which were served with the notice, and upon the records and files in the action.

[4, 5] An affidavit of merits must show that the defendant has fully and fairly stated the facts of the case to his counsel, before the advice of counsel can amount to a prima facie showing of merits on behalf of the defendant. For a defendant to say that he has fully and fairly stated the facts of his defense to his attorney is not a compliance with the rule requiring that he shall state the facts of the case. Morgan v. McDonald, 70 Cal. 32, 11 Pac. 350; Andrews v. Jacoby, 39 Cal. App. 382, 178 Pac. 969. The affidavits of respondent and of her counsel, C. O. Whittemore, do not purport to state that respondent stated all of the facts of the case to said attorney. They only say that "she has fully and fairly stated all of the facts upon which the cross-complaint herein is based" to her attorney, and was by him advised that she had a good defense to the cause of action alleged in the cross-complaint. As affidavits of merits, these are no better than those which were held to be insufficient in the cases above cited.

[6, 7] The facts leading up to the entry of the judgment upon the cross-complaint appear without dispute, and are as follows: On December 10, 1918, a cross-complaint was duly served on the plaintiff by delivery to her then attorney of record, J. R. Whittemore, who on the following day by letter to appellant's attorney acknowledged receipt of copy of the cross-complaint. On receiving the cross-complaint J. R. Whittemore instructed his stenographer to place the same in the office files in the action, but gave no instructions whatever regarding the necessity of having to prepare an answer to the cross-complaint or of noting the date when such answer should be filed. No further action regarding the case was ever taken by said J. R. Whittemore. There is no evidence that any negotiation was had or application of any kind made for an extension of time to answer. On the 21st day of August, 1919, the default of plaintiff for failure to answer the cross-complaint was entered. Four days later a pro forma hearing was had before the court, and upon the evidence thus received judgment for the relief demanded by the cross-complaint was duly entered. J. R. Whittemore died on August 25, 1919, the day on which said judgment was entered. There is, however, nothing in the record showing that he was suffering from illness or otherwise unable to attend to his professional affairs prior to the day of his death. The application for the order setting aside the judgment and default is totally wanting in any showing of reasons or causes or excuses for the inadvertence or negligence of the attorney in failing to file an answer to said cross-complaint.

> "Inadvertence in the abstract is no plea upon which to set aside a default. The court must be made acquainted with the reasons for the inadvertence; and, if satisfactory, will act upon them and relieve from burdens caused by them; but, if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not look upon it kindly, and will have none of it." Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863.

The fact that by reason of the attorney's death it became impossible to obtain his explanation of his apparent negligence cannot be accepted as raising a presumption that such negligence was in fact excusable. Regrettable as the circumstance may be, the stubborn fact remains that there is in the record no evidence sufficient to justify an order setting aside the judgment or default in this case.

The order is reversed.

We concur: SHAW, J.; JAMES, J.

CALIFORNIA REPORTER

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184 Cal. 548

DAVIS v. CLINE, Sheriff. (L. A. 6087.)

(Supreme Court of California. Dec. 22, 1920.)

1. Pleading 🔑377 — Not necessary to prove matter admitted by answer.

In replevin action against a sheriff, where the possession of the property alleged by plaintiff was admitted by the answer's failure to deny, evidence on such point was not necessary and would have been improper.

2. Trial 🔑252(4)—Refusal of instruction on estoppel not error where evidence thereof was lacking.

Refusal of defendant's instructions on estoppel was not error where there was no evidence to sustain the defense.

3. Estoppel 🔑118—Evidence held insufficient to support.

In a replevin action, evidence *held* not to show facts sufficient to estop plaintiff from claiming property levied upon under execution against her husband; there being no evidence that the sheriff or execution creditor suffered any loss or parted with any right to enforce the judgment.

4. Records 🔑2—Statute relating to sale of motor vehicles not applicable to prior transfers.

Motor Vehicle Act, § 8, relating to the transfer of ownership of motor vehicles, does not affect a purchase prior to its enactment by plaintiff seeking recovery from sheriff who seized under execution against another.

Department 1.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Replevin action by Pearline Davis against John C. Cline, Sheriff of Los Angeles County. Judgment for plaintiff, and defendant appeals. Affirmed.

I. Pacht, of Los Angeles, and H. L. Sacks, of San Francisco, for appellant.

Duke Stone, of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the defendant, John C. Cline, sheriff of Los Angeles county, from a judgment for $2,087 in favor of the plaintiff, Mrs. Pearline Davis, in an action to recover the possession of two motor sight-seeing trucks.

On June 12, 1914, the Pacific Auto Tours Company, a corporation, was organized for the purpose of conducting sight-seeing trips in the city of Los Angeles. The names of W. A. Davis, husband of the respondent, C. O. De Long, and A. G. Gillespie appeared in the articles of incorporation as the directors and the only subscribers to the capital stock. Subsequently the corporation acquired and operated the two trucks involved in this action. Davis personally conducted the sight-seeing tours and managed "the working part" of the trucks, which were registered with the state motor vehicle department in his name.

Some time in the year 1915, Mrs. Retta Farnsworth recovered a money judgment against Davis, and on September 24, 1918, appellant caused execution upon that judgment to be levied on these trucks as Davis' separate property. This action was commenced on October 4, 1918, respondent alleging that she was the owner and entitled to the possession. In his answer appellant denied respondent's ownership, that he had wrongfully taken possession of the trucks, or that he unlawfully detained them, set up the levy under execution, and, as a separate defense, alleged as an estoppel that respondent had held out Davis as the owner and that in the case of Farnsworth v. Davis the plaintiff therein believed and relied upon respondent's conduct in such holding out. The cause was tried by jury. At the close of respondent's case appellant moved for a nonsuit, but the motion was denied. The jury found that the trucks were respondent's separate property, and that she was entitled to recover their possession or, in the event they could not be delivered to her, the sum of $2,087 in lieu thereof.

[1] 1. Appellant claims first "that there was no evidence that the defendant had possession of the auto trucks." The denial in the answer on this point was as follows:

> "Defendant denies * * * that the defendant *wrongfully* took possession * * * of any of said property. Defendant further denies that he still *unlawfully* holds or retains said property." (Italics ours.)

This is almost the identical language of the answer in Ammex Motion Picture Mfg. Co. v. Ervay, 182 Pac. 312, wherein the court held it was "an admission of possession * * * at the time of the commencement of the action." See, also, Woodworth v. Knowlton, 22 Cal. 168. Since possession of the property was thus admitted by the failure to deny the allegation in the complaint that appellant "still retains possession of the same," it would have been improper to admit evidence on this point. This contention is without merit.

[2, 3] 2. Appellant next claims that—

> "It was error to refuse to give defendant's instructions 1 to 8, inclusive, for the reason that the jury was authorized to find * * * that Pearline Davis by her acts, words, or conduct allowed her husband, William A. Davis, to appear as the owner of said trucks, * * * and the defendant believed that the said William A. Davis was the owner and levied on all said property as the property of said William A. Davis, and the plaintiff was estopped by her conduct to assert her ownership of said trucks."

These instructions were hypothetical in form and contained a statement of the necessary facts upon which the jury might find that the respondent was estopped to set up her ownership because she had held out Davis as the owner. But, unless there was evidence upon which the jury might have found the facts essential to an estoppel, it was not only not error, but it was the duty of the court to refuse to instruct them on that subject.

The evidence on this point was as follows: De Long, called for the respondent, testified that in May, 1914, he purchased three trucks, two of which were the ones which respondent here seeks to recover; that at that time respondent had bought a one-third interest in the three, and had given in payment therefor her check on the All Night and Day Bank (which later became the Hellman Bank) for $1,000 or $1,500; that subsequently he sold another one-third interest in the trucks to Gillespie, and thereupon he, Gillespie, and respondent organized the Pacific Auto Tours Company; that Davis had been hired at $3 per day "to look after the trucks," given one or two shares of stock, and made president of the corporation; that respondent visited the offices of the company "frequently, four or five times a week"; that thereafter respondent purchased Gillespie's interest; and that on the dissolution of the corporation the trucks were sold outright to her. This testimony was corroborated by Gillespie and respondent herself. The latter further testified on cross-examination that her husband acted as her agent in conducting the business; that with her knowledge and consent the licenses had been issued to him; that she had allowed him to draw checks on her account at the Los Angeles Trust & Savings Bank; that she could not remember how much she paid to De Long or Gillespie for the trucks; that after the dissolution of the company she continued to conduct the same business under the fictitious name of "Red Auto Bus Line"; but that she had never filed for record that name or "any papers designating my husband as my agent." On redirect examination she stated that—

> "The reason why the licenses on the trucks were taken out in the name of W. A. Davis was because he was in the corporation and they [De Long and Gillespie] thought he was the best one to have the licenses. He was there as a driver, and he took the licenses in his name. Even before the corporation the licenses were in his name. I myself paid the motor vehicle department for the licenses. * * * The only time I permitted my husband to draw checks on my bank account was one time when I made a trip East and another time when I was sick in the hospital. Mr. W. A. Davis had no interest whatever in either of the trucks the subjects of this suit."

There were four witnesses called by appellant. A. W. Frye, auditor for the Los Angeles Trust & Savings Bank, testified that from July 26 to September 26 respondent and Davis maintained a joint account in that bank. A. J. Campbell, bookkeeper of the Hellman Bank, stated that respondent had opened a personal account therein on March 17, 1914, and that all the checks drawn by her with one exception were for sums less than $250. A. M. Beaman, assistant cashier of the Security National Bank, one of the banks in which it was claimed the

Touring Company had an account, denied that the concern had ever had an account there. And H. L. Sacks stated that prior to the levy of the execution in the Farnsworth v. Davis case he and a Mr. Melinkoff called on Davis and Mrs. Lucas, both of whom told them that Davis was the owner of these trucks.

Thus, while it is true that respondent allowed the trucks to be registered in her husband's name, there is no evidence that either Mrs. Farnsworth or appellant in levying on the trucks relied upon any acts, statements, representations by, or other conduct on the part of respondent indicating that Davis was the owner.

But we do not find it necessary to decide whether, as appellant claims, "Pearline Davis * * * allowed her husband to appear as the owner of said trucks," since it does not appear that appellant has done anything in reliance upon respondent's conduct except to make a levy on the property in suit. It is a well-settled rule that—

> "In order to create an estoppel in pais the party pleading it must have been misled to his injury; that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect. * * * Where no available right is parted with and no injury suffered there can be no estoppel in pais. * * * In the absence of injury, it is of course immaterial that the other elements of estoppel are present." 21 C. J. 1135.

See, also, Boggs v. Merced Mining Co., 14 Cal. 279.

As we have seen, appellant has admitted, by his failure to deny it in his answer, that the trucks are still in his possession. By merely levying on the property neither appellant nor Mrs. Farnsworth has parted with any right to enforce the latter's judgment against any other property, nor has either of them "suffered a loss of a substantial character." It follows that one of the essential elements of an estoppel is lacking. We cannot hold, therefore, it was error to refuse to give the instructions requested by appellant.

[4] 3. Finally, it is asserted by appellant that under section 8 of the Motor Vehicle Act (Stats. 1917, p. 391) the intended transfer of the trucks from Gillespie and De Long to respondent "was incomplete and not valid or effective for any purpose." Section 8 reads in part:

> "Upon the transfer of ownership of any motor vehicle, the person in whose name such vehicle is registered and the person to whom ownership of such vehicle is to be transferred shall forthwith join in a statement of said transfer. * * * Upon such registration the department shall * * * forward * * * a new registration certificate. * * * Until said transferee has received said certificate of registration and has written his name upon the face thereof, * * * delivery of said motor vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

Appellant's position is that, since the trucks were at all times registered in Davis' name, it must be held that the respondent never acquired title thereto. It is a sufficient answer to this claim to remark that the transaction by which respondent asserts she became the owner, through the sale to her by De Long and Gillespie of their interests, occurred in 1915. The statute just quoted was not enacted until 1917 and could not affect the prior transfer. Appellant's contention cannot be upheld.

The judgment is affirmed

We concur: SHAW, J.; OLNEY, J.

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184 Cal. 648

F. CHEVALIER CO. v. COLLINS et al.
(L. A. 6365.)

(Supreme Court of California. Jan. 11, 1921.)

1. Appeal and error ⚷1010(1)—Supreme Court will not weigh evidence supporting findings.

Where the findings are fully supported by the evidence, the Supreme Court will not weigh the evidence.

2. Property ⚷1—Joining in execution of mortgage gives no interest in property.

That persons joined in the execution of a mortgage gave them no interest in the property, in the absence of an agreement.

3. Fraudulent conveyances ⚷143—Landlord's property in tenant's possession not subject to judgment against tenant.

Civ. Code, § 3440, making a transfer of personal property presumptively fraudulent as to transferor's creditors while transferor remains in possession, and as to purchasers and incumbrancers in good faith subsequent to transfer while property is in transferor's possession, *held* not to entitle creditor of tenant in possession of hotel to subject hotel and contents to judgment, though tenant remained in possession on change of ownership; the statute being inapplicable where it is sought to take landlord's property to satisfy tenant's debt.

Department 2.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Creditors' bill by the F. Chevalier Company against John L. Collins and others. Judgment for named defendant, and plaintiff appeals. Affirmed.

Scherrer & Guthrie and Frank C. Scherrer, all of Independence, and Harvey W. Guthrie, of Bishop, for appellant.

A. H. Swallow, of Bishop, for respondent.

WILBUR, J. [1, 2] This is a creditors' bill brought to subject the Hotel Istalia and the personal property therein, standing of record in the name of defendant John L. Collins, to plaintiff's judgment for $4,927.50 against defendants Bertrand Rhine and Leora B. Rhine. The property in question was purchased by the payment of $11,000 and by the giving of a mortgage for $8,000 executed by the three defendants to C. T. Crowell. The defendants testified in effect that defendants Bertrand Rhine and Leora B. Rhine were indebted to defendant Collins, a brother of defendant Leora B. Rhine, in the sum of $7,000; that Bertrand Rhine inherited $3,000 from his mother and paid it to John L. Collins on account of the aforesaid indebtedness; that the defendant Rhine executed the mortgage in question as an accommodation to defendant John L. Collins and in response to the suggestion of the mortgagee. It is claimed by plaintiff and conceded that defendants Rhine at all times involved herein were bankrupt. As the findings of the court are fully supported by the direct evidence of the defendants, we cannot consider the contention of the appellant that the evidence preponderates in his favor. The fact that the defendants Rhine, who were admittedly bankrupt, executed a mortgage, gave them no interest in the property in the absence of an agreement to that effect. There was no such agreement.

It is claimed that the trial court erred in excluding the findings of the referee in the supplementary proceedings in the action in which the judgment was obtained. It appears from the referee's report that defendant Collins was examined as a witness, but the findings of the referee were in no way binding upon him; moreover, the conclusions of the referee are in accord with the admitted facts, with the single exception of the statement in his report that "Bertrand Rhine transferred and turned over to said John L. Collins the sum of $3,000 to invest in said hotel property, and which, it appears, was so invested by said John L. Collins, and which said (nor any part thereof), it appears, has not been repaid by said John L. Collins to said Bertrand Rhine." The testimony on the trial of this case is also that $3,000 was turned over to be invested in the hotel property, but in addition that it was so "transferred" in payment of the prior indebtedness owing by Rhine to Collins.

[3] Appellant contends that there was no change of possession of the hotel or its contents within the meaning of section 3440, Civil Code, and hence that the hotel is liable for the debts of Rhine. Rhine had been in the possession of the hotel as tenant: First, under the Hotel Istalia Company; second, under Foorman and Woodworth, who subsequently became the owners thereof; and later under Collins. The point is without merit; the section relied upon has no application to this case, where it is sought to take the property of the landlord to satisfy the debt of the tenant.

Judgment affirmed.

We concur: SLOANE, J.; LENNON, J.

184 Cal. 524

HICKMAN v. LONDON ASSUR. CORPORATION et al. (Sac. 2845.)

(Supreme Court of California. Dec. 21, 1920.)

1. Witnesses 🔑293½—Immunity as to incriminating testimony held not to apply to a private examination.

Constitutional immunity from giving incriminating testimony does not apply to a private examination arising out of contractual relationship.

2. Witnesses 🔑293½—Immunity as to incriminating testimony does not justify refusal to submit to examination by insurer.

The constitutional immunity against being required to give incriminating testimony did not justify insured's refusal to submit to examination by insurer under policy providing for such examination, on the ground that he had been accused of arson, and that his testimony on examination by insurer might be used against him in the prosecution for arson.

3. Insurance 🔑548—Insurer not required to make a new demand for examination after dismissal of charge of arson.

Where insured refused to testify on examination by insurer provided for by the policy on the ground that he had been charged with arson, and that he was protected by the Constitution against giving testimony that might be used in the arson trial, the insurer, to avail itself of such refusal to defeat payment of policy, was not required to make a new demand on insured for examination after the charge of arson had been dismissed, since insured was in default by refusal to submit on the first examination, and insurer was under no obligation to reopen the matter.

In Bank.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Frank Hickman against the London Assurance Corporation and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions to enter judgment for defendants.

Watt, Miller, Thornton & Watt and Miller, Thornton, Miller & Watt, all of San Francisco, for appellants.

Earl Rogers, of Los Angeles, and H. P. Brown, of Hanford, for respondent.

LAWLOR, J. The plaintiff, Frank Hickman brought this action against the defendants, London Assurance Corporation, New Zealand Insurance Company, Limited, British & Federal Fire Underwriters of Norwich, England, Law Union & Rock Insurance Company, Limited, Yorkshire Insurance Company, Limited, Providence Washington Insurance Company, Sterling Fire Insurance Company, the Home Insurance Company of New York, and North British & Mercantile Insurance Company of London and Edinburgh, to recover for loss by fire on their respective policies. Judgment went for the plaintiff, and the several defendants appeal. The record is presented in typewriting.

Prior to November 21, 1915, the said policies were issued to respondent to cover his stock of general merchandise kept and used by him in his "clothing and gents' furnishing goods store" in a two-story brick building at 1922–1924 Mariposa street in the city of Fresno.

On the night of November 28, 1915, practically the entire stock of goods insured was destroyed by fire, and it is this loss which is the basis of respondent's asserted cause of action. Each of the policies was in the standard form prescribed by the Legislature (Stats. 1909, p. 404) and contained a warranty that gasoline or benzine in excess of one quart would not be kept, used, or allowed on the premises. To the allegation of the complaint that the fire originated from causes unknown the defendants set up in their answer that the fire was started with the knowledge, connivance, and design of the respondent, and that in violation of the above waranty gasoline in excess of one quart was kept, used, and allowed on the premises.

In the employ of respondent at the time of the fire and for some years previously was W. H. Jenks, who testified in detail that in July, 1915, a portion of respondent's stock was destroyed, and that the latter was dissatisfied with the settlement made by him with the companies then carrying his insurance; that thereafter the policies in suit were issued; that respondent had planned with him "to have the stock totally destroyed," and had told him to bring oil and gasoline upon the premises "and make all the arrangements for burning the store"; that between the 5th and the 15th of October he purchased five gallons of gasoline in a tin container, which he placed in the basement of the store, and told respondent of this; that subsequently respondent gave him "a gallon jug and a black grip or handbag," in which he brought five or more gallons of kerosene and a number of gallons of gasoline into the store; that prior to November 28 he distributed gasoline around the basement, in vessels, and used shavings and different articles to absorb it, so that by seepage the gasoline would be ignited by the gas "pilot lights"; that about 4 or 5 o'clock on the afternoon of November 28 he raised a trapdoor in the basement, so that the draught thereby created would cause the gasoline to ignite, and went home, where he remained until notified by telephone that evening there was a fire in the store, and that thereupon, pursuant to the instructions of respondent, who had gone to San Francisco "to throw off all suspicion from him," he sent in his own name the following telegram to respondent: "Frank Hickman, care Washington Hotel, San Francisco. Don't buy more goods. Your store is burning."

The respondent testified that he went to San Francisco "to visit the Fair" and admitted having received the telegram while there, but denied that he induced Jenks to burn the property, or that he had any knowledge that it was to be done; that he had ever spoken to Jenks about burning the store or bringing gasoline or oil on the premises, or that he knew of any gasoline or oil being on the premises.

On December 2, 1915, a complaint was sworn to by J. G. Goehring, chief of police of Fresno, and filed on the following day, charging respondent and Jenks with the crime of arson alleged to have been committed in the burning of the store. December 22 they were held to answer. The district attorney filed an information on December 31, upon which the accused were arraigned January 8, 1916, when respondent was released on bail. An amended information was filed January 13. February 14 respondent pleaded not guilty. The trial opened on April 18, and on April 24, while it was still in progress, the district attorney moved the court for an order dismissing the information on the ground "that the people have not sufficient evidence on which to warrant a conviction." The motion was granted, the information dismissed, and the bail exonerated.

On May 22 Jenks pleaded guilty and applied for probation. The application was referred to the probation officer, who reported on June 9, recommending that probation be denied, and it was so ordered. Jenks thereupon withdrew his plea of guilty and pleaded not guilty. He was tried, convicted on October 11, 1916, and released on probation for the term of five years.

This action was commenced on February 27, 1917. The cause was tried by the court sitting without a jury. It was found in effect that Jenks set fire to the store, and that at the time he was insane; that the gasoline was carried upon the premises by him, without the knowledge or connivance of respondent; that respondent did not know there was any gasoline in the store; and that the fire occurred without any complicity on his part.

Each of the policies also contained the following warranty:

> "The insured shall exhibit to any person designated in writing by this company all that remains of any property herein described and

shall submit to examination under oath, as often as required, by any such person, and subscribe to the testimony so given, and shall produce to such person for examination all books of account, bills, invoices and other vouchers, and permit extracts and copies thereof to be made. * * * No suit or action on this policy for the recovery of any claim shall be sustained until full compliance by the insured with all of the foregoing requirements."

On February 5 appellants made a written demand upon respondent that he appear before Leon Levy, a notary public, on February 11, and, pursuant to the above warranty, submit to examination and produce "all original invoices, bills and vouchers of goods * * * claimed by him to have been damaged or destroyed, * * * and all books of account pertaining to the business." On the last-mentioned date the hearing was continued by consent to the following day, when respondent appeared. The following took place:

Respondent's counsel read into the record of the proceedings each of the letters in which the respective appellants had designated H. M. Farrar as their representative or adjuster "in any matters pertaining to the loss." Respondent was then sworn and this colloquy ensued:

> "Farrar. Q. Your name in full? A. Frank Hickman. Q. Your age? A. Forty-four. Q. Your residence? A. 430 Neilson avenue. Q. Business location? A. 1922 Mariposa. Q. How long have you been in your present business location? * * * A. I refuse to answer on the advice of counsel. Q. Now, Mr. Hickman, you refuse to answer any more questions? A. For the same reason, at this time."

Thereupon respondent served and filed "a written statement" to the effect that he had been accused of arson and was about to be tried upon that charge; "that any material testimony which he might give at said examination would relate either to the amount, value, cost of, or extent of damage to the goods * * * or to the cause of the fire, * * * both of which questions are at issue in said criminal proceeding"; that the criminal charge had been initiated and was being prosecuted by H. M. Farrar, appellants' adjuster; that he (respondent) had been advised by counsel that any testimony given by him at any examination could and would be used against him on his trial for arson; that, by virtue of article 1, § 13, of the Constitution, he refused to submit to examination or to produce any books or papers at that time; that he was ready "to stipulate and agree that he will" submit to examination "immediately after the conclusion of the said criminal prosecution and immediately after the trial of said cause and verdict and judgment therein"; and that, if appellants or Farrar would cause the arson charge to be dismissed, he would submit to examination at any time. In reply the following statement was made by Farrar:

> "The insurance companies * * * refuse to accept Mr. Hickman's offer * * * and further demand that he now submit to examination and furnish the books, bills, invoices, etc., heretofore demanded."

Whereupon respondent said:

> "I stand by my reasons given this morning and the course adopted this morning."

No other demand by appellants or offer by respondent to submit to examination and produce the required books and papers was made at any time.

The court found:

> "That the examination of said plaintiff at said time [February 12] * * * would have had for its purpose inquiry into matters necessarily involved in a criminal prosecution; * * * that the course and conduct of said plaintiff in the matter of said hearing * * * was proper and right, and that he was justified in said course and conduct; that the plaintiff did comply with all * * * the terms and conditions of said policies; * * * and that he was justified in refusing to submit to an examination under oath at said time when said information and trial were pending."

The court justified respondent's refusal solely on the ground of his claim of privilege.

Appellants contend:

> That respondent cannot recover because he "refused to submit to examination under oath, or to permit his books, or vouchers, or bills, or other papers concerning the property * * * to be inspected by the defendants herein, which refusal was in violation of the provisions of said policies"; further, "that the excuse given by plaintiff * * * has no merit for the reason that in * * * section 1324 of the Penal Code it is expressly declared that no information which might be obtained from him on his examination * * * could be used against him in any criminal proceedings"; and that "the provision of the policies * * * is equivalent to a positive unconditional promise on the part of plaintiff that he will comply therewith, irrespective of how such compliance may affect him, and * * * his refusal would constitute such a violation * * * of the provision as would preclude him from instituting any action thereon."

Respondent's claim of privilege is thus stated in his brief:

> "A defendant on trial for his liberty has the right to refuse to submit to a private inquisition."

It is a fact, as already appears, that two days after respondent's refusal issue was joined on the criminal charge, and thereafter until April 24 it was pending against him.

The validity of provisions of the character here under consideration has been frequently upheld. Gross v. St. Paul Fire & Marine Ins. Co. (C. C.) 22 Fed. 74; Fleisch v. Insurance Co., 58 Mo. App. 596; Firemen's Fund Ins. Co. v. Sims, 115 Ga. 939, 42 S. E. 269; Pearlstine v. Westchester Fire Ins. Co., 70 S. C. 75, 49 S. E. 4; Southern Home Ins. Co.

v. Putnal, 57 Fla. 199, 49 So. 922; Liverpool L. & G. Ins. Co. v. Cargill, 44 Okl. 735, 145 Pac. 1134; National Fire Ins. Co. v. Humphreys (Tex. Civ. App.) 211 S. W. 811; Richards on Ins. Law, 416; 1 Clement on Fire Ins. 251; 5 Joyce on Ins. § 3330; 19 Cyc. 853; 4 Cooley's Briefs on Ins. 3395.

This rule is thus expressed in 13 Am. & Eng. Encyc. of Law, 358:

> "As the facts with respect to the amount and circumstances of a loss are almost entirely within the sole knowledge of the insured, and the opportunity and temptation to perpetrate a fraud upon the insurer is often great, it is necessary that it have some means of cross-examining, as it were, upon the written statements and proofs of the insured, for the purpose of getting at the exact facts before paying the sum claimed of it. Such considerations justify the provision universally to be met with in policies, requiring the insured as often as demanded to submit to an examination under oath touching all matters material to the adjustment of the loss, and provisions of that character are held to be reasonable and valid."

And in Ostrander on Fire Insurance, § 172, it is said:

> "The right to require the insured to submit to an examination under oath concerning all proper subjects of inquiry is clearly stipulated for in the form of policies now in general use. The intent of this provision is to prevent fraudulent concealment, and to enable the insurer to obtain material information in regard to the origin and circumstances of the fire, the value of the property, and the claimant's interest therein. The requirement is a reasonable one, and will often, no doubt, be useful in securing important and truthful disclosures that would otherwise be withheld, to the injury of the insurer. When the insured refuses to be examined under oath, he will forfeit all right to recover."

In Conn. Fire Ins. Co. v. George, 52 Okl. 432, 153 Pac. 116, the court held:

> "There may be logic in plaintiff's argument that defendant was not conducting the examination in good faith, but the fact still remains that defendant was acting within the terms of an expressed stipulation found in the policy, which gave it the right to demand such an examination, and it is not for the insured to inquire into the motive actuating the company in exacting the examination, but on his part to comply therewith and to answer all material questions, notwithstanding he might believe that the principal object of the company is to find a loophole whereby it might evade payment of the policy."

It was in Bonner v. Home Ins. Co., 13 Wis. 677, that the court, speaking through Mr. Chief Justice Dixon, said:

> "This action should have been dismissed because prematurely commenced; for, until examination was had, the losses were not, by the terms of the policy, due and payable."

And it was declared in Wheeler v. Conn. Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594, that—

> "To excuse nonperformance it must appear that the act to be done could not by any means have been accomplished."

It is to be noted that under the policies a loss was not payable until 90 days after the receipt by appellants of respondent's preliminary proofs of loss, and that no action on the policies should be sustained "unless begun within 15 months next after the commencement of the fire." The latter period would have expired on February 28, 1917, and the action, as we have stated, was commenced the day before.

No case has been cited, and we are aware of none, where the constitutional immunity of an insured was urged as a ground for refusing to submit to examination, or to produce books and papers. Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, and Ex parte Clark, 103 Cal. 352, 37 Pac. 230, however, are cited by respondent in support of his failure to comply with the demand. In the first of these cases Counselman had been subpœnaed to appear before a federal grand jury and give testimony concerning certain alleged violations of the Interstate Commerce Act (24 Stat. 379). He refused to testify on the ground that any testimony he might give could be made the basis for a criminal prosecution against him under said act. Upon his continued refusal to testify he was committed for contempt, and he sued out a writ of habeas corpus. The Supreme Court, in discharging the petitioner, said:

> "It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. * * * It is an ancient principle of the law of evidence that a witness shall not be compelled, *in any proceeding*, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures." (Italics ours.)

The Clark Case was also a proceeding in habeas corpus. The petitioner had been adjudicated an insolvent, and he was cited to appear before the superior court to be examined concerning his assignee's charge that he had fraudulently concealed property which should have been turned over to such assignee for the benefit of his creditors. Clark declined to testify "upon the ground that his answers might be made the foundation of a criminal action against him." He was committed for contempt, and in discharging him from custody this court, speaking through the late Chief Justice Beatty, said:

> "To bring a person within the immunity of [the constitutional] provision, it is not necessary that the examination should be attempted

in a criminal prosecution against the witness, or that such a prosecution should have been commenced and actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law under which the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding unless the law absolutely secures him against any use in a criminal prosecution of the evidence he may give."

And the court followed Counselman v. Hitchcock, supra.

[1, 2] But those and other authorities of similar import refer only to the attempted compulsion of a witness in a trial, either civil or criminal, a hearing or other lawful inquiry of a public nature. The compulsion secured against by the Constitution is a compulsion exercised by the state in its sovereign capacity in some manner known to the law. Constitutional immunity has no application to a private examination arising out of a contractual relationship. The examination to which appellants demanded respondent should submit was an extrajudicial proceeding, not authorized by any constitutional or statutory provision, but purely by virtue of a contract between the parties. To bring a case within the constitutional immunity, it must appear that compulsion was sought under public process of some kind. This being so, respondent's refusal to undergo examination and produce his books and papers acquires no sanctity because he urged his constitutional right not to be compelled to be a witness against himself. The demand was made upon him by virtue of the stipulation in the contract and by the stipulation alone must his refusal be judged. The stipulation constituted a promissory warranty under which appellants had the right to demand compliance by respondent "as often as required," and the performance of such stipulation was a condition precedent to any right of action. No question was raised as to the sufficiency of the demand, or, aside from the claim of privilege, as to the reasonableness of the time and place designated in the demand. The obligation to perform the warranty was as binding on respondent as his obligation to pay the premiums on the policies. The respondent did not fulfill his obligation, and stands here as having recovered a judgment upon an express contract one of the conditions of which he has failed to perform; in other words, when he commenced this suit he was without a cause of action.

Respondent cites certain cases holding that the right to demand the performance of the condition precedent must be exercised in a reasonable manner. Thus in Thomas v. Burlington Insurance Co., 47 Mo. App. 169, and Gordon v. St. Paul Fire & M. Ins. Co., 197 Mich. 226, 163 N. W. 956, L. R. A. 1918E, 402, it was held under a similar stipulation that the insured was justified in insisting that his counsel be present at his examination and in refusing to be examined unless he were permitted to be present. In Phillips v. Protection Ins. Co., 14 Mo. 220, the court declared that the prevalence of a cholera epidemic at the place designated excused the nonattendance of the insured. Under a stipulation to submit to examination as often as required and a special promise to reappear after the original examination, which the insured after notice failed to do, it was held in Porter v. Trades Insurance, 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424, that because he was sufficiently examined at the first hearing the insured was not in default. In all of these cases, however, the question was merely as to the reasonableness of the time, place, or mode of examination. No objection to the examination on any such ground was made here.

[3] Respondent's offer of February 12, as we have seen, is twofold—an offer to comply with the demand after the charge of arson was dismissed, or at any time if appellants would cause such charge to be dismissed. The point is made that in view of this offer, which was a part of the respondent's refusal to submit to examination, the appellants, after the dismissal of the charge of arson should have made a new demand upon the respondent for his examination, and that, such demand not having been made, he was not in default. But the respondent was already in default, as he had no right to refuse on the ground stated to submit to examination in the first instance. It may be that, if he himself had made an offer, after the criminal charge against him had been dismissed, to then and there submit to an examination, and such offer had been refused, his default would have been removed. But he did not so offer, and, since he was in default, the appellants were under no obligation themselves to reopen the matter.

It may be conceded that the position in which respondent found himself between February 12 and April 24 was one of difficulty, but it was a difficulty created by the contract he made. It has been said that—

> "Mere hardship or difficulty will not excuse a party from carrying out a contract; and, where one contracts to do any act which is possible, he is liable for a breach, even though circumstances arise, without his fault, making it difficult, or even impossible, for him to perform. Walker v. Tucker, 70 Ill. 527; Ballance v. Vanuxem, 191 Ill. 319, 61 N. E. 85; Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 30 L. R. A. 33, 38 N. E. 773. The breach of this contract by appellants relieved the other parties from performance on their part. 7 Am. & Eng. Enc. Law (2d Ed.) p. 150, and cases there cited." Ptacek v. Pisa, 231 Ill. 522, 83 N. E. 221, 14 L. R. A. (N. S.) 537.

And it was declared in Bastian v. British American, etc., Co., 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255:

> "If the insured cannot bring himself within the terms and conditions of the policy, he cannot recover. The terms of the policy constitute the measure of the insurer's liability. If it appears that the contract has been violated, and thus terminated by the assured, he cannot recover. He seeks to recover by reason of a contract, and he must show that he has complied with such contract on his part."

See, also, Smoot's Case, 15 Wall. 36, 21 L. Ed. 107.

It follows that the conclusion of law that respondent's refusal to submit to examination and produce his books and papers on the ground of his constitutional immunity was "justified, * * * proper, and right" is erroneous, and that upon the findings of fact as to his refusal judgment should have gone for the appellants. This renders it unnecessary to consider appellants' other contentions, that the evidence is not sufficient to support either the finding that respondent was not implicated in causing the fire, or the finding that the gasoline was brought on the premises without his knowledge or consent, or to pass on their assignments of error to numerous rulings on evidence.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the defendants.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; OLNEY, J.; SLOANE, J

(184 Cal. 650)

LAUMAN et al. v. SPRINGFIELD FIRE & MARINE INS. CO. OF SPRINGFIELD, MASS. (L. A. 6446.)

(Supreme Court of California. Jan. 11, 1921.)

1. Insurance ⚷229(3)—Authority to procure insurance not authority to consent to cancellation leaving property wholly uninsured.

The authority of a broker or agent to keep property insured is not authority to receive notice of and consent to a cancellation of the insurance which would leave the property wholly without insurance, especially where the policy entitled insured to protection for ten days after notice of cancellation.

2. Insurance ⚷229(3)—Not canceled as to mortgagee by notice to mortgagor or consent by him.

Where an insurance policy was made payable to a mortgagee and provided that the company might cancel the policy on ten days' notice to the mortgagee, the relationship between the mortgagee and mortgagor was not that of principal and agent, and the mortgagee by leaving it to the mortgagor to obtain insurance did not make the mortgagor his agent, and notice to the mortgagor or consent by him to a cancellation of the policy did not bind the mortgagee.

Department 2.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Roy Lauman, trading as the Imperial Dye Works, and others against the Springfield Fire & Marine Insurance Company of Springfield, Mass. From a judgment against it, defendant appeals. Affirmed.

W. W. Hindman, of Los Angeles, for appellant.

Davis & Rush, Chandler P. Ward, and Paul H. McPherrin, all of Los Angeles, for respondents.

WILBUR, J. This action is brought by the plaintiff to recover, upon an insurance policy issued by defendant to appellant, for a fire loss which occurred July 14, 1917. The policy was issued June 26, 1917, insuring the premises owned by plaintiff Roy Lauman and mortgaged to plaintiff H. R. Dodd. Attached to the policy is a mortgage clause providing that the loss or damage hereunder should be payable to H. R. Dodd, mortgagee, containing five conditions. The third condition, which is the only one material to this inquiry, is as follows:

> "Condition 3. This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease; and this company shall have the right, on like notice, to cancel this agreement."

On July 3d the agent of the defendant company notified Roy Lauman by telephone that the policy was canceled. The policy apparently provided that it might be canceled by five days' notice in writing. No notice whatever was given to the mortgagee. In the telephonic conversation with reference to the cancellation of the policy Lauman stated that he would get the policy and return it by mail; that it was in the possession of his brother. Two days later defendant's agent again demanded the policy of Mr. Lauman, who said he would get the policy and mail it. Lauman having neglected to return the policy, defendant's agent called upon him on July 10th and demanded the policy, to which Lauman replied, "Why worry. * * * The policy is canceled and your company has no liability." The trial court found that on July 10, 1917, the plaintiff Lauman and the defendant agreed to cancel the policy of insurance, that H. R. Dodd did not agree to cancel the policy of insurance, and that the oral notice theretofore given by defendant to Lauman of the cancellation of the policy was not communicated to H. R. Dodd. In pursuance of these findings the court entered a judgment in favor of H. R. Dodd against

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the defendant for the full amount of the loss as the mortgage upon the property was $1,800, and denied recovery to Lauman.

The appellant contends that Roy Lauman was the agent for H. R. Dodd, authorized to receive notice of cancellation and to agree to such cancellation. As to such agency, R. G. Stitch, special agent of the defendant company, testified that on July 23, 1917, he interviewed plaintiff Dodd; that at the time of the interview Dodd did not have the insurance policies; that Dodd stated that he was an insurance broker, and that he had formerly placed insurance upon the property for Mr. Lauman, but that the business conducted by Lauman was dyeing and cleaning clothes, and that such establishments were not popular with the majority of companies, particularly those he dealt with; that it took a great deal of his time replacing policies that had been ordered canceled by the companies, and had so much detail attached to it that he finally gave the matter up; that he had not kept any further record of the insurance for another reason, namely, that the value of the lots would just about protect him in the event of a loss at any time, but that he preferred the insurance kept on the property on account of the fact that it would be better to have improved property and insurance to protect it than to have just the bare lots; "that he had instructed Mr. Lauman to take care of the insurance, the placing of the insurance himself, after he had ceased to act as his broker, as I would take it, or agent, to take out insurance on the property and keep it insured, and never paid any attention to it further than that; that he didn't have the Springfield policy nor any policies in force at that time, or any record of them." Mr. Heinsch testified concerning the same interview: That Mr. Dodd stated that he had no record of the insurance for several months; "that he had not had any interest in the insurance; that is, he did not have any knowledge of insurance for several months; * * * that he told Lauman to attend to the insurance himself and keep it insured, and he would depend upon him to keep it fully insured; that he did not care to be bothered with it any more."

[1, 2] It is held in Ferrar v. Western Insurance Co., 30 Cal. App. 489, 159 Pac. 609, 611 (see, also, Edwards v. Home Insurance Co., 100 Mo. App. 695, 73 S. W. 881), that where a broker or agent is employed to keep the property insured, he had the authority to cancel as well as to procure insurance. But the authority to keep the property insured would not be authority to consent to a cancellation of insurance which would leave the property wholly without insurance. In this case the effect of the agreement to cancel the insurance was to leave the mortgagee without any protection, although the contract already in force entitled him to protection for ten days. However, the relationship between Lauman and Dodd was not that of principal and agent. They were mortgagor and mortgagee, and their relation to the property was fixed by the mortgage and by the policy of insurance wherein it was specifically agreed that the notice of cancellation should not be effective against the mortgagee until after ten days' notice in writing to him. The fact that the mortgagee left the matter of securing insurance to the mortgagor did not necessarily constitute the mortgagor his agent. It is usual to provide in mortgages that the mortgagor shall secure insurance which will protect the mortgagee. There is no question of ostensible agency involved in the case. The notice given to the mortgagor was not communicated to the mortgagee and was in no sense notice to the mortgagee. The conclusion of the trial court that the plaintiff Dodd was not notified of the cancellation of the policy as required by its terms is justified by the evidence. The policy of insurance was therefore in force at the time of the fire, and the judgment of the superior court to that effect was correct.

Judgment affirmed.

We concur: SLOANE, J.; LENNON, J.

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184 Cal. 645

JACKINS v. QUEEN OIL CO. et al.
(L. A. 6357.)

(Supreme Court of California. Jan. 11, 1921.)

Execution ⟹272(1) — Agent's knowledge of assignment of stock held imputable to principal purchasing stock, as assignor's judgment creditor, at execution sale.

Where agent made a loan for principal, assisted principal in securing a judgment against borrower, and informed principal that there was stock in borrower's name on books of certain corporation, but did not inform principal that borrower had in fact assigned such stock, principal, as execution sale purchaser of stock, took it subject to rights of assignee, since he was not a bona fide purchaser; he being chargeable with agent's knowledge of the assignment.

Department 2.

Appeal from Superior Court; Los Angeles County; Russ Avery, Judge.

Action by Minnie Hance Jackins against the Queen Oil Company, Frank P. Bacon, and another. Judgment for plaintiff, and named defendants appeal. Affirmed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellants.

Joe Crail and Frank Rouse, both of Los Angeles, for respondent.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

WILBUR, J. In this action the plaintiff seeks to establish her title to 40,000 shares of the capital stock of the defendant corporation, evidenced by certificates Nos. 46 and 47. Her claim is based upon the transfer from her husband, Harry Jackins, as security for the repayment to her of a loan of $3,500 which was made March 26, 1918, but was never made on the books of the defendant corporation. On April 19, 1918, appellant Frank P. Bacon levied an attachment on such stock in an action against Harry Jackins. On July 15 a judgment was entered, and on July 25 an execution was levied, in that action, and on September 18, 1918, the stock was sold at sheriff's sale and purchased by appellant Bacon for the sum of $500, which was credited on the aforesaid judgment. It is conceded that neither the levy of the attachment nor the execution is good as against the prior assignment of the stock to the pledgee, but the appellants claim that the transfer to the plaintiff is invalid as to appellant Bacon, who is a bona fide purchaser for value and without notice at the sheriff's sale, as the transfer to respondent was never entered on the corporation books. Civ. Code, § 324. The trial court, however, found that the defendant Bacon had notice of the prior assignment to the plaintiff as security before he purchased at the sale, and the question here is whether this finding is supported by the evidence. It is not claimed by respondent that the appellant Bacon had personal knowledge or notice of the previous assignment in pledge. So far as the question of notice is concerned, the case turns upon the knowledge of W. N. Hamaker, who, it is claimed by respondent, was Bacon's agent. It appears that Hamaker was the secretary of the defendant corporation, and that Harry Jackins had applied to him to have the stock transferred to the name of the pledgee in 1911, when he first secured a loan of $3,000 from her and transferred the stock certificates to her in pledge, and had several times thereafter made a similar request, particularly when the new stock certificates were issued on the 26th day of March, 1918, and were on that day assigned by Harry Jackins to his wife. That Hamaker was fully informed as to the pledge to respondent is not disputed. Appellants' contention, however, is that this knowledge was not secured by Mr. Hamaker in his capacity as agent for Bacon, or in connection with Bacon's purchase of the stock, and that therefore his knowledge was not properly chargeable to defendant Bacon.

Was Hamaker the agent of Bacon? It appears from the testimony of the appellant himself that Mr. Hamaker had been acting for him in the making of loans for several years; that, acting in this capacity, he had made the loan upon which the judgment was secured against Harry Jackins and others, under which the stock was sold; that the original note was taken in the name of Mr. Hamaker and subsequently transferred to the appellant; that Mr. Hamaker had been endeavoring for some years to collect the note; and that such efforts were made on behalf of Bacon. Appellant Bacon further testified that everything Mr. Hamaker did in connection with the note and with its collection was done with his authority; that all information he secured about the Queen Oil stock he received from Mr. Hamaker. He was further asked the following questions and answered as follows:

> "Q. Mr. Hamaker had charge of the transaction of the lawsuit, sale and collection of the judgment, as well as the note, didn't he? A. We worked together you might say. Q. You depended upon him to look after it for you? A. Very largely; yes, sir. Q. And what he did in that regard he did as your agent? A. I presume so. Q. And with your authority? A. Yes."

It thus appears that the court was fully justified in inferring from the evidence that Mr. Hamaker was assisting in the conduct of the litigation against Harry Jackins, and for that reason had informed him of the fact that there was stock standing on the books of the corporation in the name of Harry Jackins, although at the time he knew that the property had been assigned to the respondent as security. It further appears that when the attachment was levied about the 19th or 20th of April Mr. Hamaker called up the defendant, Harry Jackins, and told him that he had been served with the attachment on the Queen stock, and Mr. Jackins told him that his wife held the stock as collateral security for a loan. That the court was justified in holding that appellant Bacon was charged with the notice given Hamaker at the time of the levy of the attachment, when Hamaker was co-operating with Bacon in procuring the attachment, and in the securing of a judgment which was to be enforced against this stock, seems too clear to require either discussion or citation of authorities.

Judgment affirmed.

We concur: SLOANE, J.; LENNON, J.

184 Cal. 653

ROBINS v. BLAKE et al. (L. A. 6393.)

(Supreme Court of California. Jan. 12, 1921.)

1. Mortgages 🔑186(5)—Evidence held not to show agreement to surrender first and second mortgages or give third mortgage priority.

In an action to foreclose a third mortgage, evidence *held* not to establish an agreement between plaintiff and holders of first and second mortgages that the latter would surrender the notes and mortgages or to indicate intention to give priority to plaintiff's mortgage.

2. Appeal and error 🔑1176(4)—Supreme Court will not direct judgment on matters not passed on by trial court.

Where a judgment foreclosing a third mortgage must be reversed because not supported by evidence of priority or of satisfaction of prior mortgages, a new judgment foreclosing first and second mortgages cannot be directed by the Supreme Court where the evidence is not clear as to what payments have been made thereon and the rights of the various parties were not passed on by the trial court on the basis that such mortgages were unsatisfied.

Department 2.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by J. D. Robins against Harry J. V. Blake and wife and others, in which the defendant P. W. Ehlen filed cross-complaint, and from judgment therein foreclosing the mortgage the defendants and cross-complainant appeal. Reversed.

Wright & McKee, of San Diego, Williams & Rutan, of Santa Ana, and James W. Glassford, of El Centro, for appellants.

Scarborough & Forgy and S. M. Reinhans, all of Santa Ana, for respondents.

WILBUR, J. This is an appeal by the Ehlen Land Company, a corporation, and P. W. Ehlen from a judgment foreclosing a mortgage executed by defendants Harry Blake and Lenore Blake to Francis A. Blake and by him assigned to the plaintiff. Harry and Lenore Blake executed two mortgages for $4,000 each to P. W. Ehlen. These two mortgages were both dated April 3, 1914, but in one of them it was recited that it was "subject to a mortgage of even date herewith between the same parties to secure $4,000." The trial court decided that these two $4,000 mortgages were satisfied and discharged on the 10th day of September, 1915, and by reason thereof that plaintiff's mortgage, which was originally a third mortgage, had become a first mortgage upon the premises. The cross-complaint of P. W. Ehlen seeking to foreclose the two $4,000 mortgages was denied and the premises ordered sold to satisfy the lien of the plaintiff's mortgage. The only dispute in the case is with reference to the nature and validity of the transaction of September 10, 1915. It appears without conflict that at the time of the latter transaction W. W. Johnson was the owner of the second $4,000 mortgage and that W. H. Davis was the owner of the first $4,000 mortgage. The second mortgage had been assigned to W. W. Johnson in exchange for 19 acres at Escondido. The first mortgage had been assigned to Davis as collateral security for an obligation of P. W. Ehlen. These assignments were shown by the records and were testified to by the witnesses, and there is no conflict in the testimony, notwithstanding which the court found:

> "That while the Ehlen Land Company was the owner of said [second] note and mortgage, the defendants, Harry J. V. Blake and Lenore M. Blake, his wife, executed a deed of all their interest in the said real property described in said mortgage securing said note, to the Ehlen Land Company, a corporation, defendant herein, in full satisfaction thereof; * * * that thereby said note and mortgage was fully paid and satisfied; that there is at this time nothing due and unpaid on said note and mortgage."

With reference to the first mortgage the finding is somewhat different, namely, that the property was so transferred "at the request of said cross-complainant and that said promissory note and mortgage were thereby fully paid and satisfied." These findings and the conclusions arising therefrom are not sustained by the evidence. The transaction of September 10, 1915, was agreed upon between Harry J. V. Blake and Alfred T. Burch. Burch was at that time the general manager of the Ehlen Land Company, and P. W. Ehlen was the president thereof. Harry Blake testified that P. W. Ehlen represented to him that Burch was his agent in the matter. For the purposes of this appeal we must accept this testimony as true, although it is directly contradicted by Burch. It therefore appears that at the time the transaction occurred Burch was representing both the corporation and P. W. Ehlen. Harry Blake testified on that subject as follows:

> "Q. With reference to the satisfaction of these two * * * mortgages, did you ask either Mr. Ehlen or Mr. Burch for satisfaction of these mortgages at that time? A. And mentioned just as you have there, no, I did not. Q. Did you make a demand upon the Ehlen Land Company for satisfaction? A. I was getting satisfaction there, that is what I was there for, and I got it. That is what I supposed I was getting. Q. You did not receive satisfaction on the mortgages though? A. No, I had no writing. * * * Q. You were dealing with Mr. Burch as agent for Mr. Ehlen; why didn't you demand a satisfaction of these mortgages, if that was your arrangement? A. I don't know why. When I went in there at that meeting, it was to get out from under this whole thing, and we did arrange and it was sat-

isfactory to me, and I did go out and turn him over my ranch at that time."

He also testified concerning the negotiation and the transaction of September 10, 1915, so far as relates to the outstanding mortgages:

> "I says, 'I want to get out from under this load, I have had all I want of it, and if there is any way for us to clean it up I would like to do so,' and Mr. Burch says, 'What would you like to do?' and I says, 'If you will clean up everything and give me a certain amount of cash,' I asked them a thousand dollars, and also to extend to Mrs. Blake a 12 months on the interest on her ranch, that is on the south 80, that I would deed over to him, lock, stock, and barrel, all the north 80, which was all I had at that time, because I had deeded the south 80 to my wife, and Mr. Burch says, 'How about these bills?' and I says there are such and such things that I cannot recall now, I think there were water bills, in fact, I was back on a great many things, and finally it got down where Mr. Burch said, 'We will give you,' after figuring, 'between seven and eight hundred dollars,' I disremember, and I says: 'That is perfectly satisfactory. You are going to take care of all these back obligations, and extend Mrs. Blake 12 months on her place.' And they said, 'Yes, that is all right,' and I think there was some document drawn up at that time, and we had to have them signed. * * *"

He also testified on cross-examination, with reference to the third mortgage, that his brother, who was present at the opening of the negotiations, stated:

> "When you are in this thing you want to take care of that personal note of mine, and Mr. Ehlen says, 'When Mr. Burch gets here, we will take care of that.'"

Mr. Blake also testified as follows:

> "Q. Were these notes that were made at the same time the two $4,000 notes? A. Well, I said at the time, 'Why don't we make them in one?' Q. No, I mean at the time you were at Orange there, was anything said? (The negotiations of September 10, 1915, were at Orange.) A. There was nothing said in regard to it. It was understood that when I closed up my transaction that I had finished and was free. * * * Q. Then it was your understanding of the deal made with Mr. Ehlen— A. I made the deal with Mr. Burch. He was the man that acted on the whole thing, and it was on his say-so that Mr. Ehlen acquiesced in everything that was put to him at the time, and he said he was not handling the business, but that this was his agent and doing all the work. Q. And at that time, Mr. Blake, it was your understanding then that you were to be let out clear? A. Certainly. Q. And these three mortgages, one to your brother, and the two $4,000 notes, were to be taken care of by the Ehlen Land Co.? A. Certainly, with the understanding that I turn it over instead of having them go to the expense of foreclosing on it, and I would get out of it."

[1] It is clear from the foregoing that there was no direct negotiations between the parties with reference to the satisfaction of the two $4,000 mortgages, and if we accept the testimony of Harry Blake concerning his "understanding" and his "intentions," as his recollection of the substance of the conversation between the parties on September 10, 1915, such testimony at most only establishes an agreement on the part of the land company to take care of the outstanding mortgages. It is clear, then, that giving this testimony the utmost credit, it did not establish an agreement on the part of the land company to surrender notes and mortgages which at the time were owned by others. Nor was anything said by either party to indicate that it was the intention of the land company and P. W. Ehlen to give priority to plaintiff's mortgage. Mr. Burch, the other party to the negotiations, denied that any agreement whatever was entered into with reference to the two $4,000 mortgages, except that the land company agreed to pay the overdue interest thereon. He testified that it was in consideration of this agreement, and of a credit of $1,250 on an unsecured note and a payment of $700 cash; that the mortgagor transferred to the land company the land and personal property thereon, the latter subject to a chattel mortgage. This testimony, as to what was agreed upon, is in harmony with the purpose of the interview which was sought by Harry Blake, and is in accord with what was actually done in pursuance thereof, and on close analysis is not in conflict with Harry Blake's testimony.

[2] It will be necessary to reverse the judgment because the findings are not supported by the evidence. Appellant asks that the trial court be directed to enter a new judgment foreclosing the first and second mortgages. That cannot be done. It is not clear from the evidence as to what payments have been made upon the first and second mortgages. The rights of these various parties were not passed upon by the trial court on the basis that the $4,000 mortgages were still unsatisfied. Upon a new trial of the action the right of the various parties can be determined, if the evidence thereupon adduced again requires the conclusion that there was no satisfaction of the $4,000 mortgages. Even if Burch was acting as agent for P. W. Ehlen, as well as for the Ehlen Land Company, in the transaction of September 10th, that fact would not justify giving the third mortgage priority over the first and second mortgages.

Judgment reversed.

We concur: LENNON, J.; SLOANE, J.

184 Cal. 535

UNION HOLLYWOOD WATER CO. v. CITY OF LOS ANGELES et al. (L. A. 5202.)

(Supreme Court of California. Dec. 21, 1920. Rehearing Denied Jan. 20, 1921.)

1. Waters and water courses 🔑203(6)—Water rates permitting earnings of 6.19 per cent. on investment not confiscatory.

An ordinance fixing water rates so as to permit net earnings of 6.19 per cent. upon the total value of the plant would not be confiscatory.

2. Evidence 🔑113(8)—Cost is evidence of value.

The cost of a thing is evidence of its value, especially where it appears that it is comparatively new, and where it has no established market value, as in the case of secondhand goods, lands not on the market, water in the ground, buildings, pipe lines laid in the ground, and the like.

3. Evidence 🔑568(4)—Court may reject part of testimony of opinion witness.

In water company's action to enjoin enforcement of ordinance fixing rates on ground that rates were confiscatory, the court, in hearing testimony as to the value of the respective parts of plaintiff's plant, was not compelled to take the estimate of any witness as a whole, but could accept such opinion on the item as to which it was lowest, and reject it on others and compute the value on the combined lowest estimates of all or any number of the witnesses.

4. Waters and water courses 🔑203(12)—Evidence held to sustain finding as to valuation of water plant as affecting rates.

In suit to enjoin enforcement of ordinance fixing rates claimed to be confiscatory, evidence *held* to sustain finding as to total valuation of plaintiff's property.

5. Waters and water courses 🔑203(5)—Public service corporation entitled to rate which will make allowances for depreciation.

A water company is entitled to a rate which will permit rebuilding of plant as it becomes outworn.

6. Waters and water courses 🔑203(6)—Methods of making allowance for depreciation in fixing rates stated.

In ascertaining amount to be allowed for depreciation, the court may either take the value of each component item of property at the time the rate is fixed and divide it by the number of years then remaining of its life and turn over amount of the quotient to the owner each year of such life, or by an addition to the rates sufficient to make up that sum, or it may provide for a sinking fund, the amount of which, if invested each year at current rates of interest on money loaned on safe security, will produce the present value at the end of the life and add such sum to the amount to be raised by the rates each year.

7. Appeal and error 🔑1011(1)—Finding on conflicting evidence conclusive.

Lower court's finding on conflicting evidence is conclusive on appeal.

8. Waters and water courses 🔑203(6)—Pipe bonuses received for laying mains in proposed subdivisions not receipts from operation.

Pipe bonuses received by water supply company from owners of tracts of land in proposed subdivisions in consideration of the company laying mains in such subdivisions *held* not income, but merely money wherewith the company made improvements to constitute a part of its capital investment.

9. Constitutional law 🔑298(3)—Eminent domain 🔑2(10)—Waters and water courses 🔑203(6)—Ordinance fixing rates held confiscatory.

An ordinance fixing water rates which would result in only 1.27 per cent. interest on the capital investment *held* in violation of the federal and state Constitutions, prohibiting the taking of private property for public use without due compensation and without due process of law.

In Bank.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Union Hollywood Water Company against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals. Reversed.

See, also, 178 Cal. 206, 172 Pac. 983.

Haas & Dunnigan, and Sheldon Borden, all of Los Angeles, for appellant.

Albert Lee Stephens, Charles S. Burnell, and Wm. P. Mealey, all of Los Angeles, for respondents.

SHAW, J. This is an action to enjoin the defendant city of Los Angeles from enforcing an ordinance of said city adopted on June 2, 1911, fixing the water rates to be charged by the plaintiff, a public service water company, during the ensuing year, beginning July 1, 1911, and to have said ordinance declared void on the ground that the rates were so low as to constitute a confiscation of plaintiff's property. Judgment was given for the defendants, and the plaintiff appeals.

The action was begun in June, 1911. The trial began in October, 1911, and the findings were filed and judgment rendered on January 19, 1915.

The basis of the judgment, as set forth in the findings, is shown by the following table of values, receipts and expenses:

Value of plaintiff's plant after deducting depreciation.........		$835,291 40
Receipts from operation, including receipts for service connections and meters and sums paid as a bonus for laying pipe lines in tracts of land....		$141,571 45
Operating expenses for the year in question	$64,263 25	
Annual depreciation.............	25,572 96	89,836 21
Total net earnings...........		$ 51,735 24

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] The net receipts amount to 6.19 per cent. upon the total value of the plant. If these valuations are correct, the rates could not amount to confiscation, and the judgment must be upheld.

The plaintiff claims that the valuations and estimates of receipts and expenses made by the court were erroneous in many particulars. The errors claimed are as follows:

1. The value of the plant as found is claimed to be less than its value, as shown by any theory, in the sum of	$ 10,554 00
2. Value of rights of way estimated by defendants' witnesses upon the wrong theory, making a difference in favor of defendant of	33,494 72
3. Discrepancy in value of Sherman tract and Hudson & Selma tract owned by plaintiff	67,088 75
Excluding one-half of the Franklin reservoir site	14,325 00
4. Underestimate of amount of water owned by plaintiff, value	37,245 00
5. Error in computing value of pipes belonging to the plaintiff situated in the city	42,770 00
6. Under-estimate of value allowable for "going concern"	18,705 00
Total addition to valuation	$ 224,182 47
Making a correct total valuation of	$1,059,473 87

In computing the net revenue errors are claimed as follows:

1. Error in allowance for depreciation	$ 14,551 29
2. Errors in finding as to operating expenses	8,583 51
3. Errors in finding as to total operating receipts	41,120 43

If these claims are correct, the receipts from operation would be only $100,451.02, and the operating expenses and annual depreciation combined would amount to $112,971.01, showing an annual loss to the plaintiff by the rates fixed of $12,519.99. If that were the result, the rates would be confiscatory and the ordinance would be void.

With respect to the first item the plaintiff claims that the lowest estimate of the value of the whole plant by any witness was that of defendants' engineer, Sonderegger, who placed it at $845,845.55. The finding that it was worth $835,291.40 is $10,554.15 less than the said minimum estimated by Sonderegger. Plaintiff asserts that this deduction is not explainable by the evidence. There was, however, other evidence of value from which the court may properly have concluded that deductions should be made from that estimate. The plaintiff, about the year 1907, purchased a large part of the stock of the West Los Angeles Water Company, which previously had owned and operated the plant, and plaintiff then took over from that company its entire plant. It continued the service and from time to time made additions to the plant as necessity required. The plant was comparatively new at the time of the passing of the ordinance. The secretary of the plaintiff testified that the total cost of the entire plant up to January 1, 1910, as shown on its books, was $746,489.22. This included the cost of a part of the plant situated outside of the city, which amounted to $43,241.55, leaving $703,247.67 as the cost of the part of the plant within the city. Additions thereto were made during the year 1910 at a cost of $87,549.32, making the total cost—that is, the total amount invested in the plant up to January 1, 1911—$790,796.99.

[2] The cost of a thing is evidence of its value, especially where it appears that it is comparatively new and where it has no established market value, as in the case of secondhand goods, lands not on the market, water in the ground, buildings, pipe lines laid in the ground, and the like. Jennings v. Oregon L. Co., 48 Or. 287, 86 Pac. 367; Angell v. Hopkins, 79 Cal. 182, 21 Pac. 729; Levy v. Scott, 115 Cal. 39, 46 Pac. 892; Booth v. Pendola, 88 Cal. 40, 23 Pac. 200; 25 Pac. 1101; Joost v. Sullivan, 111 Cal. 296, 43 Pac. 896; Luse v. Jones, 39 N. J. Law, 708; Jones v. Morgan, 90 N. Y. 10, 43 Am. Rep. 131; Norton v. Willis, 73 Me. 580; Small v. Pool, 30 N. C. 47; Boggan v. Horne, 97 N. C. 268, 2 S. E. 224; Rawson v. Prior, 57 Vt. 609; Ford v. Smith, 27 Wis. 267; Roberts v. Dunn, 71 Ill. 50; 22 Corp. Jur. p. 178, note 19, page 183, notes 12, 21, and page 184, § 140. The things above enumerated constitute the major part of the plaintiff's plant. Furthermore, there were varying opinions as to the value of the respective parts of the plant which entered into the total value above mentioned.

[3] The court was not compelled to take the estimate of any witness as a whole. It could accept such opinion on the item as to which it was lowest and reject it on others and compute the value on the combined lowest estimates of all or any number of the witnesses. For these reasons we cannot say that the court may not have abated the values of some of the items contained in the testimony of the witness Sonderegger sufficiently to account for the finding of $835,291.40, and so we must hold that it is not contrary to the evidence in the respect claimed.

[4] The supposed undervaluation of $35,073 on the plaintiff's rights of way was apparently made by deducting $8,108.12, the value thereof as fixed by two witnesses for the defendants, from the sum of $43,181.70, the value as estimated by the plaintiff's witnesses. This alone, it is admitted, would be insufficient to overturn the finding. Plaintiff's theory is that the defendants' witnesses arrived at the values given by them by first finding the fee-simple value of the lands composing the rights of way and then taking 25 per cent. thereof as the value of the plaintiff's easements to lay and maintain pipes therein. It also claims that damages which the owner of the adjoining land might be entitled to in a condemnation suit should have

been added as a part of the value or cost of the easements. The pipes would be laid at a considerable distance below the surface. When the trenches were filled, the ordinary use of the land would not be interfered with, except when repairs became necessary, which would be very infrequently. The apportionment of 25 per cent. of the total value as the value of the easements alone, under these circumstances, does not seem to us so unreasonable as to require the court to hold that the estimate should have been rejected. The witnesses testified that a water pipe line does not injure real property at all. They also testified that their opinion of the value of such easements was based on their general experience in dealing with real property and in obtaining rights of way in that vicinity some years before the adoption of the ordinance. It is obvious, therefore, that the finding has support in the evidence.

We think the plaintiff's claim that the sum of $67,088.75 was excluded from the value of the land at Sherman and at the corner of Hudson and Selma streets is not warranted by the record. Some of the defendants' witnesses gave their opinion as to the value of these lands based on their knowledge of the value of real property in that vicinity. Others valued it by taking into consideration the value of the water derivable therefrom by pumping. The plaintiff's claim is that these values were wholly separate and distinct elements, and that to find the total value the two should have been added together. The court did not so view the testimony, but apparently took each of them as valuations of the land as a whole, including the water. The court's theory does not seem an impossible or unreasonable interpretation of the testimony. We therefore conclude that there is no merit in this claim.

With respect to the item of $14,325 for one-half of the Franklin reservoir site, the value of which was excluded by the court, it is sufficient to say that the entire site included 10 acres, valued at $28,650, and that there was evidence from which the court could reasonably conclude that only one-half thereof was necessary for use in the plaintiff's plant.

The claim that the water rights of the plaintiff were undervalued to the extent of $37,245 is also untenable. The water rights consisted merely of the ownership of certain lands in which it had bored wells from which it pumped water. The value of such water rights is, of course, measured by the quantity of water that could be regularly obtained in that way, and that quantity would depend on the quantity of water from rainfall which would find its way into the underlying strata of the land and on the porous nature of the material therein. These conditions are uncertain and the quantity obtainable is necessarily uncertain. The maximum quantity ever pumped at any time therefrom cannot be safely accepted as the quantity regularly obtainable. Plaintiff's witnesses nevertheless gave their opinion of value based on this maximum. The defendants' witnesses estimated the quantity very much lower. The court would have been fully justified in following the opinions of the latter, and we may assume that it did so. It is the difference between these two theories that constitute the undervaluation contended for.

The asserted error of $42,770 in apportioning the value of the pipe lines of the plaintiff within the city is in reality nothing more than a conflict in the evidence. The total value of all the pipe lines, including those within the city and those in the country, and the length of each separately, was first taken. One set of witnesses testified that the value of the separate parts should be apportioned by reference to the receipts from the city service as compared with that from the country service, and accordingly fixed the value of the city service as 95½ per cent. of the value of both. The other witnesses testified that, since the country served by the plaintiff was much more sparsely settled than the territory served by the city part of its system, the length of pipe to each consumer necessary to the service in the country would be much greater than in the city, and that the receipts from the country service would therefore be much less compared with the cost and value of the pipe lines than the receipts from the service within the city. Accordingly they testified that the value of the city pipe lines should not be estimated at more than 87 per cent. of the total value of all the lines. We think there can be no question but that the theory of the witnesses for the defendants was the more accurate and should have been followed.

The next objection is that the court, in estimating the "going value" of the plant, excluded $18,705 from the computation. The witnesses for the defendants estimated the value of the plant as follows:

Physical property	$653,763 55
Water	84,122 00
Real estate and rights of way	54,675 00
Going concern	53,285 00
Total	$845,845 55

The witnesses testified that in estimating the "going concern" value they considered as one of the factors involved in the calculation the income of the plaintiff for the year 1910, under the rates prevailing for that year. The rate ordinance for that year had been attacked by plaintiff in an action similar to the present action, and on its motion in that action an order was made in that case that the rates therein claimed for that year by plaintiff should be paid, but that the excess of such rates over those fixed by the ordinance for that year should be impounded to await the event of that suit. This had been done, and the impounded money amounted to $18,705. They did not include this sum as part of plaintiff's income for 1910. This is the error complained of. The judgment in that action was that the rates fixed for that year were reasonable, and that the rate ordinance for that year was valid. That judgment has since been affirmed. Union H. W. Co. v. Los Angeles, 178 Cal. 206, 172 Pac. 983. It must therefore be presumed that the money was properly impounded, that it formed no part of plaintiff's income for 1910, and that it does not belong to plaintiff. The witnesses were correct in excluding it in making their compilations. Consequently the court below did not err in accepting their estimate, so far as that sum was involved.

The next objection is that the court should have allowed $14,551.29 more on account of annual depreciation. The plaintiff's witnesses estimated this amount at $40,124.25, and the defendants' witnesses at $25,572.96. The court adopted the last-mentioned estimate. Plaintiff claims that the larger sum was the proper allowance to be made.

[5] Allowances of this character are made because of the fact that a plant constructed for public service wears out, and that, if the service is to be continued, it must be replaced at the end of its life. The owner is entitled to a reasonable return on his invested capital while he continues the service. If it is to be kept up, he must also collect from the consumers enough to rebuild the plant when it becomes outworn. The annual rates are therefore increased to provide such sum.

Several methods of obtaining the fund necessary for this purpose have been in use. All of them begin with an estimate of the probable life of the several items or classes of property composing the plant at the time the rate is fixed and of the then present value thereof. Each of them is designed to return to the owner, during the life of the particular item, the entire present value of that item at the time the rate is fixed, while at the same time giving the owner a reasonable return on the invested capital value of such item. The sum of the annual allowance for depreciation on each item or class of property constitutes the total allowance on this account to be collected from consumers each year in the form of rates.

A recognized method is to take the value of each component item at the time the rate is fixed and divide the same by the number of years then remaining of its life. The quotient is to be returned to the owner each year of such life by an addition to the rates sufficient to make up that sum. Under this plan the allowance for depreciation is the same each year of the succeeding life of the item in question, but as the sums thus returned to the owner are to be deducted each year from the value of the previous year, to ascertain the then present value of the plant, the amount included in the rate on account of interest on capital invested is gradually reduced during the succeeding years. While the sum allowed for depreciation is constant, the annual rate allowance for interest on capital is gradually reduced and the consumer pays a much higher rate at the beginning of the period than at the end. This plan, we understand, was the one adopted by the witnesses for the plaintiff, and which it is insisted must be followed.

Another plan is known as the sinking fund plan. Instead of dividing the present value by the number of years of life remaining, an annual contribution by the consumers to a sinking fund is provided. The amount which, if invested each year at current rates of interest on money loaned on safe security, would produce the present value at the end of the life, is ascertained or estimated. This sum is added to the amount to be raised by rates each year. It is assumed that by investing these sums as they come in the owner may reimburse himself for the present value, so that at the end of the life he will have funds sufficient to replace the property. The sum added to the sinking fund is the same each year. The rates are fixed so as to raise this addition to the sinking fund and also allow a reasonable return to the owner on the original estimated value each year. By this plan the consumer pays the same rate during the entire life of the particular item in question, but the rate in the first years of the life is smaller than under the first-mentioned plan, and is larger in the later years.

There is a modified sinking fund plan sometimes used whereby the addition for sinking fund is increased each year by the amount of the estimated accrued interest on the previous years' contribution to sinking fund, and the amount allowed to the owner for interest on capital investment is reduced by the same amount. The result is the same for both parties. The rate remains constant throughout the term of life, and the owner receives the same amount each year, but it is apportioned differently between the sinking fund account and the interest on capital account.

[6] We understand that the amount estimated by the defendants' witnesses and allowed by the court as for depreciation was determined by one or the other of the last-mentioned methods. The tables used by the witnesses in computing this amount are not given in the record, and it is difficult to understand from their explanations which one of the two was taken. It is not important to determine that point. The method of procedure under either plan would result in justice both to the consumer and owner, and would accomplish the ultimate object of providing the necessary fund for reconstruction. We can see no reason why either one, if al-

lowed by the court, was not just and proper. If a change from the sinking fund plan to the so-called "straight line" plan contended for by plaintiff were made hereafter, some injustice might possibly follow. But this might happen under either plan. We must assume, in theory at least, that the proper public authority will act fairly in the matter. It may be noted that the power to fix rates passed to Railroad Commission on November 3, 1914 (Const. art. 12, § 23), and that the commission usually, if not invariably, follows the sinking fund method of estimating the addition to the rates on account of the necessity of providing a fund for ultimate reconstruction. Los Angeles v. S. C. G. Co. et al., 5 R. R. Com. Dec. 40; 13 R. R. Com. Dec. 728. Furthermore, since the estimate of the value of the plant by the plaintiff's witnesses was much larger than that made by the defendants' witnesses and accepted by the court, the major portion of the difference between the two allowances for depreciation is accounted for by the difference in amount which the same percentage would produce on the respective estimates of value.

In Redlands W. Co. v. Redlands, 121 Cal. 312, 53 Pac. 791, and San Diego W. Co. v. San Diego, 118 Cal. 583, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261, cases arising when the law provided for annual fixing of rates by city councils prior to 1914, it was held that the rates should not be "so fixed as to enable it [the water company] to set apart a certain amount each year for the depreciation of its plant." In Contra Costa W. Co. v. Oakland, 159 Cal. 334, 113 Pac. 668, these decisions were virtually overruled on this point, and the rulings of the United States Supreme Court on that question were followed. Knoxville v. Knoxville W. Co., 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371. The question may now be regarded as settled.

[7] The claim that $8,583.51 was improperly deducted by the court from the operating expenses shown by the evidence proves, upon examination, to be a mere question of a conflict of the evidence upon which the decision of the court below is conclusive.

The remaining point is the contention that the receipts from operation were overestimated to the amount of $41,120.43. The finding of $141,571.45 as the total receipts from operation states that it includes money paid by consumers at the rate fixed by the ordinance, and also "hydrant receipts, irrigation water rentals, charges for putting in meters and services (which meters and services were retained and became the property of plaintiff), land rentals, city pipe line bonuses (being charges required of property owners for putting in pipe lines, which pipe lines were retained as and became the property of plaintiff), delinquent charges, and miscellaneous receipts."

The record shows that this item was made up of the following charges:

Receipts from rate payers at ordinance rates	$100,172 10
Receipts from meters and services	26,243 45
Receipts from pipe bonuses	14,877 03
Miscellaneous receipts and delinquent charges	278 87
Total	$141,571 45

[8] The receipts, amounting to $26,243.45, for meters and services, consisted of money exacted from the consumers along the line of the pipes, ostensibly for the purpose of paying the cost of laying the connecting pipes between the company's mains and the property line and for installing the meters thereon. The receipts, amounting to $14,877.03, for pipe bonuses, were obtained from owners of tracts of land who proposed to subdivide the land into building lots, and who desired the company to extend its pipes into such subdivisions along the streets thereof so as to furnish water to expected residents on the lots, and who paid these sums of money to the company to be used in constructing and laying such mains. The defendants contend that these sums were a part of the legitimate receipts from the operation of the water company in its character as a public service company. We cannot agree with this contention. The mains laid in the proposed subdivisions were clearly a part of the plant of the plaintiff, and the money expended in so doing was a part of its capital investment. The same thing is true of the pipes laid from the mains along the streets to the property line of the consumers and of the meters attached thereto. They were a necessary part of the water system, and the expenses thereof were a part of the capital investment and went to make up the total cost of the plant. The source from which the plaintiff received the money which it expended in making these additions to its system is wholly immaterial. If it had borrowed the money for that purpose, no one would question the fact that the additions constituted part of the plant, and that the borrowed money was not revenue. The fact that the money was paid to the company by the subdivision owners to obtain an extension of the mains and by the consumers to obtain connections with the mains does not in the least change the character of the money so received. After the money had been so paid, whether by donation or otherwise, the plaintiff was the owner thereof and could apply it to that purpose, or to any other purpose it saw fit, provided, of course, it rendered the consideration for which it was given, as otherwise it would have been liable to an action for the return thereof by the payer as money had and received. These sums were not received from the operation of the plant and should not have been added to the receipts from operation.

The question whether or not the value of the parts of the plant constructed with this money should be included in the valuation upon which it was entitled to a return has not been argued, and we express no opinion upon it. It does not affect our decision.

It appears that the company's engineers ascertained that the amounts expended by the company for these additions to its system did not equal the contributions for that purpose, and that the company made a profit on that branch of its work amounting to $6,968.67, which those engineers, for the purposes of the case, conceded to be a part of its operating receipts. We do not think this concession can be allowed. The profit must either be considered as a donation to the plaintiff, or as money held by it subject to the demand of the payors. In either case it has no place in the computation necessary to ascertain whether or not the rates fixed by the ordinance are sufficient to give the company a reasonable return on the capital invested in its plant.

[9] We are satisfied that the court erred in including these two items in the operating receipts of the company. Deducting them from the total operating receipts, it would leave a balance of only $100,451.42. Taking from this amount the expenses of operation and amount allowed for depreciation, $89,836.21, the amount left as the net receipts from operation would be only $10,615.21. This would make a return to the plaintiff, as interest on its capital investment, of only 1.27 per cent. There was testimony with respect to the amount that should be allowed as a reasonable rate of interest upon investments of this character, which ranged from 6 to 8 per cent. It is obvious, therefore, that the ordinance rates did not allow the plaintiff a reasonable return on its investment, and that it amounted to a confiscation of property. Consequently it must be held to be void because it is in violation of the Constitution of the United States and of this state, being a taking of private property for public use without due compensation, and a deprivation of property without due process of law.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

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50 Cal. App. 264

PARKER v. PACIFIC GAS & ELECTRIC CO. et al. (Civ. 2190.)

(District Court of Appeal, Third District, California. Dec. 3, 1920.)

1. Injunction 🔑137 (1) — Where plaintiff would suffer no injury, temporary injunction denied.

Where plaintiff will not suffer any actual injury pending the trial, but a temporary injunction against defendant would tie up the source of water supply for large areas of the country and work irreparable injury, a temporary injunction should not be granted.

2. Injunction 🔑158—Denial of temporary injunction would not affect final injunction sought.

Plaintiff's application for a permanent injunction would not be affected by a ruling denying a restraining order pendente lite, as plaintiff's rights, if any, would be ascertained as of that date.

3. Injunction 🔑137(1)—Temporary injunction not granted where plaintiff's loss would be negligible.

The purpose of a restraining order pendente lite is ordinarily to prevent monetary loss, and, where such would be negligible and the defendants are able to respond in damages, it should not be granted.

4. Injunction 🔑135 — Refusing injunction pendente lite not an abuse of discretion.

Where defendants are not shown insolvent, and the record does not show abuse of trial court's discretion in denying injunction pendente lite and it did not err in concluding that the damages, if any, which plaintiff might incur pending trial would be negligible and monetary only, and capable of ascertainment, the order must be sustained.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Ivan H. Parker against the Pacific Gas & Electric Company and another. From an order denying plaintiff's application for a temporary injunction, the plaintiff appeals. Affirmed.

Arthur C. Lowell, of Auburn, for appellant.

Thos. J. Straub and Wm. B. Bosley, both of San Francisco, and J. M. Fulweiler, of Auburn, for respondents.

PLUMMER, Presiding Justice pro tem. Action for an injunction and restraining order pendente lite.

It appears from the allegations of the complaint that the plaintiff is the owner of 120 acres of land situate in Placer county; that Bear river, a natural water course, flows through said land; that at the time of the commencement of this action the defendant was constructing a concrete settling reservoir in and near the channel of said river, at the head of a certain canal theretofore constructed by the defendants; that the dam and settling reservoir maintained and being constructed by the defendants are situate some six miles upstream from the lands belonging to the plaintiff; that for a considerable period of time the defendants have caused to flow down the channel of Bear river to the head of said canal, and there divert into its said canal, about 14,000 inches of water; that the waters flowing down said Bear river carry quantities of sand, gravel, and other débris;

that in order to prevent such sand, gravel, and débris from entering said canal, defendants intend to operate said settling reservoir by collecting therein and filling the same with water, soil, sand, gravel, and débris, and then opening the gates in said settling reservoir and discharging the contents thereof in the largest possible volume, to wit, in a stream of more than 50,000 inches, into the channel of said Bear river, and thence down upon and over the property belonging to the plaintiff.

The application for an injunction pendente lite was heard upon the verified complaint filed by the plaintiff, and three affidavits filed by the defendants. After the hearing of such application, the trial court made and entered its order denying the plaintiff's application for a temporary injunction. From this order plaintiff appeals.

[1] It appears from the pleadings and affidavits that the defendant Pacific Gas & Electric Company is a public service corporation, furnishing light and power to various cities and towns, and also supplying a large area of farming lands with water for irrigation purposes. It likewise appears that the plaintiff's land is valuable chiefly for the mineral deposits contained therein; that it lies, in large part, along the beds and banks of said river, and is covered with sand, boulders, and other material usually found in such sections of the country. No reasons are assigned in the order denying the application for a temporary injunction, which has necessitated a careful reading of the pleadings and affidavits upon which the hearing was had. The learned trial court, however, filed an opinion which has been set out in the briefs, and sets forth in very concise language the conclusion at which we have arrived, and we therefore adopt the opinion of the trial court as herein, to wit:

> "In truth, the affidavits tend to show that the lands crossed by the flowing water constitute the bed and banks of Bear river. It further appears that this bed and these banks consist largely of sand, gravel, and boulders, having little or no value, save for the minerals contained in them; hence the actual injury to the premises, pending the trial of the suit, may be eliminated as negligible. The real and only persuasive ground for a preliminary injunction is the claim that, if the defendant once commenced the public use, then it could no longer be enjoined. But it has been discharging this water into Bear river for several years, and the court is compelled to recognize this fact. There is, however, another view to this matter. The plaintiff will not suffer any actual injury pending the trial of this action (by this is meant actual money damage to property). While, on the other hand, an injunction that would tie up the source of water supply for large areas of the country would work irreparable injury."

It is true that the complaint alleges that the plaintiff's damages would be irreparable, but there is no showing that the defendants are insolvent, or unable to respond in damages. The burden of the argument appears to be, as stated by the trial court, that if once the use of the reservoir were begun, an injunction would not lie.

[2, 3] We do not well see how plaintiff's application for a permanent injunction would be affected by the ruling of the trial court upon his application for a restraining order pendente lite, as his rights, if any, would be ascertained as of that date. The purpose of a restraining order pendente lite is ordinarily to prevent monetary loss or damage to the injured party. In this case the opinion of the trial court, with which we agree, shows that the monetary loss, if any, would be negligible, and that if any such should occur the defendants are able to respond in damages, and there is no showing that such damages could not be readily ascertained.

The argument of counsel has been directed almost entirely to the right of the plaintiff to a permanent injunction upon the final hearing of the action. As we view the matter, it is not necessary, and would be improper, to express any opinion at this time upon the merits of the case. Unless an abuse of discretion has been shown, the action of the trial court must be upheld.

[4] In Williams v. Los Angeles Railway Co., 150 Cal. 592, 89 Pac. 330, Justice Shaw states the law in the following concise language:

> "The question of granting or refusing an application for a temporary injunction is addressed to the sound discretion of the lower court, and its action will not be reversed upon appeal unless there appears to be an abuse of the discretion. If the damage or injury threatened is of a character which may be easily remedied if the injunction is refused, as where it is chiefly monetary damage and the defendant is solvent, the court, in its discretion, may refuse to issue an injunction, leaving the question to be decided upon the final hearing. [Citing a number of cases.] Where one or the other of the parties is to suffer by the granting or refusing of an injunction pending the action, the inconvenience likely to be incurred by each from the action of the court in granting or refusing a temporary injunction should be balanced, and the court should grant or withhold the injunction accordingly."

In Piper v. Hawley, 179 Cal. 10, 175 Pac. 417, the Supreme Court of this state again disposes of this question, as follows:

> "It would be superfluous to cite authorities to show that the granting or refusing of a preliminary injunction is a matter resting largely in the discretion of the trial court. Where there is a substantial conflict in the evidence regarding an issue which may affect the discretion of the court in passing upon the application for such injunction, the order made will not, on appeal, be overthrown merely because there may be considerable, or even preponderating evidence which, if believed, would have led

to a contrary conclusion. The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate right in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending the trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him."

All the authorities having to do with the granting or refusal of an injunction pendente lite are to the same effect, and do not require citation.

From the fact that the defendants in this case are not shown to be insolvent, and from the further fact that there is nothing in the record from which this court could come to a conclusion that the trial court abused its discretion and was erroneous in its conclusion that the damages, if any, which the plaintiff might incur pending the trial of this action would be negligible, would be only monetary and capable of ascertainment, it is apparent that the order of the trial court herein should be, and the same is, hereby affirmed.

We concur: BURNETT, J.; HART, J.

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50 Cal. App. 294

YOCUM v. TAYLOR. (Civ. 3444.)

(District Court of Appeal, Second District, Division 1, California. Dec. 7, 1920.)

1. Vendor and purchaser 🔑330—Vendor can recover loss of crop caused by purchaser's delayed notice.

Where the purchaser unreasonably delayed giving notice of her intention not to perform during the time when the vendor could have planted a crop, the vendor is entitled to recover as special damages the profit he would have realized from the crop.

2. Appeal and error 🔑907(3)—Evidence not brought up presumed to support findings.

Where the appeal is on the judgment roll alone, so that the evidence is not brought up, it is presumed that it was sufficient to support the decision.

3. Vendor and purchaser 🔑330—Special damages caused by purchaser's breach may be recovered.

Civ. Code, § 3307, allowing recovery of specified items of damage by way of general damages for breach of contract for the sale of land, does not prevent recovery of other items of damage properly pleaded and proved as special damages.

4. Vendor and purchaser 🔑330—Vendor held not entitled to recover ditch assessment paid.

In an action for the purchaser's breach of contract for the sale of land, the vendor cannot recover as special damages the amount of an irrigation ditch tax paid by him, though he did not get the benefit of the water for which the tax was paid, where he was liable for the tax whether he used the water or not, and there was no evidence he could have made a profit by using the water.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by J. W. Yocum against Helen F. Taylor. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Luther G. Brown, E. H. Heizman, and Wilbur D. Finch, all of Los Angeles, for appellant.

Nathan Newby, of Los Angeles (Hugh A. McNary, of Los Angeles, of counsel), for respondent.

JAMES, J. This is an appeal from a judgment for recovery of money as damages. It is presented on the judgment roll alone.

The action grew out of a transaction had between plaintiff and defendant whereby the defendant contracted to purchase certain real property belonging to the plaintiff. An agreement to effect such sale was duly made, but defendant defaulted in the performance of the conditions required of her as to the payment of the purchase price, and plaintiff then brought this action for damages. In the complaint facts were first alleged showing that damage had been suffered which would fall within the measure established by section 3307 of the Civil Code. It was particularly alleged, further, that certain special damages have been sustained. At the trial, as the findings disclose, all claim to the general damages was waived, and the court found that special damages had been sustained as to two matters: First, that plaintiff had been compelled to pay a ditch tax incident to the ownership of the land "without using said irrigation ditch," and that, because plaintiff had been unable to plant a crop of barley until the growing season had advanced too far, further damage had been suffered in the amount of $1,782.

[1] These special damages were alleged and found to have occurred because of the fact that under the contract the defendant was given a reasonable time after October 18, 1918, within which to perform her part of the contract, and that she did not notify plaintiff until after the 1st of December, 1918, of her determination not to so perform. It was the running of this time, as alleged, which prevented plaintiff from planting the crops on the land during the month of October, which, if they had been so planted, would have produced to plaintiff a net income in the amount last above stated.

[2] We have no doubt that the law permits the recovery of the latter item of damages, and, under the familiar rule, where the evidence is not brought up, we must assume

that there was ample evidence to sustain the decision as made by the court.

[3] We cannot agree with appellant's counsel in the argument that no damages other than those which fall within the measure provided by section 3307, Civil Code, may be recovered. The damages therein specified are general damages which are recoverable under general allegations of damage. There may be special damages also, such as are the natural consequence of the detrimental acts complained of, and these may always be recovered under proper pleadings and evidence. Stevenson v. Smith, 28 Cal. 103, 87 Am. Dec. 107; Morris v. Allen, 17 Cal. App. 684, 121 Pac. 690; Moore v. Fredericks, 24 Cal. App. 536, 141 Pac. 1049. These cases announce the general rule as we have stated it. That such special damages are not speculative and too remote to be susceptible of legal proof is now well settled.

[4] As to the first item of damages, to wit, that referring to the tax paid on the irrigation ditch, we fail to find sufficient in the findings to sustain the judgment for the recovery of that amount. By the findings it appears that the ditch charge was collectable whether the water was used or not, and there are no facts found which show how or in what manner plaintiff would have derived a profit had he been able to use the ditch.

It is ordered that the judgment be modified by deducting therefrom the sum of $118. As so modified the judgment is affirmed; the respective parties to bear their own costs.

We concur: CONREY, P. J.; SHAW, J.

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50 Cal. App. 238

ROSEN v. DAWSON et al. (Civ. 3302.)

(District Court of Appeal, Second District, Division 1, California. Dec. 2, 1920. Hearing Denied by Supreme Court Jan. 31, 1921.)

1. Appeal and error ⟹931(8)—Presumption in view of findings that variation in size of windows manufactured was negligible.

In an action for the value of materials used in manufacturing and installing windows and sashes, despite findings that the windows were in part larger than provided in the written contract, in view of a further finding that they were and are workmanlike and pursuant to and in conformity with the specifications and contract between the parties, it will be presumed that the variation in size was negligible, and that the articles as manufactured were in substantial compliance with the contract.

2. Contracts ⟹332(4)—Plaintiff held not required to allege work was done to satisfaction of defendant.

Where plaintiff, suing for manufacturing and installing windows and sashes, alleged performance of all conditions demanded by the specifications affecting the work up to the point where he was stopped, it was not necessary that he further allege that the work was done to the satisfaction of the architect and owner of the building, as one term of his contract provided.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by J. Rosen, doing business as the J. Rosen Cornice Works, against John B. Dawson and Lyman Farwell. From judgment for plaintiff, defendants appeal. Affirmed.

J. H. Allen, of Los Angeles, for appellants.
E. V. Rosenkranz, of Los Angeles, for respondent.

JAMES, J. Defendants have appealed from a judgment entered in favor of plaintiff. The action was to recover the value of materials used and a profit which would have accrued to plaintiff had he been permitted to complete performance under a contract made with defendants whereunder plaintiff was to construct and install certain windows and metal sash. The findings were in favor of plaintiff upon all issues tendered by his complaint. Defendants in their answer, among other matters of denial, asserted that the windows and sash were not as contracted for. It is their claim that the findings of the court sustain their contention as to this issue, and that the judgment, therefore, is not supported by the facts found. The appeal is presented upon the judgment roll alone, under which we must assume that there was ample evidence to warrant the findings as made. The finding involved in the particular contention of appellants is as follows:

> "(5) That said windows in part were larger in size than provided in said contract; that said change was made at the request of defendants; that said labor and material furnished and said windows and casements were and are workmanlike and pursuant to, and in conformity with, the details, specifications, agreements, and contract between plaintiff and defendants."

[1] When counsel for appellants argues that the findings show such a change of the contractual terms as to make a new contract which would be void unless expressed in writing, he leaves out of account the settled rule as to the presumptions which attend a trial court's findings where the evidence is not brought up. Notwithstanding that the findings are that the windows were in part larger than provided in the contract, in view of the further finding that they "were and are workmanlike and pursuant to, and in conformity with, the details, specifications, agreements, and contract between plaintiff and defendants," it will be presumed that the variation in the size was negligible, and that the articles as manufactured

were in substantial compliance with the contract.

[2] Plaintiff alleged in his complaint, and the court found, that he was prevented from fully performing his contract by reason of notification being given him by defendants to cease work thereunder, and that he did so cease work after communicating his protest to defendants. He alleged performance of all conditions demanded by the specifications affecting the work, up to the point where he was stopped. Under such a state of facts it was not necessary that he further allege that the work was done to the satisfaction of the architect and owner, as one term of the contract provided.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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50 Cal. App. 268

GUGLIEMETTI et ux. v. GRAHAM et al. (Civ. 3321.)

(District Court of Appeal, Second District, Division 1, California. Dec. 3, 1920. Hearing Denied by Supreme Court Jan. 31, 1921.)

1. Insurance 🔑156(1)—Under contract of insurance of automobile stage line, insurer was proper party to damage action.

A contract, insuring a company operating an automobile stage line, construed as creating a primary liability against the insurer in favor of persons whose property was injured or damaged, and not a mere contract indemnifying owner from loss paid, so that insurer was a proper party to damage action against driver.

2. Compromise and settlement 🔑23(3)—Evidence held not to show damages for killing cattle had been settled prior to action.

In an action for loss of cows killed by an automobile stage, evidence, including that of plaintiff's payment for injuries to the automobile made in ignorance of his rights, *held* not to show that plaintiff's claim had been fully adjusted and settled prior to action.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by T. Gugliemetti and wife against Charles H. Graham and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.

J. K. Stickney and H. W. Scheld, both of San Diego, for respondents.

JAMES, J. Defendants appeal from a judgment entered against them. The action was for damages alleged to have been suffered by the plaintiffs by reason of the killing of two cows. The cows were struck by an automobile stage driven by defendant Graham and owned by the United Stages. The defendant Western Indemnity Company is sued because of its alleged liability on an undertaking given. The undertaking mentioned was one general in form and that commonly in use, and made for the purpose of insuring automobile carriers against loss by reason of damage caused by the operation of their vehicles.

[1] The principal point argued by the appellant is that there was a misjoinder of parties defendant, particularly that the surety company by its undertaking only agreed to respond after judgment against the insured; in other words, that the contract was one of insurance against loss, and not one to indemnify against liability. It is true that the contract of insurance, in so far as its terms directly fix the liability of the insurer toward the insured, does bear the general character of a contract of insurance against loss, rather than one to indemnify against liability. However, there are two clauses in the contract which further extend the obligations of the insurer. It provided, in part, that—

> "* * * This policy otherwise to all its warranties, terms, conditions and provisions not conflicting herewith, is hereby extended to indemnify the assured against loss arising from the liability imposed by law for damage on account of injury to or destruction of property of any or every description (property of the assured or property of others while in charge of the assured or the assured's employees excepted) resulting from any accident due to the ownership, maintenance or use of any automobile enumerated and described herein. * * * This policy will inure to and be the benefit and protection of any one who shall sustain any damage or injury, or to the heirs, personal representatives, administrators, executors or assigns of any such person who may be so damaged or injured or suffer death by reason of negligence or misconduct on the part of the driver or operator of the automobile. * * *"

The latter clause, we think, is plainly intended to create a primary liability against the insurer in favor of persons injured or damaged. While the general terms of the contract are as we have characterized them, to wit, a contract to indemnify the insured against loss, the term last quoted imports a condition and agreement that, so far as other persons are concerned, the obligations of the policy are available where such persons have sustained "damage or injury." Necessarily, then, a cause of action would arise whenever the damage accrued, regardless of whether action had been brought against the insured to enforce collection of the same. That the surety company may be joined as defendant in an action to recover damages where the policy is conditioned similarly to that involved here is held in Milliron v. Dittman et al., 180 Cal. 443, 181 Pac. 779. For the reasons stated, no error was committed by the court in overruling the demurrer of defendants and denying their motion for judgment of nonsuit.

[2] Further contention is made that the evidence does not sustain the findings of the court, in that the evidence shows that the claim of plaintiffs was fully adjusted and settled with the defendant United Stages prior to the commencement of this action. We think the evidence does support the findings of the court. It appears that immediately after the cows of the plaintiffs were killed, plaintiffs were called to the office of the stage company, and there defendant Graham insisted that they should pay him for the damage done to the automobile when it collided with the cows. By the testimony of plaintiff T. Gugliemetti it appears that he protested against making any payment, and insisted that he was damaged through the act of Graham, and that his cows were worth $300 each. He testified that Graham threatened to have him arrested unless he paid for the damage done to the machine; that Graham said, "I will sue you; I will have you arrested;" and that plaintiff replied:

> "All right. You will have me arrested, and I will pay you for the fixing of the machine, and you will pay for the cows. 'Well,' he says, 'I got nothing, I got $10,000 insurance on that machine,' he says, 'and the indemnity company,' he says, 'is good for it.'"

The upshot of the matter was that the plaintiffs paid to Graham $162.50 in settlement of the bill for damage to the machine and immediately brought this action to recover the value of the cows. It is easily inferable from the testimony of this plaintiff that he was ignorant as to whether there was any reciprocal liability, and that when he paid to Graham the money he did so without any intention or understanding that he was waiving his right to claim damages for the loss of the cows. The cows were killed through the negligence of the defendant stage company and its driver. Of course, Graham possessed no claim against the plaintiffs capable of enforcement, and collection of the money from the plaintiffs by Graham was without legal right. The evidence as to the payment of this money by the plaintiffs to Graham could have no effect except as a circumstance tending to show an admission of neglect on the part of the plaintiffs in permitting the cows to get in the way of the automobile. However, the court has determined that there was no negligence in that regard imputable to the plaintiffs, and that finding, in view of the evidence presented must be taken as conclusive.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(50 Cal. App. 22)

RIORDAN v. ZUBE et al.

(Civ. 3475, L. A. 5244.)

(District Court of Appeal, First District, Division 2, California. Nov. 15, 1920. Hearing Denied by Supreme Court Jan. 13, 1921.)

1. Judgment 🔑94—Clerk could not enter judgment on default in action to set aside judgment of justice court.

In an action in the superior court to set aside a judgment of a justice court and to restrain its enforcement, not being one arising on contract for the recovery of money or damages only, clerk was without power to enter any judgment on defendant's default, but plaintiff should have applied to the court for the relief demanded.

2. Army and navy 🔑34—Moratorium Act did not divest justice court of jurisdiction in unlawful detainer.

Justices' courts are courts of the state and find life and power in the acts of the Legislature, and the Moratorium Act (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3078¼a–3078¼ss) did not divest such courts of jurisdiction of actions in unlawful detainer where the premises were occupied by dependents of soldiers or sailors in military service.

3. Army and navy 🔑34—Moratorium Act does not change jurisdiction of any court.

The Moratorium Act (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3078¼a–3078¼ss) relating to unlawful detainer where premises were occupied by dependents of soldiers or sailors, does not change the jurisdiction of any court which is created under state authority; the provisions of the act being made applicable to all courts of competent jurisdiction, whether created by Congress or the various states.

4. Army and navy 🔑34—Soldier or sailor not entitled in equitable action to have judgment in justice court set aside.

Defendant in unlawful detainer against dependents of soldiers or sailors in military service had no right to an equitable action to set aside a justice's judgment in favor of plaintiff which was valid on its face, where no appeal was taken, notwithstanding the Moratorium Act (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3078¼a–3078¼ss).

On Hearing in Supreme Court.

5. Appeal and error 🔑102, 113(3) — Orders setting aside default and sustaining demurrers held not appealable.

Orders setting aside default of defendants and sustaining demurrers to complaint without leave to amend were not appealable.

6. Appeal and error 🔑112—Appeal lies from void judgment.

An appeal will lie from a void judgment.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Daniel Riordan against E. R. Zube and Benjamin C. Strang, Justice of the

Peace. From orders setting aside a default of the defendants and sustaining defendants' demurrers without leave to amend, plaintiff appeals. Appeal dismissed in the District Court of Appeal, and hearing denied in Supreme Court.

Daniel Riordan, of Pasadena, in pro. per.
Wilton W. Webster and Leonard L. Riccardi, both of Pasadena, for respondents.

NOURSE, J. Plaintiff and appellant commenced an action in the superior court to set aside a judgment of the justice's court and to restrain its enforcement. He named as defendants the justice of the peace who had tried the case in the justice's court and the plaintiff in that action. Their demurrers to plaintiff's complaint were sustained. Plaintiff was given ten days to amend and the defendants were given five days thereafter to plead to the amended complaint. Within due time plaintiff filed his amended complaint. The defendants failed to plead within the five days allowed, and upon application of the plaintiff the clerk of the court entered their default. Within three days thereafter the defendants moved to set aside the default upon a showing of inadvertence and misconception of the order, and after a full hearing the court granted the motion. Thereafter defendants' demurrers to the amended complaint were sustained without leave to amend. Plaintiff appeals from these two orders, the one setting aside the default of the defendants and the other sustaining defendants' demurrers without leave to amend.

[1] Neither order is appealable. The record does not disclose that any judgment was entered either for the plaintiff following the default or for the defendants following the order sustaining their demurrers. It is argued by appellant in his brief that, following the entry of the default, the clerk entered judgment in his favor. But, even if this were so, the judgment would have been a nullity, because, the action not being one arising upon contract for the recovery of money or damages only, the clerk was without power to enter any judgment, but plaintiff should have applied to the court for the relief demanded.

[2, 3] However, on the merits of the appeal, the order of the trial court sustaining the demurrers without leave to amend was clearly proper, because the complaint failed to state a cause of action and could not have been amended to present one. The relief was sought from the judgment of the justice's court upon the grounds that it was void on its face because the act of Congress of March 8, 1918, commonly known as the "Moratorium Act" (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3078¼a–3078¼ss), had divested the justice's court of jurisdiction of actions in unlawful detainer where the premises were occupied by dependents of soldiers or sailors in military service. The plain answer to this proposition is that the jurisdiction of the justice's court of this state is found in the laws of the state, and not in the acts of the Congress. Though not mentioned in the Constitution as such, the justices' courts are courts of the state of uniform, though limited, jurisdiction. They find their life and power in the acts of the Legislature, which the Constitution expressly authorizes the Legislature to enact. The argument of appellant seems to be that, as the Moratorium Act prohibited the eviction of such dependents except upon leave of court, and that as the term "court" as used in that act was therein defined to include "any court of competent jurisdiction of the United States, or of any state, whether or not a court of record," the application should have been made to a superior court, because justices' courts are not included in the enumeration of state courts in the state Constitution. But the Moratorium Act does not pretend to change the jurisdiction of any court which is created under state authority. The provisions of that act are made applicable to all courts of competent jurisdiction, whether created by the Congress or the various states.

[4] The justice's court, therefore, had jurisdiction to render the judgment, and it was not void upon its face. The execution was stayed for three months, which was the maximum period of leniency authorized by the Moratorium Act. Section 300, subd. 2. Appellant was thus given the full protection of the law. The justice's court having had jurisdiction of both the person and subject-matter of the action, its judgment was valid upon its face. Defendant in that case having been given all the protection provided by the Moratorium Act, he had no cause in equity to prevent the execution of that judgment. On the other hand, if aggrieved by the judgment in the justice's court, the statute gave him an adequate remedy by appeal to the superior court. His failure to pursue that remedy does not warrant an equitable action to set aside the judgment, which is valid on its face.

For the reasons first given, the appeal from both orders is dismissed.

We concur: LANGDON, P. J.; BRITTAIN, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [5, 6] The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 2, is denied, without regard to what is said in the opinion as to the merits of the case. The orders appealed from were not appealable orders, and the appeal was therefore properly dismissed. It should be added that the record does not show that any judgment was ever entered in the action, and further that an appeal will lie from a void judgment. See Ewing v. Richvale Land Co., 176 Cal. 152, 167 Pac. 876, and cases therein cited.

All concur.

(50 Cal. App. 336)

WARD v. STIMSON et al. (Civ. 3445.)

(District Court of Appeal, Second District, Division 1, California. Dec. 8, 1920.)

Work and labor ⚷24(1)—Proof of work done under express contract precludes recovery on quantum meruit.

In an action for the reasonable value of work done, proof that a part of the work was done under an express contract for an agreed sum precludes recovery.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by David M. Ward, doing business as the Ward Iron Works, against Willard H. Stimson and Charles Willard Stimson, copartners, doing business as Willard H. Stimson & Son. Judgment for plaintiff, and defendants appeal. Reversed.

R. L. Horton, of Los Angeles, for appellants.

Harry C. Levey and Kemp & Clewett, all of Los Angeles, for respondent.

SHAW, J. Action to recover the reasonable value of materials furnished and labor performed by plaintiff at the special instance and request of defendants in repairing a steam boiler.

Judgment was rendered for plaintiff, from which defendants have appealed.

It appears without contradiction that, the boiler being in bad condition, defendants, upon an express contract, employed plaintiff to repair the same, at an agreed price of $124.50. The repairs called for the welding upon the boiler of what is termed a lip, some 4½ or 5 feet in length. Plaintiff himself testified that, while he did not recommend or guarantee that such repairs would prove successful, nevertheless, as done, it would have answered the purpose for which the welding was intended, if the state had allowed it. He says, "I did the work all right, but the authorities would not let it go;" that is, after the work was completed as ordered by defendants, the boiler inspector would not accept it. Thereupon plaintiff, in the absence of an express contract, and as ordered by defendants, furnished materials and did other work in repairing the boiler, for all of which, including the welding of the lip covered by the express contract, he sued herein to recover upon a quantum meruit.

In defense of the action, the answer alleged: First, the making of the express contract and that the work was done thereunder; and, second, that not only the work so called for, but all work done by plaintiff, was faulty, imperfect, and improperly done and performed.

As we view the case, it is unnecessary to consider the second defense pleaded, since the judgment must be reversed on account of insufficiency of the evidence to support the finding that, while the work done under the express contract, "was in progress and before the completion thereof by plaintiff, said defendants ordered plaintiff not to complete said work in accordance with said agreement, but ordered plaintiff to do different and other work in welding a patch in said boiler in place of extending and reinforcing the lip thereof, and that said work was done in said manner upon the order of said defendants through their said agent and engineer, and not upon the advice or recommendation of said plaintiff, and that plaintiff did not warrant or guarantee said work in any manner." That part of the finding to the effect that the contract was rescinded before its completion has no support in the evidence; on the contrary, as stated, the testimony of plaintiff himself shows that he performed all of the repair work called for by the express contract, for which he was to receive the sum of $124.50, which was the measure of his right to recover therefor. Except as to work performed other than that designated in the contract and for which there was no special arrangement, he was not, under the evidence, entitled to recover the reasonable value thereof. Since the proofs made show that a part of the work was done under a special contract, which fixed the price to be paid therefor, it necessarily fails to support the allegations on the complaint upon quantum meruit for the work done as a whole. In other words, as so often said, the probata and allegata do not correspond. O'Connor v. Dingley, 26 Cal. 11; Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903, and cases therein cited.

Clearly, under the evidence offered, plaintiff's right to recover for the work which he fully performed under the special contract, should be limited to the amount specified therein. The judgment in effect grants him a recovery for the reasonable value thereof, which may be greatly in excess of the price at which he agreed to do the work.

Our conclusion renders it unnecessary to discuss other alleged errors pertaining to the character of the work and rulings of the court in admitting testimony.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(50 Cal. App. 231)

HALFHILL TUNA PACKING CO. v. FISHERMEN'S EXCHANGE SUBSCRIBERS.

(Civ. 3443.)

(District Court of Appeal, Second District, Division 1, California. Dec. 1, 1920. Hearing Denied by Supreme Court Jan. 27, 1921.)

Insurance 🔑159—Vessel held lost outside of territory covered by policy.

Under Civ. Code, §§ 1638, 1639, requiring interpretation of contracts to be governed by their plain language, a policy insuring a vessel against fire loss "while operated * * * north of" a certain island *held* not to cover the vessel's loss by fire while at a cove in the island near the southerly end of its east shore; for evidence of custom of fishermen in the neighborhood to pack their fish at such cove did not show that defendant insurer ever construed the phrase "north of" the island as inclusive of the cove, or that settlements of loss had been made on that basis.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Halfhill Tuna Packing Company against the Fishermen's Exchange Subscribers. Judgment for defendant, and plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; Olney, J., dissenting.

Anderson & Anderson, of Los Angeles, for appellant.

F. A. Knight, of Long Beach, for respondent.

CONREY, P. J. Action to recover on a policy insuring property against loss by fire. Judgment in favor of the defendant, from which judgment the plaintiff appeals.

The policy insured plaintiff's boat against loss by fire "while operated in the Pacific Ocean south of Monterey Bay on the north, east of 123 degrees west, and north of San Martin Island on the south." The fire and loss occurred at Hassler's cove, which is located on the east shore of San Martin Island and near the southerly end of that shore. Evidence was introduced to show that Hassler's cove is the only anchorage west of the coast available for the use of fishermen in packing their catch, and that it was the custom of fishermen in the vicinity of San Martin Island to anchor in that cove for that purpose; that about 15 of the boats belonging to members of defendant association (of whom the plaintiff was one) made a practice of fishing in the vicinity of that island, and all of them used Hassler's cove for the purpose of packing their fish.

Basing their argument upon these facts, counsel for appellant seek to establish respondent's liability by the application of two principles: First, that policies of insurance are to be liberally construed in favor of the assured; second, that a policy of insurance must be construed with relation to those established usages and customs with reference to which the insurance has been issued and which are known to the insurer. Giving full recognition to these principles, and without discussion of the interesting decisions referred to in the briefs, nevertheless we think that they furnish no ground for reversal of the judgment in this case.

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Civ. Code, § 1638.

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title." Civ. Code, § 1639.

The "other provisions," however, are not applicable to clear and explicit terms of a contract freely entered into without any attendant circumstances of fraud, mistake, or accident. The evidence to the effect that fishermen in the described neighborhood were accustomed to pack their fish at Hassler's cove is not evidence connected in any way with this contract of insurance. No attempt was made to show a custom that for the purposes of insurance, or for any purpose, defendant association or any of its members have ever construed the phrase "north of San Martin Island" as inclusive of Hassler's cove, or that settlements of loss have been made on that basis. The plain fact is that the destruction of the vessel did not occur north of that island, and the conclusion necessarily follows that the loss was not covered by the policy.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(50 Cal. App. 309)

McCLENAHAN v. HOWARD. (Civ. 3101.)

(District Court of Appeal, First District, Division 1, California. Dec. 7, 1920.)

1. Insane persons 🔑98—Evidence held to sustain finding alienist's services were not requested by incompetent.

Evidence that the only services rendered by an alienist consisted in examining the alleged insane person at the request of the one who had instituted the insanity proceedings *held* to sustain the trial court's findings that plaintiff's services were not rendered at the request of the incompetent.

2. Insane persons 🔑7—Insanity proceedings are adversary in nature.

Proceedings to have a person adjudged insane and incompetent are adversary in their nature.

3. Insane persons 🔑98 — Person rendering services to incompetent without request must prove benefit.

An alienist who examined an incompetent person and testified to her incompetency without her request, but at the request of the person instituting the proceedings against her, must prove that his services were necessary and beneficial to her, to recover the reasonable value thereof from her estate; there being no presumption that such services were either necessary or beneficial.

Appeal from Superior Court, San Mateo County; John L. Hudner, Judge.

Action by H. C. McClenahan against Frances S. Howard, an incompetent person. Judgment for plaintiff for only a small portion of the amount claimed, and plaintiff appeals. Affirmed.

Samuel M. Shortridge, of San Francisco, for appellant.

Garret W. McEnerney, of San Francisco, for respondent.

WOOD, Presiding Justice pro tem. Plaintiff sought by this action to recover a sum slightly in excess of $1,800 for professional services rendered by him as an alienist, to and for the defendant, and at her request. The trial judge found that on January 8, 1915, the plaintiff rendered medical services to the defendant of the reasonable value of $45 at a time when she was unconscious and in need of medical attention. The court found also that at other times between January 8 and April 21, 1915, plaintiff rendered professional services as an expert alienist in examining and diagnosing her mental condition, for the purpose of advising her relatives of such condition, and for the further purpose of testifying as an expert witness in certain proceedings which were pending and which involved the question of her sanity and her mental competence.

The court further found that such services were not rendered at her instance or request or for her use and benefit, and were not necessary for her health, but that they were rendered at the instance and request of her relatives, and for their use and benefit. A judgment was awarded to the plaintiff for the sum of $45 only, and the plaintiff here assails the sufficiency of the evidence to sustain the findings, in denying him any further relief.

It appears from the record in the case that on January 6, 1915, the defendant's brother met with a fatal injury; and on the following day she created some kind of disturbance at his bedside at a private sanatorium in San Francisco which resulted in her arrest upon a charge of insanity made by Mr. Morris, who was the attorney for her brother and certain members of the family. After being taken to the detention hospital, with the approval of the judge and her friends she was removed to a sanatorium devoted chiefly to the treatment of alcoholic cases. In some manner she there obtained and imbibed a large quantity of whisky, and early on the morning of January 8th the doctor in charge informed appellant over the telephone that one of the patients had drunk a large quantity of whisky and was in a precarious condition. Plaintiff went to the sanatorium immediately and there remained, rendering assistance until nearly noon, and until the defendant was out of danger. It is for these services that the trial court awarded plaintiff the sum of $45, and no objection is here made to such allowance.

[1] Upon his return to the office of the sanatorium, plaintiff met a Mr. Rixford, who said that he was the personal attorney of Miss Howard (the defendant), and who informed plaintiff that her mother was ill; that he had inquired around for some one to look into the case; that he did not know what to do or what his rights were in the matter; that he had to make some investigations; and that his cousin or some relative told him that plaintiff could look into the case and should do so. In the afternoon, at the suggestion of plaintiff, there was a family gathering held at his office in order to get information and history of defendant's case to make the investigation as to her mental status. The attorney who made the insanity charge was present also. For the time consumed in this consultation plaintiff makes a charge of $40. From thence on for a period covering 68 different days, the plaintiff rendered services either by observation of the patient, consultation with her relatives and friends, or in attendance upon the court, which attendance and detention occupied his time for parts of 3 days.

Some 10 days or 2 weeks after defendant's arrest upon the insanity charge, her mother arrived from the East and commenced proceedings to have defendant adjudged an incompetent. The petition was dismissed by the superior court without prejudice on October 13, 1915, after a contested hearing. During all this time defendant was practically in custody under the charge of insanity, but shortly afterward, at a time not disclosed, that charge was dismissed. In the following year, on January 28, 1916, a new proceeding was brought, which resulted in the appointment of a guardian for both the person and estate of Miss Howard. This proceeding was not contested, and the plaintiff was not a witness upon the hearing.

While at the sanatorium defendant was under the care of two physicians. Within a few days she was removed to the sanatorium of her own physician, Dr. Ward. Afterward she was taken to San Mateo, where she was attended by two other physicians. Plaintiff never acted as her physician at any time. He never prescribed for her. He did not treat her. The only examinations he made were by way of observation. He refused to consult with the attorneys for Miss Howard. He declined to report the result of his opinion or tell them anything, unless Mr. Morris, who made the insanity charge, instructed him so to do. He was a witness and gave testimony against Miss Howard in the insanity charge and the contested guardianship proceedings, and was called by the attorneys acting against her.

The only circumstances referred to as indicating that plaintiff was acting at the request of defendant are: That it does not appear that she objected to the rendering of his services, and that once just after she went to San Mateo, at her request over the telephone, he took lunch with her, her sister, brother-in-law and two uncles. There is nothing, however, to indicate that she had knowledge while thus in custody under a warrant of insanity that any services were being rendered for her benefit.

Under all the circumstances mentioned, the finding that the services were not rendered at the request of defendant, but were rendered at the request of her relatives, is not without support in the evidence.

[2] It is urged that the proceedings taken against defendant were not adversary in their nature, and also were in fact beneficial to her. As to the first proposition the authorities are to the contrary. Evans v. Johnson, 39 W. Va. 299, 19 S. E. 623, 23 L. R. A. 737, 45 Am. St. Rep. 912; Berry v. Berry, 147 Ind. 176, 46 N. E. 470; Karnes v. Johnston, 58 W. Va. 595, 52 S. E. 658; Jones v. Learned, 17 Colo. App. 76, 66 Pac. 1071; In re Welch, 108 Wis. 387, 84 N. W. 550.

[3] As to the second proposition, in the absence of evidence that the services were rendered at defendant's request, it devolved upon plaintiff to prove that they were beneficial to her. Cases cited by respondent in which the estates of minors, idiots, insane, and persons bereft of reason by the sudden stroke of accident or sickness are held liable for necessaries furnished in good faith while in that condition have no application here, for in those cases a recovery is permitted upon the theory that the services were necessary or beneficial. It was upon such theory that the trial judge awarded respondent the reasonable value for such services as he performed while Miss Howard was unconscious. We know of no presumption that services rendered in observation and consultation by an expert alienist to determine the mental condition of a person are either necessary or beneficial to such person.

An examination of the entire record fails to indicate that, other than the time when Miss Howard was unconscious, she ever received any medication or any advice for her physical or mental welfare or improvement, or for the palliation of any of her infirmities; likewise is the record silent as to any benefit to her property because of any act or suggestion of plaintiff, either in his investigation to ascertain her mental condition, or after his acquirement of the knowledge that she was suffering from precocious dementia and a deteriorated mental state.

If the services were not rendered at the request of Miss Howard and were of no benefit to her, the challenged finding "that they were for the use and benefit of her relatives" was immaterial, and not prejudicial to plaintiff.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

50 Cal. App. 257

PEARDON v. MARKLEY. (Civ. 2154.)

(District Court of Appeal, Third District, California. Dec. 3, 1920.)

1. Vendor and purchaser 🔑44—In action for rescission, defendant's representations will be presumed made in good faith.

In an action to rescind sale of land for mistake and failure of consideration, under Civ. Code, § 1689, in the absence of an express averment that defendant's representation that a certain spring was on the land was made in good faith, it will be presumed so made, as dishonesty would not be imputed.

2. Vendor and purchaser 🔑123—Facts held to show a cause of action for rescission for mistake and failure of consideration.

A complaint showing that plaintiff purchased from defendant a stock ranch, that defendant represented that a valuable spring shown plaintiff was on the ranch and that plaintiff relied on the representation and would not otherwise have purchased, that shortly after the sale plaintiff ascertained that the spring was not on the ranch, and that, the place not being adapted to plaintiff's use, he proceeded to rescind, *held* to state sufficient facts to justify the court granting a rescission.

3. Vendor and purchaser 🔑37(2)—Purchaser could rely upon vendor's representations as to spring being on his land.

A vendor is presumed to know the extent of his property, and purchaser could rely on his representations as to the lands including a spring pointed out on the ground, where purchaser's attention was not directed to any fact or circumstance inconsistent with the representation, and it is no excuse in rescission action that purchaser by independent investigation might have ascertained the facts before purchase.

4. Vendor and purchaser 🔑44—Evidence held to show that alleged untrue representations were made by vendor.

In purchaser's action for rescission on the ground of mistake and failure of consideration, in that vendor's representation that a certain spring was on the land was not true, evidence *held* to show that such representations were in fact made by the defendant to plaintiff.

5. Vendor and purchaser 🔑116—Vendor held to have waived formal tender by purchaser seeking to rescind.

Where purchaser sought to rescind an objection that the purchaser's tender in offering to give the deed back was not formal enough was waived by appellant vendor's failure to specify it at the time, in view of Civ. Code, § 1501, relating to offers of performance.

6. Vendor and purchaser 🔑116—Failure to make formal tender on rescission immaterial, where it would not have been accepted.

Where the record shows that appellant would not have accepted any tender from respondent on rescission, however complete, appellant was not prejudiced if respondent plaintiff should have proffered a deed to the property.

7. Appeal and error 🔑1071(5)—Finding held not reversible error, where not needed to support judgment.

A finding of fact, objected to as outside of any issue tendered, may be ignored on appeal, where the judgment was sufficiently supported without it.

Appeal from Superior Court, Yuba County; E. P. McDaniel, Judge.

Action by James Peardon against Henry C. Markley. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Carlin, of Marysville, for appellant.

A. H. Hewitt, of Yuba City, for respondent.

BURNETT, J. The action was for rescission on the ground of mistake and failure of consideration, and plaintiff prevailed in the court below.

After alleging that plaintiff desired to purchase a tract of land for grazing purposes, and entered into negotiations with defendant to buy 160 acres—describing it—the complaint proceeds:

> "And thereupon at defendant's request plaintiff went to the vicinity of said land, and defendant pointed out to plaintiff a tract of land adjoining said land above described, upon which there was and is a spring of living water flowing each and every year not less than five inches measured under a four-inch pressure during the dry season of each and every year, and defendant then and there positively stated to plaintiff that said land so pointed out, containing said spring aforesaid, was the land above described and was the land then owned by defendant. Plaintiff had no means of knowing the location of defendant's said lands, other than said information imparted to him by defendant as aforesaid. And thereafter, on the 9th day of July, 1917, and relying entirely upon said statement made by defendant as aforesaid, and solely because thereof, plaintiff did purchase said lands and premises above described from defendant, and did receive the deed therefor, and did then and there on said date last named pay to defendant for said lands and premises the sum of $1,600, fully believing that the said lands and premises pointed out to plaintiff as aforesaid contained said spring of living water.
>
> "Said lands were purchased by plaintiff solely for grazing purposes and without living water thereon plaintiff would not have purchased said lands. After the purchase of said lands plaintiff continued to believe they were the identical lands pointed out to him as aforesaid, and continued in such belief until on or about the 12th of January, 1918, when * * * for the first time he learned that the lands and premises pointed out to him by defendant as aforesaid were not the lands above described, and were not the lands which he believed he purchased at the time of the execution of said deed aforesaid, but were lands adjoining the same; and he then and there learned that the lands hereinbefore mentioned and which were described in and granted by said deed aforesaid, did not and do not contain any spring or any living water at all, and as a matter of fact during the dry season of each and every year said lands above described are entirely dry, devoid of living water, and entirely unfit for grazing or any other useful purposes and of no value to plaintiff, and of very little, if any value at all."

Then follows an allegation that after said discovery plaintiff offered to retransfer the property to defendant and demanded a return of the $1,600 paid as aforesaid.

[1, 2] A general demurrer to the complaint was interposed and overruled. It was submitted without argument. Probably appellant had little faith in his position, or he would have tried to convince the court that there was merit in the demurrer. He has apparently acquired more confidence, as he makes in this court elaborate contention that the complaint does not state a cause of action. His attack, however, is based upon the hypothesis that plaintiff sought relief on the ground of fraud, and the burden of appellant's criticism is that the complaint is fatally defective, because there is no allegation that the representation was made with knowledge that it was false or that there was an intent to deceive. No doubt, appellant is right in his theory of the material averments of a complaint to set aside a transaction for the reason that it has been induced by fraud. But respondent bases his action upon the ground of mistake and failure of consideration. It is really an action under section 1689 of the Civil Code for rescission, providing that—

> "A party to a contract may rescind the same. * * * 1. If the consent of the party rescinding * * * was given by mistake. * * * 2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part."

The allegations of the complaint are sufficient to show the existence of these two conditions. The pleading might have been more explicit as to the material mistake that was made. But, in the absence of an express averment that the representation as to the spring was made in good faith, such would be the presumption, as dishonesty would not be imputed to the defendant. That plaintiff was materially misled by the statement of defendant does very clearly appear, and that an important part of the consideration for the purchase was the transfer of the spring does not admit of doubt. The case made by the complaint is substantially this: Plaintiff negotiated with defendant for the purchase of a stock ranch; defendant represented that a certain valuable spring was a part of said ranch; plaintiff relied upon said representation, and would not have purchased the property without said spring; shortly after the sale plaintiff ascertained that defendant did not own the spring, and, the place not being adapted to his use without said water, he immediately proceeded to rescind the contract. Such facts ought to be sufficient to justify a court in granting relief and we have no doubt they are. Similar cases have been passed upon by the courts, and we may refer to two of these.

In Johnson v. Withers, 9 Cal. App. 52, 98 Pac. 42, it was held that a contract to sell and purchase mineral land may be rescinded by the purchaser and a deposit recovered back promptly upon the discovery of a material mistake of fact as to the quantity of mineral in place; the mistake having arisen from a wrong calculation of an expert. The court said:

> "Plaintiffs dealt with defendants upon the truth of this statement and it was incorrect. It was the one estimate of quantity, the one concrete fact, upon which they relied in making the purchase. It was such a mutual mistake as courts of equity will relieve from."

In Taber v. Piedmont Heights Bldg. Co., 25 Cal. App. 222, 143 Pac. 319, the intending purchasers visited certain premises with the vendor's agent and indicated to the latter the particular parcel they would buy and also the land they did not desire to purchase, and upon his mistaken statement that the property they desired was lot No. 35, they purchased the lot bearing that number, when as a matter of fact it included a portion of the land which they had rejected. It was held that the purchasers were entitled to rescind upon the ground of mistake.

[3] It is also true that the vendee had a right to rely upon the representations of the vendor. The latter was presumed to know the extent of his property, and the former was not required to make further inquiry at his peril. Of course, if it had been apparent that the spring was not included within the boundaries of the proposed purchase, the folly of the vendee in rejecting the testimony of his own senses would prevent relief; but such is not this case. His intention was not directed to any fact or circumstance inconsistent with the representations of the vendor. It is no excuse that the vendee by an independent investigation might have ascertained that the spring did not belong to the vendor and that it was not included in the deed of conveyance.

In Quarg v. Scher, 136 Cal. 406, 69 Pac. 96, the land was described by metes and bounds in the contract of purchase and it was stated that it contained "about 40 acres more or less." It was afterward discovered that there were but twenty-three and a half acres. This discrepancy led to a suit, and, on considering a similar question to the one before us, the Supreme Court said:

> "It is next insisted that the defendant saw the land and inspected it before making the contract, and having every opportunity to learn of the quantity of the land, he had no right to take the word of plaintiffs on the question of quantity; in other words, that the rule of caveat emptor applies to the case. This contention is not well founded; the defendant had a right to rely on plaintiffs' representation as to the quantity of land. The acreage of land is a thing that cannot be seen with the eye at a glance, but can only be ascertained with accuracy by scientific measurement, and when a vendor states to the vendee the amount of land in the tract which is the subject of the sale, such vendor will not thereafter be heard to say in a court of equity, the vendee had no right to believe him."

The same principle is indorsed in the Taber opinion, supra, and by the authorities generally.

[4] Nor do we perceive any merit in the claim that the evidence is insufficient to show that said representations were made by defendant. Herein it is admitted that one J. W. Walker, a real estate agent, was authorized to represent the vendor in the sale, and it is sufficient, for the purpose in view, to quote the following testimony of plaintiff:

> "Q. Did Mr. Walker show you the land? A. Yes, sir; showed me the land. * * * Q. Did he show you anything on the land, any spring, anything of that kind? A. Yes; he showed me the spring. Q. What did he show you—what kind of spring? A. Spring flowed about three inches of water, stone wall around it, about a quarter of an acre right on top of the hill; they call it the high springs. Q. What did he say about that spring? A. After we got up there, * * * I took a drink out of it. I said, 'Are you sure of this land?' 'Oh, hell! yes; I know all about it, I sold this land for Boyer to Mr. Markley.' So he pointed out the fence, showed me all around the land. * * * Q. Never mind that now; at the time you were there, did he point out the spring; if you bought the land you would buy this spring? A. I says, 'Is this known as the Blair Ranch?' He says, 'This is the land you are buying right here where this spring is.' * * * Did you specially ask him if you were buying that spring? A. Where that spring was the land was the land I was buying. Q. That is what he told

you? A. Yes, sir. Q. Did you believe it? A. I didn't doubt his word; he said he sold it before."

It may be added that it is not an unfair inference from Walker's testimony that such representation was made, although he manifestly was a witness rather hostile to plaintiff. Of course, he was naturally anxious to shield himself, and he appears to have been somewhat disingenuous; but a careful consideration of his whole testimony strengthens the conviction that he represented to plaintiff that the spring was a part of the property to be conveyed.

Another point is made as to the insufficiency of the evidence of rescission. In reference to this plaintiff testified:

"I told Mr. Markley I didn't get the land that Mr. Walker sold to me; I demanded my money back, and I would give the deed back; he said we would have to make a survey of it, and he kind of hunched away, didn't seem to want to talk on the proposition. I waited a little longer, a few days; thought maybe he would have a survey made; but I didn't see nothing of him coming around, so I started the suit."

[5] To the contention that the tender was not formal enough it is sufficient to say that such objection was waived by the failure of appellant to specify it at the time. Civ. Code, § 1501; Winkler v. Jerrue, 20 Cal. App. 555, 129 Pac. 804.

[6] Besides, it is entirely apparent from the record that appellant would have refused any tender, however complete. Appellant was not prejudiced, therefore, if we concede that respondent should have proffered a deed of the property. 38 Cyc. 134.

[7] Appellant contends that a certain finding numbered 5 is outside of any issue tendered by the complaint. It is, however, in response to an allegation made in a separate defense of the answer. Moreover, it is apparent that it is substantially in accord with the finding, based upon the allegation of the complaint as to the representation made by defendant in reference to said spring. Said finding is as follows:

"And on or about the 6th of July, 1917, said J. W. Walker, acting for defendant and for the purpose of inducing plaintiff to purchase the lands in said deed hereinabove described, took plaintiff upon the lands hereinbefore described and also upon adjoining lands. Both defendant and his said agent, Walker, during all of said times were well acquainted with and knew the lands actually owned by defendant, being the lands hereinbefore described; but said Walker did not point out to plaintiff the boundaries of the same.

"Said agent, Walker, however, did take plaintiff over a portion of said lands, and did take plaintiff to the living spring hereinbefore referred to, and said agent, Walker, did then and there, while the plaintiff was at said spring, expressly state to plaintiff that said spring was on the land owned by defendant, namely, the lands in said deed and hereinbefore described, and which said lands defendant through his said agent was then and there endeavoring to sell to plaintiff; and said agent, Walker, then and there acting for defendant in making said sale, at the said time he stood with plaintiff beside said spring of living water, expressly stated to plaintiff that if he (plaintiff) would purchase the lands then being offered to him for sale, to wit, the lands hereinbefore and in said deed described, he (plaintiff) would also purchase and own said spring of living water, as the same was upon said lands."

Indeed, the criticized finding may be entirely ignored as immaterial; the judgment being sufficiently supported without it.

We have examined all the points and authorities of appellant, but we deem it unnecessary to notice them more specifically.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

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50 Cal. App. 389

GLASS v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.
(Civ. 3402.)

(District Court of Appeal, Second District, Division 1, California. Dec. 14, 1920. Hearing Denied by Supreme Court Feb. 10, 1921.)

1. Physicians and surgeons ⚷2—Statute concerning advertising as ground for revoking license held constitutional.

St. 1917, p. 111, § 14, subd. 3, providing that the board of medical examiners may revoke the license of a physician or surgeon advertising so as to deceive the public or impose upon credulous or ignorant persons, and be harmful or injurious to public morals or safety, is not unconstitutional in that it denies to citizens the equal protection of the law and is class legislation.

2. Statutes ⚷47—Statute permitting revocation of license held not void as uncertain.

State Medical Practice Act, § 14, subd. 3, defining as unprofessional conduct for which a license might be revoked, all advertising of medical business which is intended or has a tendency to deceive the public or impose on credulous or ignorant persons, and so be harmful and injurious to public morals or safety, is not so uncertain and indefinite that it is void and fails to confer any jurisdiction on the Board of Examiners to revoke a license on facts claimed to be in violation "of those indefinite, ambiguous and uncertain provisions" (St. 1917, p. 111).

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Proceeding by Thomas F. Glass against the Board of Medical Examiners of the State of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

California and P. T. Phillips and others, as members of said Board, to review an order revoking a certificate licensing the former to practice medicine. From a judgment affirming the order of the Board, the plaintiff appeals. Affirmed.

Warren L. Williams, Paul Schenck, Richard Kittrelle, and Seymour S. Silverton, all of Los Angeles, for appellant.

Harry A. Encell, Frank M. Smith, and Chas. D. Ballard, all of Los Angeles, for respondents.

CONREY, P. J. Upon complaint before the Board of Medical Examiners against Thomas F. Glass, and after answer filed by him and a hearing before the Board, an order was made revoking the certificate of said Glass licensing him to practice medicine and surgery in the state of California. On petition by him, the superior court of the county of Los Angeles issued a writ of review of said proceedings and order. A full return having been made and the matter having been duly considered by that court, the order of the Board of Medical Examiners was affirmed. From the judgment so entered petitioner prosecutes this appeal.

The State Medical Practice Act provides for the revocation of a certificate to practice medicine and surgery whenever the holder of such certificate is guilty of unprofessional conduct as defined in said act. Section 14 of the act provides that—

> "The words 'unprofessional conduct' as used in this act, are hereby declared to mean: * * * Third. All advertising of medical business which is intended or has a tendency to deceive the public or impose upon credulous or ignorant persons, and so be harmful or injurious to public morals or safety." Stats. 1917, p. 111.

It appears that appellant's license was revoked by reason of acts constituting a violation of said subdivision 3.

[1, 2] The argument in support of this appeal is based upon two propositions only: (1) That subdivision 3 is unconstitutional for the reason that it denies to citizens the equal protection of the law and is class legislation; (2) that the language of the subdivision is so uncertain and indefinite that it is void and fails to confer any jurisdiction upon the Board of Examiners to revoke a license upon facts claimed to be in violation "of these indefinite, ambiguous and uncertain provisions." The first proposition is without merit. The law does not recognize the right of any person to do acts which are harmful or injurious to public morals or safety. So far as the penalty is concerned, it is made as broadly applicable as the subject-matter will permit; in fact, it includes the entire public to which it could possibly apply, since a certificate to practice medicine could not be taken away from a person who did not hold any such certificate.

The principal authority relied upon by appellant to sustain his contention that subdivision 3 is void because of uncertainty and indefiniteness is found in the case of Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750. The court there reviewed an order of the Board of Medical Examiners under the act relating to this subject which was in force at that time. It was provided in that act that "all advertising of medical business in which grossly improbable statements are made" should constitute unprofessional conduct. It was held that the provision was too indefinite to state an offense, and the order was annulled. The court said:

> "While, as we have said, the right of the Legislature to confer power upon a medical board to revoke the license of a physician is granted upon the authority of the Legislature to legislate in the interest of public health, safety, and morals, there is nothing in the terms of this provision authorizing the board to revoke a certificate to practice medicine on account of the publication of 'grossly improbable statements,' from which it can be even inferred that any of these considerations prompted the legislative mind in conferring the power of revocation upon the board, or that any of them are to be taken into consideration by that body in determining whether a given statement is 'grossly improbable' or not. Under this provision the penalty of forfeiture of a physician's license is not made to depend upon falsity in fact of any matter contained in a statement or knowledge on the part of the physician that it is false, or for the reason that it was intended or had a tendency to deceive the public or to impose upon credulous or ignorant persons, and so be harmful and injurious to public morals, health, and safety. It is a matter of no moment under the provision of the act, and is entirely immaterial whether the statement is true or false, beneficial or injurious."

A comparison of the foregoing language used by the Supreme Court with the words used in subdivision 3 of section 14 of the act now under consideration is sufficient to fairly test the whole matter. The legislation was evidently framed with the direct purpose and intention of stating a rule in conformity with the principles declared in the Hewitt Case. Under these provisions a certificate could not be revoked unless it was first determined by the Board that the advertising complained of was in fact false and was intended or had a tendency to deceive the public or impose upon credulous or ignorant persons, and so be harmful to public morals or safety. It would not be possible to frame a definition of unprofessional advertising which would anticipate in terms every form of advertisement which unscrupulous practitioners might thereafter devise. This being so, it cannot reasonably be held necessary to the validity of the statute that it go further than to state a reasonably definite rule under which all such specific acts might be included. This we think has been done in the terms of the statute so far as the same are now presented for consideration. Precisely the same words are found in the Medical Practice Act of the state of Washington. In State Board of Medical Examiners v. Macy, 92 Wash. 614, 159 Pac. 801, this provision was attacked upon the same grounds urged by appellant here. After an extensive review of decisions from various states, including Hewitt v. State Board of Medical Examiners, supra, the court held that this definition of unprofessional conduct in advertising is not void or unconstitutional for vagueness or uncertainty.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

50 Cal. App. 39

VATCHER v. GRIER. (Civ. 3238.)

(District Court of Appeal, Second District, Division 2, California. Nov. 18, 1920. Hearing Denied by Supreme Court Jan. 17, 1921.)

1. Limitation of actions 🔑51(2) — Statute commences to run on installments when due.

Under Code Civ. Proc. § 337, limitations started to run on each installment when it fell due under a contract whereby defendant agreed to pay plaintiff a specified percentage of installments for brokerage services rendered.

2. Brokers 🔑40—Contract held to create fund from which payment was to be made.

A contract providing that broker should be paid "eleven and one-ninth $(11^{1}/_{9})$ per cent. of each payment as payments are made" had the effect of creating a particular fund from which the broker should be satisfied, and broker had no cause of action for recovery of the agreed compensation in the absence of a showing that such payments were made, and that the fund thus became available.

3. Appeal and error 🔑917(1)—Assumed on appeal from judgment following demurrer that plaintiff had no further facts to allege.

Where, on sustaining demurrer to complaint, plaintiff made no request for leave to amend but chose to stand on his complaint as framed, it must be assumed on appeal from a judgment in favor of defendant that no further facts could have been alleged in aid of plaintiff's claim.

On Hearing in Supreme Court.

4. Limitation of actions 🔑46(2)—Statute held not to run against action for commission until purchaser made payments from which commission was payable.

Where, after plaintiff broker rendered services, defendant agreed to pay him a specific amount, to be paid out of payments made by the purchaser, a certain percentage thereof, limitations did not start to run against plaintiff until the respective payments on the purchase price were actually made.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by H. J. Vatcher, Junior, against S. W. Grier. Judgment for defendant, and plaintiff appeals. Affirmed in the District Court of Appeal and hearing denied in Supreme Court.

William Ellis Lady, of Los Angeles, for appellant.

Henning & McGee, of San Diego, for respondent.

WELLER, J. Plaintiff appeals from an adverse judgment entered after a demurrer to his complaint had been sustained without leave to amend.

The complaint alleges that plaintiff's assignors were employed by defendant to negotiate the sale of certain lands in San Diego county, and that as the result of their efforts the defendant executed certain escrow instructions to the Union Title & Trust Company of San Diego, which provided for the payment of $5,000 cash and $85,000 in installments, secured by a trust deed on the property. On the 19th day of October, 1912, the same day that the escrow was deposited, defendant agreed in writing to pay plaintiff's assignors for their services in effecting the sale the sum of $10,000, they in return to pay defendant the sum of $2,500 for the work done by him in negotiating the deal. By the terms of the written agreement such payments were to be made, "eleven and one-ninth $(11^{1}/_{9})$ per cent. of each payment as payments are made; one-fourth (¼) to be applied on the commission to be paid to the party of the first part [defendants], and three-fourths (¾) to be applied on the commission to be paid by the parties of the second part [plaintiff's assignors]." It further is alleged that, by the terms of the agreement, defendant promised to pay plaintiff's assignors $7,500, in seven installments, as the payments fell due under the trust deed mentioned in the escrow instructions, the last three payments so specified maturing April 19, 1914, October 19, 1914, and April 19, 1915, respectively. So far as the record shows, this action was commenced on May 1, 1918.

The demurrer was general and also on the ground that the cause of action was barred by the provisions of section 337, Code of Civil Procedure.

This is not the ordinary case of a broker's contract, where the right of recovery is dependent upon the performance of precedent conditions by the broker. The agreement here in question was made after the services had been completed, and is to be construed according to its terms.

[1, 2] We shall first consider the plea of the statute of limitations. The complaint attempts to allege an unqualified promise to pay $7,500 in seven installments, falling due at specified dates, five of which matured more than four years prior to the filing of the complaint. As to these five installments, aggregating $4,166.64, accepting plaintiff's construction of the contract, there can be no question that they would have been barred at the time of the commencement of the action, as the statute commences to run on each installment when it falls due. Bissell v. Forbes, 1 Cal. App. 606, 82 Pac. 698. As to the remaining two items, aggregating $3,333.36, the situation presents a different aspect. If the agreement to pay at the times alleged were absolute, as claimed by plaintiff, they would not be barred, as they matured within four years before the complaint was filed. This brings us to a consideration of the provisions in the contract regarding the times and conditions of payment. It will be observed that the clause reads that "eleven and one-ninth ($11^1/_9$) per cent. of each payment as payments are made" is to be paid to the brokers. This provision has the effect of creating a particular fund from which the obligations shall be satisfied, and, unless it is alleged and proven that such payments were made and the fund thus became available, no cause of action for the recovery of the amount arises. Lindley v. Fay, 119 Cal. 239, 51 Pac. 333.

The allegations in the complaint regarding the maturity of the installments are based upon an erroneous construction of the contract. Without taking into consideration the conditional promise to pay from the source indicated, the pleader concludes that the maturity of the installments on the trust deed note definitely fixed the time for the payments on his contract. If the promise to pay the $7,500 had been unconditional, as contended by plaintiff, and the sum had fallen due on the date of the contract, namely, October 19, 1912, then the plea of the statute would be a good defense. But, as we have seen, payment was postponed by the terms of the agreement until the happening of some future event, i. e., the payment of installments of the purchase price, and therefore it must be made to appear affirmatively that such event has occurred as a condition precedent to plaintiff's right to recover. Van Buskirk v. Kuhns, 164 Cal. 472, 129 Pac. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932.

There is here no averment that any of the installments of the trust deed note were ever paid, and it is not shown by the pleading that the fund from which plaintiff's claim should be satisfied at any time materialized; hence no sufficient cause of action is alleged in the complaint.

[3] Plaintiff made no request for leave to amend, but chose to stand upon his complaint as framed, and we must assume, therefore, that no further facts could have been alleged in aid of his claim.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

Opinion of Supreme Court, In Bank, Denying Hearing.

PER CURIAM. [4] The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 2, is denied.

The opinion of the District Court of Appeal is, perhaps, inaccurate in stating that a provision of the agreement has "the effect of creating a particular fund from which the obligation shall be satisfied." It does, however, fix the time at which the respective payments on commissions shall fall due as the time when the payments of the purchase price are actually made, with the result that the reasoning and conclusion of the district court are correct.

All concur, except LENNON, J., absent.

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50 Cal. App. 285

Ex parte HUNTER. (Cr. 544.)

(District Court of Appeal, Third District, California. Dec. 7, 1920.)

Habeas corpus 🔑117(2) — Discharge from Sonoma State Home of ward of juvenile court did not affect her previous commitment to Industrial Home.

Where petitioner for habeas corpus was adjudged a ward of the juvenile court until she should attain the age of 21 or be sooner discharged, and was committed to the Boys' and Girls' Industrial Home conducted by the Salvation Army until she should attain 21 or until further order, and subsequently, on petition of the superintendent of the Industrial Home alleging the ward had become feeble-minded, a superior court judge committed her to the Sonoma State Home, but on habeas corpus ordered her discharge from such State Home because the order committing her thereto was based on a petition not signed by the proper person, the discharge did not involve the validity of the first commitment to the Industrial Home, and did not amount in law to a discharge from the Industrial Home under Juvenile Court Law, § 9.

In the matter of the application of Ruby Hunter for writ of habeas corpus to secure the release of petitioner from the Juvenile Detention Home. Writ discharged, and petitioner remanded.

See, also, 193 Pac. 155.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

King & King, of Gridley, for petitioner.
J. R. Robinson, of Chico, for respondent.

ANDERSON, Presiding Justice pro tem. Ruby Hunter, the petitioner herein, was adjudged a ward of the juvenile court in and for the county of Butte in the month of December, 1919, and by such order her status as such ward was fixed until she should attain the age of 21 years, or until sooner discharged by the court.

Thereafter, on February 7, 1920, the said court, exercising its jurisdiction over said ward, committed her to the Boys' and Girls' Industrial Home at Lytton Springs, in the county of Sonoma, state of California, said home being conducted by and under the management of the Salvation Army. A limit was likewise placed in said commitment, stating that said ward should remain in said Industrial Home until she should attain the age of 21 years, or until the further order of said juvenile court.

An attack was made against these proceedings on habeas corpus, but the proceedings were duly upheld by the appellate court for the Third district on January 19, 1920. Application of Hunter for Writ of Habeas Corpus (Crim. No. 498–199) 188 Pac. 63.

While said ward was in the custody of the authorities of said Industrial Home, a petition was signed and filed by the superintendent of said Industrial Home in the superior court in and for the county of Sonoma, alleging that the said ward had become and was weak and feeble-minded, and was a proper person to be committed to the Sonoma State Home, an institution conducted for the care and treatment of feeble-minded persons, and thereupon the Honorable Emmet Seawell, judge of the said superior court in and for the county of Sonoma, made an order committing the said ward to the custody of the authorities of the said Sonoma State Home.

Thereafter, a petition for a writ of habeas corpus being filed in the said superior court in and for the county of Sonoma by the said ward, Ruby Hunter, the said the Honorable Emmet Seawell, on the 14th day of September, 1920, granted the prayer of the petitioner and ordered her discharged from said Sonoma State Home, on the ground that the order committing the said Ruby Hunter to said Sonoma State Home was based upon a petition signed by a person not entitled to sign the same, which signing was in violation of the provisions of section 2192 of the Political Code of the state of California.

After the discharge was so granted, the said Ruby Hunter did not return and was not sent back to the said Industrial Home, and thereafter, to wit, on the 16th day of September, 1920, said juvenile court in and for the county of Butte made its order modifying the former order of commitment wherein the said ward was committed to said Industrial Home and ordered that the said ward be committed to the Butte County Detention Home, and directed that a warrant be issued for her arrest for the purpose of carrying out said order, under which last-mentioned order and commitment the said ward and petitioner herein is now being detained in the Butte County Detention Home.

It is contended by petitioner that her discharge in the habeas corpus proceedings, involving the defective petition in the matter of the commitment to the Sonoma State Home, also involved the validity of the first commitment by the Juvenile court in and for the county of Butte to the said Industrial Home, for the reason, it is claimed, that the said Industrial Home comes within the scope and powers of institutions designated by the statute as "similar state institutions."

A further contention is made that, inasmuch as the said judge of the juvenile court in and for the county of Butte had "knowledge" of, and "consented" to the petitioning by the "management" of said Industrial Home to the said superior court in and for the county of Sonoma for the commitment of the said Ruby Hunter to the Sonoma State Home, this amounted in law to a discharge from said Industrial Home, and that such discharge, "so sanctioned by said juvenile court is a bar in this proceeding."

The principal authority cited by petitioner in support of her contention is In re Johnson, 36 Cal. App. 319, 171 Pac. 1074. The decision in this case is based upon the construction to be given to section 9 of the Juvenile Court Law (Stats. 1915, p. 1225), which is as follows:

> "Any order made by the court in case of any person subject to the jurisdiction of the court under the provisions of any of subdivisions one to thirteen inclusive of section one of this act may at any time be changed, modified or set aside as to the judge may seem meet and proper; provided, however, that nothing in this act contained shall be deemed to interfere with the system of parole and discharge that is now or may hereafter be provided by law, or by rule of the board of trustees of the Whittier State School, the Preston School of Industry or the California School for Girls, or any similar state institution or institutions, respectively, for the parole and discharge of wards of the juvenile court committed to the said schools or to any similar state institutions hereafter created, or with the management of the said schools, save that the court committing a ward to any of said schools may thereafter change, modify or set aside said order of commitment upon ten days' notice of the hearing of the application therefor being served by United States mail upon the superintendent of the said school to which said person has previously been committed, and providing that the court shall not then change, modify or set aside said order without due consideration of the effect thereof upon the discipline and parole system of said school or institution."

An examination of this case will reveal the fact that the court was dealing with one of the exceptions enumerated in the statute, and it did nothing more than to say, in effect, that the plain language of the statute should be followed by the courts. The case was one wherein the juvenile court tried to control the ward after the authorities at the Preston School of Industry had discharged him in accordance with their rules and regulations; but there is nothing in this decision, nor has any decision been called to our attention, wherein the appellate courts have intimated that the powers of the juvenile court should be curtailed in dealing with wards of the court, further than that they are limited by the express letter of the statute.

Learned counsel for petitioner earnestly labor to show that the said Industrial Home conducted by the Salvation Army is an institution such as is named in section 9 of the Juvenile Court Law under the designation, "similar state institution," and upon this they contend that, when the superintendent of said Industrial Home obtained the order committing said ward to said Sonoma State Home, said act thereby operated to discharge said ward from said Industrial Home, and likewise from the order of the juvenile court. With this contention we cannot agree, for to so hold would require a violent construction, as it clearly appears to us that an institution conducted as is the said Industrial Home bears no resemblance to a state institution. Even if it could be shown—which it has not been—that the said Industrial Home had a system of rules and credits entitling an inmate to a discharge under certain conditions, certainly an order of discharge granted by such an institution would not be binding upon the juvenile court.

Petitioner cites the case of Board of Directors of Woman's Relief Corps Home Association of California v. A. B. Nye, 8 Cal. App. 527, 97 Pac. 208, as giving support to her contention that the said Industrial Home may be properly designated as "a similar state institution," but an examination of this case will clearly show that the state did have the management and control of the institution considered in said decision. The trustees were appointed by the Governor, accounts were compelled to be kept; in fact, all expenses for conducting said institution were subject to consideration and ratification by the state authorities.

The fact that the judge of the juvenile court had knowledge or even was agreeable to the proceedings instituted by the superintendent of said Industrial Home in the effort to confine the said ward in the Sonoma State Home could not oust the juvenile court of Butte county of jurisdiction of the ward, for it is nowhere contended that the said juvenile court, as such court, took any action in regard to the proceedings before the superior court in and for Sonoma county, and any consent to the proceedings manifested by the judge in sending telegrams, letters, etc., would amount to nothing more than the act of a private individual. It is not contended that the judge acted in his official capacity, but, even if he had so acted, there seems to be nothing in the Juvenile Court Law inconsistent with such action, and, indeed, it would seem a duty incumbent upon the judge of the juvenile court, constituted as he is, the virtual guardian of the ward, to jealously guard, guide, and protect the ward under all changing conditions, for practically all the duties of a father devolve upon the court then; nor do we believe that after the order is made declaring a child to be a ward of the court, and after the child is committed to an institution or to a private individual for its care, education, support, maintenance, etc., the child should unfortunately become mentally weak, and that it would be inconsistent with the court's duty to commit the child to the care of an individual who might restore it to mental health and vigor, or to a private institution for a like purpose, or be instrumental in starting the machinery of the law for the purpose of having a ward committed to a state institution. Could it be contended, then, that because the court was looking out for the child's mental welfare it would lose its jurisdiction any more than it would if it were looking after the welfare of the child in any other way?

If after the law is invoked, through the instrumentality of the court or otherwise, and the ward is thus placed in a state institution for the benefit of its mental trouble, and after it is freed from such institution by reason of being cured, or for any other reason, may it be contended that by virtue of its incarceration and subsequent grant of freedom it has become absolved from the necessities of ordinary mortals for care, education, support, etc.? If so, upon a parity of reasoning, it may be contended that the natural father loses all control over his child after he has been instrumental, or some other person has been instrumental in having it committed to an institution for the feeble-minded, and the child upon a writ of habeas corpus obtains its freedom by reason of some defect in the commitment, or by reason of being cured. It is idle to so contend, for the necessity for caring for, controlling, and supporting the child still remains, and this subject-matter must still be dealt with by the father or by the juvenile court.

When the superior court of Sonoma county acted, its action each time was in relation to a subject-matter separate and apart from that upon which the juvenile court acted, and the restoration of liberty from an institution dealing with the subject-matter of the child's mental welfare was not a restoration of liberty from every other tie or obligation resting on the child.

The most that can be said of the discharge by the superior court of Sonoma county is that the ward is left where the court found her. It did nothing more than to undo what it had previously done: It made an order committing the child to the Sonoma State Home, and in another proceeding it found that in so doing it had made a mistake. It then proceeded to undo this action, and, after this was done, the ward then stood where she did before—clothed with all former rights and subject to all former claims and obligations.

Counsel for petitioner seem to take the view that a restoration of liberty under a writ of habeas corpus is a granting of freedom for every purpose and against every claim. In the very nature of things, this could not be so. Taking the petitioner's case, for instance, let us assume that the petitioner after having been committed to the said Industrial Home had committed a felony in Sonoma county, and the authorities there had decided to prosecute her in that county; that she applied for and was granted her discharge on habeas corpus by reason of some deficiency in the proceedings; could it then properly be contended that she was discharged from the order of the juvenile court of Butte county? Or, to further illustrate, assuming that after the commission of a felony, as aforesaid, it was found that she was insane and that she was committed to the state hospital for the insane; that she was afterwards discharged as cured, or discharged upon a writ or habeas corpus by reason of some defect in the proceedings committing her to said state hospital; could it then properly be contended that she was discharged from the order of the juvenile court of Butte county? The result simply would be that the juvenile order would remain dormant and inactive during these periods, as it came in conflict with superior authority, and as soon as the superior authority was removed the juvenile order would begin to function. And so it is in the case at bar; the order of the juvenile court is now in full force and effect, and must be respected.

The writ is discharged, and the petitioner remanded.

We concur: HART, J.; BURNETT, J.

(50 Cal. App. 803)

Ex parte HUNTER. (Cr. 545.)

(District Court of Appeal, Third District, California. Dec. 7, 1920.)

In the matter of the application of Pearl Hunter for writ of habeas corpus prayed to be directed to the juvenile court of Butte county to secure the release of petitioner from the Juvenile Detention Home. Writ discharged, and petitioner remanded.

See, also, 193 Pac. 155.

King & King, of Gridley, for petitioner.

J. R. Robinson, of Chico, for respondent.

ANDERSON, Presiding Justice pro tem. At the time of the hearing of the above-entitled matter it was stipulated by counsel for the respective parties herein that the decision rendered in the proceeding entitled, "In the Matter of the Application of Ruby Hunter for a Writ of Habeas Corpus, Crim. No. 544," 195 Pac. 76, this day decided, should be decisive of the application in the proceeding herein; and, inasmuch as we find that the applications and the points and contentions in relation thereto are identical in both cases, it is therefore ordered that upon the authority of the decision rendered in the proceeding entitled, "In the Matter of the Application of Ruby Hunter for a Writ of Habeas Corpus, Crim. No. 544," this day decided, the writ herein be discharged, and the petitioner remanded.

We concur: HART, J.; BURNETT, J.

(50 Cal. App. 272)

FRANK v. CRESCENT WHARF & WAREHOUSE CO. et al. (Civ. 3595.)

(District Court of Appeal, First District, Division 1, California. Dec. 6, 1920. Hearing Denied by Supreme Court Feb. 3, 1921.)

1. Shipping 🔑50—Contract construed as making charter party liable for liens while operating.

In view of Civ. Code, § 1643, where a contract must be construed as providing that the charterer should pay all costs of operating and maintaining steamer and upon expiration of the charter deliver it to the owner free from liens and incumbrances, the owner must be protected against a lien imposed while the steamer was being operated under the charter party unless imposed for work excepted therefrom.

2. Shipping 🔑58(2)—Presumed that charter parties knew that owner's engineer might impress liens on vessel.

In construing a contract chartering a vessel, existing laws enter into and become a part thereof, where applicable and it must be presumed that the charterer knew that, in operating and maintaining a steamer, liens and incumbrances might be impressed under Code Civ. Proc. § 813, through the acts of the chief engineer, retained and reserved by the owner, without their knowledge.

3. Estoppel 🔑112—Answer held not to plead estoppel, no prejudice being alleged.

In an action by the owner of a vessel against a charter party to recover for a lien placed on the steamer while operated by defendant, answer *held* not sufficient to plead an estoppel because of plaintiff's position taken in the libel action establishing the lien, where no injustice or injury to defendants appellants is shown resulting therefrom.

Appeal from Superior Court, City and County of San Francisco; G. A. Sturtevant, Judge.

Action by Marshal A. Frank against the Crescent Wharf & Warehouse Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Nathan H. Frank and Irving H. Frank, both of San Francisco, for appellants.

Gavin McNab and Luther Elkins, both of San Francisco, for respondent.

WOOD, Presiding Justice pro tem. This action was brought upon a bond given for the faithful performance of the covenants of a charter party of the steamer F. A. Kilburn; at the time the steamer was owned by plaintiff. He had judgment against both defendants, and they appeal.

The covenants, in particular, to which our attention is directed by appellants, are:

> "(7) The party of the second part shall pay all costs of operating and maintaining the said steamer (except as hereinafter provided), and upon the expiration of this charter the said steamer shall be delivered back to the party of the first part free of all liens and incumbrances.
>
> "(8) If, owing to the acts of God, fire, perils of the sea, negligence of the master or for any other causes beyond the control of the party of the second part, the said steamer should, during the term of this charter, be damaged or become unserviceable or unseaworthy, the party of the second part shall not be held liable for the same."
>
> "(4) The party of the first part shall have the privilege of appointing the chief engineer of the steamer during the term of this charter, but the master shall be mutually satisfactory to both the first and second parties."

It is not disputed that, in the operation and maintenance of the steamer by the second party (the appellant Crescent Wharf & Warehouse Company), work and labor was done and furnished to the steamer by the Moore & Scott Iron Works, upon the credit of the vessel; that a libel was filed for the same in the District Court of the United States; that a lien was adjudged therefor by virtue of section 813 of the Code of Civil Procedure; that the steamer was delivered back to plaintiff incumbered with this lien; and that plaintiff sustained the amount of damages awarded by the trial court in this action.

The judgment of the District Court in the libel case brought against the steamer by the Moore & Scott Iron Works was appealed from and thereafter was affirmed by the Circuit Court of Appeals and is reported in 179 Fed. 107, 103 C. C. A. 252.

In the libel case it appeared that the owner of the steamer did not know of the repairs and supplies in question and was never told of them prior to the libel suit, but it was held that in view of the fact that Flynn, the chief engineer, was appointed by him, and that the Moore & Scott Iron Works had given former credits to the steamer upon the order of Flynn from time to time prior to the making of the charter party, and that the charges therefor had always been paid, that the chief engineer had ostensible authority from the owner to order the repairs and materials, and hence the vessel was subject to the lien of the libelant.

[1] The contention made by appellants here is that of an estoppel, and the attack is directed against a portion of finding X, as being contrary to the adjudication made in the United States court in the libel suit against the steamer. That part of the finding referred to reads as follows:

> "That the said lien for said work and labor done and supplies furnished to the said steamer F. A. Kilburn was created by the said defendant Crescent Wharf & Warehouse Company, a corporation; and the said work and labor done and supplies furnished to the said steamer F. A. Kilburn, for which said lien was claimed, was so done and performed and furnished at the special instance and request of said defendant Crescent Wharf & Warehouse Company."

It is argued by appellants that it is a legal impossibility for the charterer of a vessel to create a lien thereon as found by the superior court, and that hence this judgment must be erroneous However, in the case upon which they place most reliance to support this argument, The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, the concluding portion of the opinion is in part as follows:

> "Under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter party requiring him at his own cost to provide for necessary supplies and repairs, may pledge the credit of the vessel, it is not necessary now to determine."

Whether this principle of law, as contended by appellants, is correct, and whether the doctrine of res adjudicata may be invoked against finding X, is unimportant, for, in our opinion, it was not necessary in order to support the judgment in favor of plaintiff for the court to find, as it did, either that the lien was created by the Crescent Wharf & Warehouse Company, or that the labor and supplies were furnished at the request of said company.

A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties. Civ. Code, § 1643.

The charter party provided, as we have seen, that the appellants should pay all costs of operating and maintaining the steamer (with certain exceptions not involved here), and, upon the expiration of the charter, deliver back the said steamer to the owner, free of all liens and incumbrances. The defendants in this action covenanted in their bond that the Crescent Wharf & Warehouse Company should strictly perform all the covenants and agreements of the charter party, which by it was to be kept and performed, and deliver back said steamer to the owner after the expiration of the charter party, free from all liens and incumbrances. There is not a word in the charter party or bond, limiting respondent's right of recovery to liens created by any particular person or persons. The reasonable construction to be placed on the instruments is that the owner should be protected against all liens while the steamer was being operated under the charter party unless the liens were imposed for work and materials made necessary under the exceptions mentioned in the eighth subdivision.

[2] The fact that the owner retained the chief engineer and reserved the right to appoint that officer cannot alter the meaning of the contract in this particular, for it appears even from the opinion of the Circuit Court of Appeals, cited by appellants, that Lehman, the president of the charterer company, testified in the libel case that the owner reserved such right "to keep the vessel in good condition."

It is to be presumed that the appellants knew that, in operating and maintaining the steamer under the charter party, liens and incumbrances might be impressed upon the steamer under section 813 of the Code of Civil Procedure of this state, through the acts of the chief engineer and without their knowledge. In construing a contract, existing laws enter into and become a part of contracts to which they are applicable. Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48; Fowler v. Smith, 2 Cal. 568.

The owner was not to pay any of the costs of operating and maintaining the steamer, except in cases arising under the 8th subdivision we have mentioned, and yet, in effect, appellants take the position that such obligation is imposed upon the owner by the charter party, if fortuitously the ship chandler enters his credit against the vessel instead of against the charterer. No such construction can be successfully raised as a shield in their defense.

[3] The appellants argued that certain matters appearing in their answer, the same being taken from the answer of the owner in the libel suit against the steamer, also constitute an estoppel here. The only plea of estoppel set up by their answer is:

> "That by virtue of the foregoing decision the said plaintiff is estopped to allege or maintain that the said work and labor done and materials furnished to said steamer F. A. Kilburn as in said amended complaint alleged, was so done or furnished at the instance or request of the defendant Crescent Wharf & Warehouse Company, a corporation, or that said lien in said amended complaint mentioned was created by said defendant Crescent Wharf & Warehouse Company, a corporation, in the operation and maintenance of said steamer during the pendency of said charter party or otherwise, or at all created by said Crescent Wharf & Warehouse Company."

This also is the only plea of estoppel referred to in the findings of the court. The appellants were not parties to or actors in the libel suit, although respondent made timely demand upon them to defend. Of course, it must be conceded that, if a party relies upon an estoppel, he must plead it (Burk v. City of Santa Cruz, 163 Cal. 811, 127 Pac. 154, and cases there cited), and that as a general rule a party is not precluded from asserting a claim because inconsistent with some claim previously asserted by him, but not successfully maintained (Lackman v. Kearney, 142 Cal. 115, 75 Pac. 668; 15 R. C. L. 956).

In discussing the doctrine of estoppel, it was said by the learned author of the opinion in Allen v. Hance, 161 Cal. 189, 118 Pac. 527:

> "Whether the estoppel rests in judgment, deed, contract, or in pais, in its essence it amounts to but this, that a man is forbidden to show the existence of a fact because by his past conduct, his declarations, his agreement, his deed, or a judgment, it would work an injustice and an injury to his adversary to permit him to do so."

We search the answer of appellants in vain for any statement, intimation, or suggestion that anything appearing therein, or that any act, writing or conduct of respondent at any time, caused any injustice or injury to appellants.

For the reasons stated, we are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: KERRIGAN, J.; RICHARDS, J.

50 Cal. App. 161

PAYNE, Agent, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. * (Civ. 3296.)

(District Court of Appeal, Second District, Division 2, California. Nov. 26, 1920. Rehearing Denied Dec. 24, 1920. Hearing Denied by Supreme Court Jan. 24, 1921.)

Commerce ⚷27(8)—Railroad employee, repairing engine, was engaged in interstate commerce.

Railroad employee, repairing engine in general shops, who, while tapping its boiler, sustained an injury to his eye from a piece of steel blown from the exhaust of a compressed air motor operated by men working near him, *held* engaged at the time in work so intimately connected with interstate commerce as practically to be a part of it, so that the Industrial Accident Commission of the state had no jurisdiction to make an award under the Workmen's Compensation Act.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Certiorari granted, 254 U. S. —, 41 Sup. Ct. 377, 65 L. Ed. —.

Application for certiorari by John Barton Payne, as Agent under Transportation Act 1920, § 206 (41 Stat. 461) subd. (b), he having been substituted for Walker D. Hines, against the Industrial Accident Commission of the State of California, to review its order awarding compensation for injuries to O. J. Burton. Award annulled.

Hearing denied by Supreme Court; Angellotti, C. J., and Lawlor and Wilbur, JJ., dissenting.

Fred E. Pettit, Jr., and E. E. Bennett, both of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

WELLER, J. This proceeding was brought to review the action of the Industrial Accident Commission of California in awarding compensation to one O. J. Burton for injuries sustained by him in the line of his employment under Walker D. Hines, Director General of Railroads, operating the Los Angeles & Salt Lake Railroad.

On February 1, 1919, when he received the injury, Burton was engaged in repairing engine No. 3673 in the general shops of the Salt Lake Railroad at Los Angeles. While tapping the boiler of the engine, a piece of steel, blown from the exhaust of a compressed air motor operated by men working near him, lodged in his left eye, causing the injury for which he was awarded compensation. This locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce between points in the states of Nevada and California, on the main line of the railroad. On the 19th of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure, whereupon it was the intention to return it to its regular service. It was estimated that this work would be finished about January 30, 1919, but owing to delay in delivery of necessary materials it was not actually completed until about February 21, 1919. After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, a portion of the cargo in both instances being consigned to points outside of California. It was testified that the trip to San Pedro was a part of the process of "breaking in" after a locomotive had undergone extensive repairs. After this run to San Pedro, the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run between Yermo, Cal., and Caliente, Nev., on the main line of the railroad, where it has ever since been used.

This rather elaborate detail seems essential to a thorough understanding of the facts which are uncontroverted. It is conceded that, if the Industrial Accident Commission of California had jurisdiction of the case, the award is just and proper in all respects. The sole question presented for our consideration is: Was the engine at the time of the accident, engaged in interstate commerce, within the meaning of the federal Employers' Liability Act (35 Stat. 65 [U. S. Comp. St. §§ 8657–8665])?

The answer to this simple proposition is rendered difficult by the apparent conflict of decisions of the various courts, federal and state, which have been called upon to apply the law to the facts in issue in particular cases. It is complicated by reason of the fact that no fixed rule has been established by the Supreme Court of the United States for the application of the statute. It has held that each case must be decided in the light of the particular facts, with a view to determining whether, at the time of the injury, the employer is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereof. New York C. & H. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298. Where the employer is engaged in both intrastate and interstate commerce, and the instrumentalities are used indiscriminately in both, the line of demarkation between the two classes of business is exceedingly difficult to trace. A résumé of some of the decisions will serve to illustrate this point.

In Louisvile & Nashville R. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119, the employee was engaged in switching a car not moving in interstate commerce from one track to another, for the purpose of reaching and moving an interstate car; and it was held that he was engaged in interstate commerce. The court says:

> "The difference is marked between a mere expectation that the act done would be followed by other work of a different character, * * * and doing the act for the purpose of furthering the later work."

New York C. R. Co. v. Carr, supra, was a case where two cars carrying interstate freight was uncoupled from an interstate train and backed into a siding, where the employee was injured. We quote from the decision:

> "The matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an in-

terstate trip, he is entitled to the benefits of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

In the case of Erie R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662, an employee was in charge of a switch engine which was used in switching cars about in the yard, especially to and from a transfer station; some cars containing interstate freight, others intrastate, and still others carrying both classes. After completing his day's work, he put his engine away and started to leave the yard. While crossing a track on his way out, he was struck by an engine and killed. It was held that, as his work was particularly interstate, and his leaving the yard was a necessary incident to his employment, he was at the time engaged in interstate commerce within the purview of the federal act.

New York C. R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536, determined that a workman engaged in removing snow from tracks used for the transportation of interstate and intrastate commerce was entitled to compensation under the federal law.

In Philadelphia, B. & W. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed. 869, the employee was the cook of a construction crew which was employed in repairing bridges at different places along the line. The court stated that as he was actually assisting the bridge carpenters by keeping their bed and board close to their place of work, he was engaged in interstate commerce.

Pederson v. Delaware, L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, decided that an employee who was carrying bolts to be used in repairing an interstate railroad, and was injured by an interstate train while performing that duty, was within the terms of the federal statute.

Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, enunciates the principle that a workman employed in removing and installing fixtures in a machine shop which is conducted for repairing locomotives used in both interstate and intrastate transportation is not entitled to the benefit of the federal act. The court in its opinion says:

> "The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation."

In the case of Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, the workman was employed with a crew in switching cars of coal to sheds, where it was placed in chutes, thence to be used to supply coal to engines engaged in both classes of transportation. The court held that he was not in interstate commerce, stating that—

> "Manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes."

The above citations will suffice to indicate the subtle distinctions which have been drawn by the Supreme Court of the United States in interpreting and applying the federal Employers' Liability Act.

Coming, now, to the decisions of our own Supreme Court construing these authorities, we encounter a direct conflict which adds to the difficulty of reaching a satisfactory solution of the problem.

In the case of Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916E, 916, the Industrial Accident Commission of California had assumed jurisdiction, under substantially the following facts: A workman named Ruth was repairing a switch engine, which had been withdrawn from service in the yard at Roseville Junction, Cal., where some 70 per cent. of the switching was interstate commerce work. While thus engaged, Ruth received injuries resulting in his death. The accident occurred during the time the engine was in the roundhouse undergoing repairs, and three days before it was restored to service. Our Supreme Court annulled the award, after discussing the decisions of the federal court, some of which we have cited. On May 21, 1917, without filing an opinion, the Supreme Court of the United States denied a petition for a writ of certiorari whereby it was sought to review the decision of the state court.

On January 8, 1917, the Supreme Court of the United States rendered an opinion in the case of Minneapolis & St. Louis R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, from which we quote:

> "The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both intrastate and interstate commerce, and * * * it was so used after the plaintiff's injury.' The last time before the injury * * * was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all * * * we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic, and it does not appear that *this engine was destined especially to anything more definite than such business as it might be* needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as appears, might be inter-*

state or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depends upon its employment at the time not upon *remote probabilities* or upon *accidental later events.*" (Italics ours.)

On the authority of this Winters Case, our Supreme Court, in Hines v. Industrial Acc. Com., 192 Pac. 859, filed October 4, 1920, affirmed an award to one Brizzolara, under circumstances somewhat similar to those in the Ruth Case, supra. The finding of the commission in the Brizzolara Case was as follows:

> "That at the time of said injury and death said employee was engaged in making repairs upon a switch engine, which had been temporarily withdrawn from service therefor. That, when in service, said switch engine was used in both interstate and intrastate traffic. That the evidence herein is insufficient to establish as a fact that the proportion of said interstate use exceeded or amounted to thirty per cent. of the whole."

After quoting from the decisions of the United States Supreme Court, the opinion proceeds to state that the ruling in the Ruth Case is at variance with the holding in the Winters Case, and that the Ruth Case, therefore, cannot be considered as controlling, notwithstanding that the Ruth Case was affirmed by the United States Supreme Court some four months after the Winters Case was decided.

Some of the other adjudications of our Supreme Court are illuminating upon this intricate problem. It has been held that a watchman at a railroad crossing used for both interstate and intrastate traffic is engaged in interstate business while employed in keeping the track clear of obstructions in order to facilitate the passage of interstate trains. Southern Pacific Co. v. Industrial Acc. Com. (Rolfe Case) 174 Cal. 8, 161 Pac. 1139, L. R. A. 1917E, 262; Southern Pacific Co. v. Industrial Acc. Com. (Smith Case) 174 Cal. 16, 161 Pac. 1142. An electric lineman, employed in the removal of an overhead telephone wire which had fallen on the trolley wire used by a railroad for furnishing electric power for the operation of cars of the railroad's interstate and intrastate passenger system, was engaged in interstate commerce, as he was then engaged directly in removing an obstruction to the operation of an instrumentality in actual use for purposes of such commerce. Southern Pacific Co. v. Industrial Acc. Com. (Covell Case) 174 Cal. 19, 161 Pac. 1143.

In the case of Southern Pacific Co. v. Industrial Acc. Com., 178 Cal. 20, 171 Pac. 1071, one Butler was killed by an electric shock received while he was wiping insulators on the main power line of an interstate and intrastate system, between the power house and substations. The electrical energy was generated at this power house and conveyed in an alternating current of high voltage to the substations, there converted and transformed to a direct current of reduced voltage, thence passed to the trolley wires, and from there to the motors on the cars. Our Supreme Court applied the principle of the Harrington Case, supra, and decided that the work being done by Butler was analogous to the situation of an employee loading coal chutes for the supply of interstate engines, and held that Butler's employment was too remote from interstate commerce to bring him within the federal statute. This action was reversed by the Supreme Court of the United States (251 U. S. 259, 40 Sup. Ct. 130, 64 L. Ed. 258), the court saying;

> "Generally, when applicability of the federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. * * * Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body, they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation and an essential part of it."

The cases which most closely parallel the one we have under consideration are found in the decisions of the Circuit Courts of Appeals, and, though they are not expressions of the court of last resort, nevertheless they may guide the action of the state courts in determining the applicability of the federal statute.

Law v. Illinois Cent. R. Co., 208 Fed. 869, 126 C. C. A. 27, L. R. A. 1915C, 17, was decided by the Circuit Court of Appeals of the Sixth Circuit. A boiler maker's helper was injured in the shops of the railroad company at Memphis, Tenn., while assisting the boiler maker in repairing a freight engine regularly used in interstate commerce. The engine was in the shop for what is called "roundhouse overhauling," and had been dismantled at least 21 days before the accident. Up to the time it was taken to the shop, it had been regularly used in interstate commerce, was destined to return thereto on completion of the repairs, and did so return the day following the accident. In the opinion holding the federal act applicable to the facts, the court propounds the following pertinent interrogatories:

> "Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would

suffice to take it out of the purview of the act? And is it material whether the repairs take place in the roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character?"

Further quoting from the opinion:

> "As held in the Pederson Case, the work of keeping the instrumentalities used in interstate commerce (which would include engines) in proper state of repair while thus used is so clearly related to such commerce as to be in practice and in legal contemplation a part of it."

In Northern Pacific R. Co. v. Maerkl, 198 Fed. 1, 117 C. C. A. 237, the Circuit Court of Appeals of the Ninth Circuit held that an employee engaged at the railway shops in making repairs upon a refrigerator car theretofore used indiscriminately in intrastate and interstate commerce, and intended again to be so used when repaired, was one of the instruments of interstate commerce.

Some general statements in the opinion in the Brizzolara Case, supra, might seem to be determinative of the issues here involved; but a perusal of the opinion discloses that such statements, in so far as they attempt to state the legal principles applicable to all engines, are not warranted by the decision in the Winters Case, Supra, upon which they purport to be based. The Winters Case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentaity of interstate commerce could not be made to depend upon remote possibilities or upon accidental later events. The switch engine involved in the Brizzolara Case, when in service, was used in both interstate and intrastate traffic—the proportion of each not being ascertainable from the evidence. It does not appear that it was intended for such service in the future, or that it was utilized for any purpose whatever after being repaired. The facts in the instant case are distinguishable from those in either the Winters Case or the Brizzolara Case. Here the engine was permanently devoted to interstate commerce, was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use. It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce. As stated in the Parker Case, supra, "the purpose controls, and the business is interstate." Its future use was not dependent upon "remote probabilities or accidental later events"; but, so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.

In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore that the Industrial Accident Commission of California had no jurisdiction.

Award annulled.

We concur: FINLAYSON, P. J.; THOMAS, J.

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50 Cal. App. 314

FLINT v. GIGUIERE. (Civ. 1904.)

(District Court of Appeal, Third District, California. Dec. 7, 1920. Rehearing Denied Jan. 6, 1921; Hearing Denied by Supreme Court Feb. 3, 1921.)

1. Appeal and error 🔑1002—Verdict on conflicting evidence conclusive.

Jury's finding on conflicting evidence as to fraud will not be disturbed on appeal.

2. Contracts 🔑108(2)—Waiver of option in favor of another not against public policy.

Agreement not to exercise option, so as to allow another to buy, is not legally objectionable; there being nothing to indicate that it is against public policy.

3. Contracts 🔑65(3)—Agreement not to exercise option so that defendant might buy consideration for agreement to pay.

Plaintiff's agreement not to exercise an option, so as to allow defendant to buy, was consideration for defendant's promise to pay plaintiff a certain sum.

4. Contracts 🔑9(1)—Agreement not to exercise option sufficiently definite.

Agreement not to exercise an option so as to allow a third person to buy the articles *held* not so uncertain or indefinite as to make it invalid or unenforceable.

5. Contracts 🔑333(5)—Agreement not to exercise option held pleaded.

Complaint *held* to plead, in effect, contract of plaintiff not to exercise option, so as to allow defendant to buy the articles, in consideration of amount to be paid for each article bought.

6. Contracts 🔑28(3)—Finding of agreement not to exercise option warranted by evidence.

Evidence *held* to warrant finding of agreement of plaintiff not to exercise option, allowing defendant to buy the articles, he in consideration to pay plaintiff a certain amount for each article that he should buy of the third person.

7. Contracts 🔑348—One attacking written option as without consideration has burden of proof.

Under Civ. Code §§ 1614, 1615, as to presumption of consideration and burden of proof as to lack of consideration of written instrument, defendant, sued on contract whereby plaintiff agreed not to exercise his written option and to allow defendant to buy the articles, has the burden of proof on his claim of want of consideration for the option.

8. Contracts 🔑50—Agreement not to exercise option held to contain the necessary reciprocal promises and obligations.

Plaintiff's option constituting property, his agreement not to exercise it and to allow defendant to buy the articles, imposed on him a burden and on defendant a benefit under Civ. Code, § 1605, so that, defendant agreeing to pay plaintiff, in consideration for such agreement, a certain amount for each of such articles that he should buy of the third person, there were the reciprocal promises and obligations necessary for a valid contract.

9. Frauds, statute of 🔑84—Agreement as to option held not sale within statute.

Agreement of plaintiff not to exercise his option, so that defendant could buy the articles independently of the option, was not one for sale within Civ. Code, § 1624, subd. 4.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chose in Action.]

10. Frauds, statute of 🔑85—Agreement for sale not within statute, the price not necessarily being $200.

If agreement of plaintiff not to exercise option to buy 365 cattle, but to allow defendant to buy them, defendant to pay plaintiff $1 for each head purchased, be considered one for sale of the option, it is not within Civ. Code, § 1624, subd. 4, as he might buy less than 200 head so that the price of the option would be less than $200.

11. Frauds, statute of 🔑144—One receiving benefit of contract estopped to claim its invalidity.

Even if plaintiff's agreement not to exercise an option to buy cattle, but to allow defendant to buy them, defendant in consideration to pay plaintiff $1 for each head defendant should buy of the third person, be considered a contract for sale of the option within the statute, defendant, having availed himself thereof, is estopped to assert invalidity of the contract because not in writing.

12. Contracts 🔑350(1)—Evidence that purchase by defendant from third person was under agreement with plaintiff held sufficient.

Evidence *held* sufficient to sustain finding that the purchase of cattle by defendant was under his agreement with plaintiff, whereby plaintiff, having an option for their purchase, agreed not to exercise it, but to allow defendant to buy them, he to pay plaintiff $1 for each head that he should buy of the optionor.

13. Contracts 🔑192—Defendant, to be liable under agreement whereby plaintiff waived option in his favor, need not have purchased during life of option.

For defendant to be liable under agreement with plaintiff, who, having option to buy cattle, agreed not to exercise it, but to allow defendant to buy them, he to pay plaintiff $1 for each head that he should buy of the third person, it was not necessary that defendant's purchase should be before expiration of the option.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by S. W. Flint against Carl Giguiere. Judgment for plaintiff, and defendant appeals. Affirmed.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellant.

Arthur C. Huston, of Woodland, for respondent.

BURNETT, J. The complaint in this action is brief and may be set out in full as follows:

"(1) That within two years last past the said plaintiff and D. B. Woods entered into a contract whereby the said D. B. Woods agreed to sell and deliver to the said plaintiff 365 head of cattle situated in Berryessa Valley, Cal.

"(2) That said plaintiff and defendant agreed that if plaintiff would permit said defendant to purchase said cattle so held under contract by plaintiff from the said Woods that the said defendant would pay plaintiff the sum of $1 per head for each and every head purchased by him; that, in consideration of said agreement on the part of said defendant to so pay him the sum of $1 per head, the said plaintiff agreed that said Woods might sell said cattle to the said defendant, notwithstanding the contract between plaintiff and the said Woods.

"(3) That the said defendant thereupon purchased from the said Woods 365 head of said cattle.

"(4) That there is due, owing, and unpaid from the said defendant to the plaintiff the sum of $365; that the same has not been paid and no part thereof has been paid."

In the answer it was denied, on information and belief, that plaintiff and Woods entered into such contract, and it was denied positively that plaintiff and defendant entered into the contract mentioned in the complaint. An affirmative defense of fraud, based upon misrepresentation by plaintiff of the fitness of said cattle, was also set up, and it was alleged that the agreement was that defendant should pay plaintiff the sum of $1 per head "for each and every head of the said cattle fairly fat, fit and suitable for slaughtering purposes which he might purchase from the said Woods"; that immediately after entering into said contract defendant discovered that said cattle were extremely thin, lean, and scrawny and entirely unfit and unsuitable for slaughtering purposes, and informed plaintiff that he would not purchase the same or any thereof.

The action was tried before a jury, and a verdict was rendered in favor of plaintiff for the sum of $328, and the appeal is from the judgment entered thereon.

[1] At the outset we may dispose of the question of fraud by saying that as to it the evidence is conflicting, and it may not be amiss, indeed, to recall the principle that requires us to approach the determination of

all the issues with the disposition to find, if possible, legal support for the verdict and judgment, and to be content if such support be found.

The theory of plaintiff, as we understand it, is that he had an option for the purchase of certain cattle from one Woods; that he agreed with defendant that he would not exercise said option if the defendant would pay him $1 per head for all of said cattle that the defendant might purchase; that thereafter said defendant did purchase 328 thereof, and hence plaintiff became entitled to the payment of $328.

[2-4] Abstractly considered, such agreement does not appear to be legally objectionable. There is nothing to indicate that it is against public policy, and the declination of the plaintiff to exercise his option in order that the defendant might have the opportunity of purchasing the cattle for himself would constitute a sufficient consideration for the latter's promise to pay the former the said sum of money. Nor is there anything so uncertain or indefinite in its terms as to make such contract invalid or unenforceable.

But we do not understand appellant to claim that an agreement of that kind may not be enforced, but his contention is that no such contract was either pleaded in the complaint or shown by the evidence.

[5] As to the complaint it is true that it is not expressly alleged that plaintiff agreed "to stand aside" or not to exercise his option, but that is necessarily implied in the averment "that said plaintiff agreed that said Woods might sell said cattle to the said defendant, notwithstanding the contract between plaintiff and said Woods." The inference is also strengthened by a consideration of the use of the expression "permit said defendant to purchase said cattle." In brief, the complaint shows the agreement to be that defendant would pay plaintiff $1 per head for each of the cattle purchased by him, and in consideration of this promise the plaintiff agreed that Woods might sell said cattle to defendant, notwithstanding said option. If that is not equivalent to a promise on the part of plaintiff not to exercise his legal right to purchase said cattle, then the promise amounts to nothing. Of course, he could not permit defendant to buy the cattle or carry out his agreement that "Woods might sell said cattle to said defendant," if he exercised his option. Both conditions could not coexist. It hardly seems controvertible that plaintiff has substantially set forth in his complaint a contract in accordance with the theory for which he contends in his brief.

[6] We may next consider whether the evidence furnishes any rational ground for the inference that such was the contract of the parties. In reference to it the plaintiff testified as follows:

> "Mr. Giguiere came to my house. Mrs. Flint and I were there. Mr. Giguiere wanted to get those cattle. He says 'I hear that you got Woods' cattle tied up.' That's the expression he used. I says, 'I have a contract on his cattle and I am going to try to sell them;' and he says, 'Will you turn those cattle over to me?' I says, 'I would be glad to, Carl; we live here in Yolo county, and I've done some business with you before; I would be glad to do it, turn them over to you, providing you pay me what I would make; otherwise a dollar a head is my commission.' He says, 'All right, I'll pay you a dollar a head.' And then Mrs. Flint took the original contract— Q. When you say the original contract, you mean the one of February 22d? A. Yes, sir; all those, all of them, and gave Mr. Giguiere a copy. Mrs. Flint wrote this copy out and handed it to Mr. Giguiere, and Mr. Giguiere took it and said he would go ahead and finish the business up with Mr. Woods."

Is it not a reasonable inference from the foregoing that the intention of the parties was that plaintiff would make no attempt to buy the cattle, in other words, to consummate his option, and in consideration of this waiver the defendant would pay him $1 for every head that he might buy? The agreement was not formulated with the accuracy that would be expected of attorneys, but these men are laymen, and extreme precision, especially in the use of legal terms, may not be looked for. But here again we may say that the language quoted can hardly bear any other construction than as claimed by respondent. In the cross-examination he added that defendant said: "All right, now, if I buy these cattle, Sam, I'll give you one dollar a head." But it is not contended by respondent that appellant was to pay unless he purchased the cattle. So that the foregoing expression is not inconsistent with plaintiff's theory. Indeed, as we have seen, the complaint makes the purchase by defendant a condition of his obligation to pay plaintiff.

We are not concerned, of course, with the fact that defendant testified that the agreement was that he was to pay $1 a head for all the fat cattle he bought. But it is worthy of remark that his testimony on the other point is to the effect that plaintiff was to give up his option in consideration of said promise of defendant.

As to the execution of said agreement, it is sufficient to say that it is not disputed that plaintiff did "step aside" and permit defendant to purchase the cattle, and there is evidence which the jury had the right to believe—if indeed it is really contradicted —that defendant did purchase 328 head of said cattle. Thus were the conditions fulfilled for the creation of the obligation of defendant to pay said sum.

[7] Now for a more specific consideration of defendant's criticisms of the judgment: The first is that there was no consideration for the promise to pay said money to plaintiff. This is based upon the assumption that

plaintiff did not confer any benefit or suffer any detriment, for the reason that his so-called option was without consideration. As to this, it is probably sufficient to say that the defendant presented no such defense in his answer. The option was embodied in a written instrument, and in such cases the burden of showing a want of consideration sufficient to support it lies with the party seeking to invalidate it. Civ. Code, § 1615.

The instrument being in writing, the presumption is that there was a sufficient consideration (section 1614, Civ. Code), and to overcome this presumption it was incumbent upon appellant to allege and prove the contrary (Yellow Jacket, etc., Co. v. Holbrook, 24 Cal. App. 687, 142 Pac. 128; Pastene v. Pardini, 135 Cal. 431, 67 Pac. 681).

[8] Nor do we see anything in the form or terms of said option to render it invalid. It conferred upon plaintiff the legal right to purchase within a certain time said cattle at a certain price. Manifestly plaintiff was not required to promise to purchase the cattle in order to make it an enforceable instrument. If he had so promised, it would, of course, have made the instrument a contract of sale instead of an option. From the nature of this instrument it would follow that, a valuable consideration having presumably been paid therefor, the "option" was binding upon Woods and constituted property which was capable of ownership and of being transferred. But whether Woods could have withdrawn the privilege granted therein before it was acted upon is indeed immaterial, since there is no doubt that it was operative at the time of said agreement between plaintiff and defendant. This privilege or option being a property right, necessarily it would be a sufficient consideration to support an obligation. It is immaterial what its value was, although plaintiff and defendant placed its value at $1 per head. At any rate, we must presume it was of value, and therefore the assignment of it—or what in effect is the same thing as far as the consideration is concerned—the voluntary declination of plaintiff to exercise said option, imposed upon him a burden and upon defendant a benefit; and hence there were reciprocal promises and obligations that constituted a valid contract between plaintiff and defendant. Bacon v. Grosse, 165 Cal. 481, 132 Pac. 1027; Civ. Code, § 1605.

[9] It is also contended by appellant that the contract between Woods and Flint constituted a chose in action, and therefore the attempted transfer of it by oral agreement was invalid by virtue of subdivision 4 of section 1624 of the Civil Code, pronouncing invalid "an agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accepts or receives part of such goods and chattels or the evidences, or some of them, of such things in action, or pays at the time some part of the purchase money."

But the answer is that the agreement between plaintiff and defendant was not for the sale of said "chose in action," but that plaintiff would not avail himself of said privilege. There was no claim nor was there any evidence that defendant was to buy the cattle under the agreement between plaintiff and Woods, as would have been the case if there had been a sale of the "chose in action." By reason of plaintiff abandoning his right to purchase, defendant was left at liberty to make whatever terms he could with Woods.

[10] Moreover, if the transaction might be regarded as a sale, the statute would not apply for the reason that the promise of defendant was not to pay a definite amount of $200 or more, but he was to pay $1 for every head which he might buy. He did not bind himself to buy any definite number. In fact, this seems to have been left to his judgment. It might therefore have been less than $200. To such a contract the statute does not apply.

[11] But, be that as it may, under the circumstances of the case, as we are required to view it, appellant is estopped from urging the statute of frauds. Flint performed his part of the agreement. He surrendered his property right upon the faith of Giguiere's promise to pay $1 per head. Having received the benefit of that agreement with Flint, it would be unjust and inequitable for defendant to repudiate it upon the ground that the contract was not in writing. Many refinements and much learning on the subject are displayed in the books and the decisions, but we think it can be safely said that in cases like this where one of the parties has performed his obligation, has suffered the detriment contemplated by the agreement, and the other party has fully received the benefit of the transaction, the chancellor has a large discretion in determining whether it would be inequitable to allow the party who gains by the contract to take refuge under the statute of frauds, and, unless it can be said that such discretion has been abused, an appellate court will not interfere. The question, we may say, arose upon an objection to the testimony of plaintiff as to the contract with defendant, and we think it cannot be held that the trial court erred in the ruling.

As illustrative of the application of this principle we may refer to the two California decisions cited by respondent.

In Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159, the action was for the specific performance of an oral contract to convey real property, and the Supreme Court, in holding that there was a sufficient performance by one party to require an execution of the contract by the other, made this statement:

"Where there is a verbal agreement under which each of the parties is to convey land to the other, it is generally held that a conveyance by one on the faith of the agreement constitutes such part performance as will in equity take the case out of the operation of the statute [citing cases]. The case at bar is within the principle of these decisions, and the conveyance by plaintiffs therefore places them in a position to compel compliance by the defendants with the undertakings on their part."

In Hefferman v. Davis, 24 Cal. App. 295, 140 Pac. 716, the action was for the recovery of rent, and the lessee defended upon the ground that the lease was invalid, because not in writing. It was held that he was estopped from setting up the statute of frauds; this court holding that it would be inequitable to allow him to repudiate the contract on any such ground.

[12] Some contention is made that appellant did not buy the cattle under said contract with respondent, but that it was a subsequent transaction in which he was jointly interested with his partner, Holmes. But, if we concede merit in such defense, there is sufficient evidence to the contrary to sustain respondent's position. As to this it will answer to quote the following from the testimony of plaintiff:

> "Q. After that did you ever have any talk with Mr. Giguiere in regard to whether he had actually taken the cattle from Woods? A. Yes, sir; I was out in Mr. Giguiere's machine and sold him, if I remember right, a couple of head of cattle that I bought out here from Tom Chalmers, and Giguiere says, 'Well, I made the trade and I'll give you a check.' I says, 'All right,' and I says, 'Any time.'"

[13] Another point is made that the purchase of the cattle was subsequent to the expiration of the option, and therefore not within the terms of the contract between plaintiff and defendant. Respondent claims that there is a conflict in the evidence as to this, but, granting that appellant is right as to the time, it does not seem to be material. The agreement between plaintiff and defendant did not require the purchase to take place before the expiration of the option. Indeed, as to that, no time was specified, although probably a reasonable time was implied. The sale, at any rate, took place only a few days after said option expired, and plaintiff, having performed his part of the agreement, was entitled to recover.

In conclusion, we may state that in none of the cases cited by appellant do we find anything militating against this view. We may briefly notice the last of these Thomas v. Birch, 178 Cal. 483, 173 Pac. 1102.

That case involved an option, and the court held that it was not binding upon either party until the defendant exercised his option by making the payment within the time limited, but it was found that the option was without consideration and therefore constituted a mere offer which required acceptance before it became a contract. Herein, however, there was a consideration for the option, and we are justified in holding that it was accepted by Flint, and therefore became a property right of value.

The case involves a comparatively trivial amount, but we have given it as careful consideration as though much were at stake, and we have reached the conclusion that, under familiar principles, we should not disturb the result reached.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

50 Cal. App. 403

GOATMAN et al. v. FULLER et al.
(Civ. 3347.)

(District Court of Appeal, Second District, Division 1, California. Dec. 15, 1920. Rehearing Denied Jan. 13, 1921. Hearing Denied by Supreme Court Feb. 10, 1921.)

1. Landlord and tenant 🔑18(3)—Evidence held to prove an indebtedness, sustaining plaintiff's claim that lessee held lease as security only.

Evidence *held* to prove an indebtedness of K. to a defendant, sustaining plaintiff's contention that a lease to a defendant belonged in fact to K., who assigned to plaintiff, but was executed to defendant as security for debts owed by K. to such defendant.

2. Evidence 🔑158(28)—Testimony as to items charged to witness not competent; books being best evidence.

In an action for an accounting, testimony of plaintiffs' assignor that certain payments of wages were charged to him by a defendant was not competent; such defendant's books being the best evidence.

3. Account 🔑18—Copy of statement admissible over objection it did not show it related to land in suit.

In an action for an accounting, copy of statement furnished to plaintiffs' assignor by a defendant's bookkeeper *held* admissible over objection that there was nothing to show that it related to the land involved in the suit.

4. Pleading 🔑237(1)—Court did not abuse discretion in denying motion to amend answer to correspond with proof.

In an action for an accounting, the trial court did not abuse its discretion in denying defendants' motion at the close of the evidence to amend their answer in a particular to correspond with the proof, where, in view of the facts found by the court, the denial sought to be incorporated by the amendment would not have corresponded with the proof.

5. Trial 🔑391—Specific finding on averments of answer including only probative facts not necessary.

In an action for an accounting, certain averments of the answer *held* to include nothing more than probative facts bearing on one of the principal issues tried and determined by the court, that is, whether or not a defendant took a lease on behalf of another defendant and in trust for plaintiffs' assignor, so that specific finding on such averments was not necessary.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by William Goatman and R. P. Gage against O. B. Fuller and others. From judgment for plaintiffs, defendants appeal. Affirmed.

U. T. Clotfelter and E. T. Lucey, both of Los Angeles, for appellants.

Anderson & Anderson, of Los Angeles, for respondents.

CONREY, P. J. Respondents, as assignees of one Peter Karales, brought this action to have it decreed that the plaintiffs are the owners of a certain lease of 320 acres of land, which was executed by Artesian Land Company to O. B. Fuller, and thereafter assigned by him to C. H. & O. B. Fuller Company, hereinafter called the Fuller Company, and for an accounting of the rents, issues, and profits thereof. An interlocutory decree was entered, whereby it was adjudged that the plaintiffs are the owners of said lease. It was further ordered that the lease be assigned to the plaintiffs, that the plaintiffs forthwith be given possession of the leased premises, that the subleases be assigned to the plaintiffs, and that the defendants O. B. Fuller and the Fuller Company account to the plaintiffs for the rents, issues, and profits of said Karales lease. From this judgment the defendants appeal.

Among other things, the court found that on the 24th day of September, 1917, Karales was engaged in the business of leasing, farm-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ing, and subletting farming lands and properties in the county of Orange, and in the course of said business, which he had carried on and conducted for some time prior thereto, had been given financial aid and assistance by the defendants Fuller Company and Pioneer Ranch Company, and had set over and assigned to said defendants various and sundry leasehold interests as security for his obligations to them; that on the 24th day of September, 1917, Karales had negotiated and secured the promise of a lease from the Artesian Land Company upon the terms and conditions of the lease here in question; that on said 24th day of September, 1917, when the said Artesian Land Company was about to make and execute said lease to Karales, the defendant O. B. Fuller, acting as the agent for and on behalf of the defendant Fuller Company, requested and demanded that said lease be made and executed to him, the said O. B. Fuller, and in his name, as further security for the moneys then owing and thereafter to become due from Karales to said Fuller Company; that thereupon Karales agreed to join O. B. Fuller in said request and demand; that thereupon, and pursuant to said request and demand, and solely by reason thereof, and for the said purposes stated, and not otherwise, the lessor made, executed, and delivered to the said O. B. Fuller, as the agent of and representing the Fuller Company, the said lease; that O. B. Fuller took said lease as such agent of the Fuller Company and in trust, with the knowledge, acquiescence, and consent of said company, for Karales and his successors and assigns, for the uses and purposes stated, and not otherwise; that Fuller thereafter executed an instrument assigning to the Fuller Company all the right, title and interest of Fuller in said lease; that the Fuller Company ever since has held and now holds the said lease in trust for Karales, his successors and assigns. Other facts are stated on which it was held that the plaintiffs are entitled to an accounting, and it was ordered that such accounting be made before the court.

Appellants contend that the evidence is insufficient to justify these findings, and especially that there is no evidence legally sufficient to sustain the finding that the lease was placed in the name of Fuller as further or any security for moneys owing from Karales to the Fuller Company. Incidental to this specification, appellants claim that the evidence is insufficient to establish the fact that on the 24th day of September, 1917, or at any time thereafter, Peter Karales was indebted to the defendants or any of them in any sum whatever. The argument is that, since there was no debt, therefore the testimony tending to show that the lease was made in the name of Fuller as security for a debt becomes legally insufficient to establish the conditions on which respondents rely as entitling them to the status of beneficiaries of a trust.

On the law of the case, counsel for appellants first refer to various decisions defining the character of evidence required to establish an equity of the kind asserted by respondents in this case. The gist of the rule, as applied where it is sought to show that a deed in form is in fact a mortgage, is set forth by Mr. Pomeroy as follows:

> "The presumption, of course, arises that the instrument is what it purports on its face to be, an absolute conveyance of the land; to overcome this presumption, and to establish its character as a mortgage, the cases all agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail." Pomeroy's Eq. Jurisp. (3d Ed.) § 1196.

We shall assume, without further discussion, that the rule is as thus declared and that it is applicable to this case. However, it also must be remembered that, where facts have been found by the trial court and the evidence is conflicting, the appellate court will not set aside those findings, unless the evidence favorable to the findings is so slight that it becomes legally insufficient to establish the facts. In a case of the kind now under consideration, therefore, the rule that the evidence must be clear, unequivocal, and convincing means no more than that the evidence in support of the findings, if believed by the court, must have been sufficient to furnish clear, unequivocal, and convincing proof of the facts found. If it was thus sufficient, then the fact that there was other and conflicting evidence, in which it appears that the court did not have confidence, cannot alter the legal effect of the evidence upon which the findings are based.

Prior to a date on or about May 5, 1917, Peter Karales had been indebted to the Pioneer Ranch Company, a corporation whose officers were the same persons as the officers of the Fuller Company. O. B. Fuller was president of the Fuller Company and vice president of the other. The indebtedness to the Ranch Company was, among other things, secured by a chattel mortgage on certain cattle, and by an assignment of a lease then held by Karales on a 935-acre tract owned by the Artesian Land Company and situated near the 320-acre tract described in the lease here involved. By foreclosure sale of the cattle, the indebtedness of Karales to the Pioneer Ranch Company was fully satisfied. A few days later, Peter Karales (together with his brother who had some interest therein) assigned to the Fuller Company said 935-acre lease. Appellants claim that at that time, in consideration of this assignment, and in connection with the Fuller Company's agreement to employ Peter Karales in its operation of said 935 acres, all indebtedness of Peter Karales to the Fuller Company was then and there satisfied and canceled. Peter Karales in his testimony denied the fact of such settlement agreement. The witnesses on the part of the appellants have not testified to any oral statements made between appellants and Peter Karales concerning this matter, nor to any written statement other than that Karales at said time executed the assignment of the 935-acre lease. At about that time the Fuller Company opened an account under the heading "Karales Ranch," in which items of receipts and expenditures were entered relating to the 935-acre tract, and in some instances relating to the 320-acre tract. This account also shows entries of $100 per month paid to Karales by the Fuller Company between May and October, 1917. During that period Karales was rendering services connected with all of these leased lands. Whether he was then merely an employee at a salary of $100 per month, or whether these were advancements made to Karales as a part of the transactions out of which his indebtedness arose, is one of the evidentiary questions of fact in dispute herein.

Prior to September 24, 1917, Karales on his own account had negotiated with Artesian Land Company for a lease of said 320 acres. The lease had been made out in his name, but he had not been able to make the initial payment of $220, without which the Land Company would not deliver the lease. By application made to Mr. Ramsey, an officer of the Fuller Company, Karales had asked the Fuller Company to advance this money for him. Finding Mr. Ramsey unwilling to comply with this request, Karales applied to the president, O. B. Fuller. Fuller and Karales went to W. H. Daum, manager of the Land Company, and had a conversation which resulted in the substitution of the name of O. B. Fuller for that of Peter Karales as lessee in the written lease which had been prepared. Thereafter Fuller paid the $220 and received the lease. Peter Karales testified that at that interview Mr. Fuller said to him:

> "Peter, I get everything in my name as collateral;" also, "I want to get this 320 acres in my name;" that "Daum turned around and asked me if that was so, if that was fair. I tell him all right; that is all there was."

Mr. Daum testified that at that interview Mr. Fuller said he would like to have the lease in his name, instead of Karales, as Mr. Karales would have to assign it anyway to protect funds that had been advanced. On cross-examination, Mr. Daum discriminated between the degrees of definiteness of his recollection of the facts, thus:

> "I would say I was positive that he said he would like to have it in his own name so far as the assignment was concerned; as to the balance it is the very best of my recollection."

The cross-examination on this point went on at great length, but the witness still insisted that the facts were as stated, to the best of his recollection. On the other hand, Mr. Fuller's version of the conversation at Daum's office is as follows:

> "I took that lease in my own name. We went up to Mr. Daum's, and I told him what we come for, and he asked me how I wanted the lease. I said I wanted it to myself, O. B. Fuller. He said to Peter, 'Is that all right?' Peter said, 'All right, go ahead and take it,' and I did so."

Again:

> "Did you give him (Daum) any reason for it? A. I don't think so."

With respect to the indebtedness, Fuller testified that Peter Karales never owed him personally any money at any time, and that since May, 1917, Karales had not owed the Fuller Company any money. About the beginning of December, 1918, pursuant to negotiations of Karales with the plaintiffs, Goatman and Gage, a transaction occurred whereby the 935-acre lease was assigned by the Fuller Company to the plaintiffs. Whether the consideration for that assignment was part of an ordinary sale made by the Fuller Company as lease owner, or whether plaintiffs took over the assignment by paying the amount of an existing debt of Karales to the Fuller Company, is an additional question of fact in the case. At about this time Karales and the witness Brown called at the office of the Fuller Company. Karales says that he asked Mr. Fuller for a statement; that Mr. Fuller told the bookkeeper, Mr. Pearl, to let him have it, and Pearl gave him a statement (a copy of which was introduced in evidence). Brown testified that he told Fuller he came in to talk about Peter Karales' account, stating that possibly he could raise the money; that Fuller asked for Mr. Ramsey to come into the room, and that Fuller asked Mr. Ramsey, "How much does Peter owe us?" that Ramsey stated the amount to be about $9,200; that Fuller said, "Peter, I want my money, or else I will close you up." Some days later they returned to the Fuller Company's office with Mr. Goatman and Mr. Gage. At that time a statement of account from the Fuller Company's books relating to these matters was produced by the company, and Mr. Fuller wrote at the top thereof "Peter Karales Ranch Account with C. H. & O. B. Fuller Company." It was in accordance with the balance shown by that statement that the payment was made in consideration of which the 935-acre lease was assigned to the plaintiffs. Mr. Gage testified that this heading on the statement was placed there by Mr. Fuller at his request, because there was no heading on it.

> "Q. You still thought it was a statement of Peter Karales' indebedness to C. H. & O. B. Fuller Company, didn't you? A. If it is not, somebody has misrepresented it to us; Mr. Fuller said it was."

However, on cross-examination this occurred:

"Q. Neither Mr. Karales nor Mr. O. B. Fuller told you at any time during these negotiations that Peter Karales was indebted to the company, did he? A. I don't know as he used the word you use, Mr. Clotfelter; but they said the balance due them on the Karales Ranch account was $10,200 and some odd dollars."

Mr. Goatman testified:

"I asked Mr. Fuller myself, sitting opposite across the table, if this money was what Mr. Karales owed you people, and he said 'Yes.' He went on to tell about Peter being a very fine fellow, but he had something to say about his not managing just as he should do, etc., and that six months ago Peter had a credit of $1,700."

Opposed to this we have Fuller's testimony that, when Karales and Brown asked him how much Peter Karales was owing the Fuller Company:

"I told them Peter Karales owed nothing; the indebtedness was an indebtedess that was owed by the Peter Karales Ranch to the C. H. & O. B. Fuller Company."

Fuller's explanation of the book account is that it was merely an expense account between the company and its leased property, showing expenditures and receipts on account thereof, and that in fixing the amount which they would accept for the assignment of the 935-acre lease, they established that consideration at "the difference between the outgo and the income on the ranch," instead of fixing a lump sum as the price. The reason, he said, was—

"because I told Peter Karales that, if he could sell out our interest in that thing and get our money out, that was all we wanted; we would be willing to lose our own time and all our work, if we could get our money out."

[1] Enough of the evidence has been stated here to test the question raised by appellants' contention that the evidence is insufficient to prove that any indebtedness of Karales to the Fuller Company existed on or about the 24th day of September, 1917. There had been such indebtedness. Was it settled and satisfied in May? If there was not an agreement whereby the transfer of the 935-acre lease to the Fuller Company was accepted by the creditor, and made by the debtor, as payment of the debt; if the 320-acre lease was made to Fuller, and passed to the Fuller Company by reason of the facts declared in the testimony of Daum and of Karales; if the corroborative facts existed as set forth in the testimony of Karales, Brown, Goatman, and Gage, concerning their conversations with Fuller and others at the Fuller Company's office, and the statements of account then furnished—then, from those facts, the court might reasonably determine, as the ultimate fact clearly, unequivocally, and convincingly established, that the 320-acre lease was placed in the name of Fuller as further security for the indebtedness of Karales to the Fuller Company. That those facts did exist may not be denied by this court, for there was evidence of them, which the trial court believed.

[2-5] Appellants argue in support of five alleged errors in rulings at the trial. The first is of slight importance, and the ruling was correct. The second relates to the overruling of an objection to a question asking Karales to whom certain payments of wages were charged after the payments had been made by the Fuller Company; in response to which the witness answered, "Charged to me." The evidence called for was not competent, as the company's books were the best evidence. It is, however, scarcely possible to conceive that this item appreciably affected the result of the action.

The third of these points is that the court erred in receiving in evidence a copy of the statement which had been furnished by the company's bookkeeper to Karales. The objection to this document was that it had been shown by the testimony of Mr. Pearl, the bookkeeper, that the document simply purported—

"to set forth the operating expenses and receipts in connection with some land and there is nothing on the face of the report to show that it relates to the land involved in this suit. Therefore no foundation has been laid."

Taken in connection with the testimony above mentioned, in which the circumstances under which the statement was given are shown, we think that the objection was not well taken.

The fourth of these claimed errors was the denial of a motion made by appellants, at the close of the evidence, to amend their answer in one particular to correspond with the proof; that is to say, by stating that the defendants deny:

"That on the 4th day of December, 1918, or at any time since May, 1917, Peter Karales was indebted to either of the defendants."

In view of the facts found by the court, which heretofore we have held are sufficiently sustained by the evidence, this denial would not have corresponded with the proof. Moreover, the nature of the evidence received indicates that the case was tried on the theory that such denial had been made. The court did not abuse its discretion in refusing to permit the amendment.

Finally, appellants claim that the court failed to find on a material allegation in the answer. This allegation was as follows:

"The defendant O. B. Fuller alleges that, before he took said lease as before stated, the said Peter Karales informed him that unless he, the said Karales, were furnished the money necessary to be paid as a condition precedent to the execution and delivery of the lease by the Artesian Land Company to him on the lands described in the complaint, he, the said Karales, would be wholly unable to get the lease, and that said defendants C. H. & O. B. Fuller Company and Pioneer Ranch Company had refused to let him, the said Karales, have said money, and that he was therefore compelled to drop the negotiations for such lease and to give up the idea of obtaining the same; that but for such information on the part of said Karales the said defendant O. B. Fuller would not have taken said lease."

These averments of the answer include nothing else than probative facts bearing upon one of the principal issues tried and determined by the court, viz. whether or not O. B. Fuller took said lease on behalf of the Fuller Company and in trust for Karales. A specific finding upon the particulars stated in said paragraph of the answer was not necessary.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(50 Cal. App. 329)

HOYT v. THOMAS et al. (Civ. 3440.)

(District Court of Appeal, Second District, Division 1, California. Dec. 8, 1920. Hearing Denied by Supreme Court Feb. 3, 1921.)

1. Specific performance 🔑114(1)—Complaint to enforce agreement to make will must show money judgment not adequate relief.

Complaint in an action to enforce an agreement to make a will and devise property to plaintiff must show, either by direct averment or from a description of the character of the services rendered, that a money judgment would not furnish adequate compensation to plaintiff.

2. Specific performance 🔑114(1)—Complaint in action for specific performance of contract to make will insufficient.

Complaint alleging that plaintiff rendered personal services to decedent, and that as rendered they were worth $3,500, or thereabouts, and that decedent agreed to make a will in his favor therefor, *held* not to disclose services rendered by plaintiff such as to entitle him to specific performance of decedent's contract.

3. Pleading 🔑408—Denial in answer held not a waiver of right to question complaint as not showing right to relief.

Where defendants in an action for specific performance of contract to make a will by their answer denied that services of the value stated in the complaint, or of any value, had been rendered by plaintiff, by such denial they did not waive their right to question the complaint on the general ground that it failed to state sufficient facts to authorize equitable relief by way of specific performance to be administered.

4. Specific performance 🔑121(3)—Evidence held insufficient to show that services rendered could not be compensated in money.

In an action for specific performance of decedent's contract to make a will in favor of plaintiff, evidence *held* insufficient to support the trial court's finding that services rendered by plaintiff could not be compensated in money.

5. Appeal and error 🔑294(1), 553(2), 757(1)—Motion for new trial unnecessary to review of evidence under alternative method; reporter's transcript serves as bill of exceptions under alternative method; under alternative method brief should contain part of record referred to.

Under the alternative method of appeal, the reporter's transcript, prepared according to the requirements of Code Civ. Proc. § 953a, serves all the puposes of a bill of exceptions to permit review of the evidence; it being necessary, however, that the parties print in their briefs such portions of the records as they desire to call to the attention of the court, and so absence of motion for new trial will not preclude review of the evidence under the alternative method.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Frank C. Hoyt against Belle Thomas and others. From judgment for plaintiff, defendants appeal. Reversed.

Lloyd W. Moultrie, of Los Angeles, for appellants.

James S. Bennett, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment awarding to the plaintiff the relief demanded in his complaint.

Defendants are the heirs and distributees of the estate of Hattie McIntire, deceased. Hattie McIntire died intestate in September, 1917, leaving an estate consisting of real and personal property which was appraised at the sum of $4,043.77. The value of the property distributed after settlement of the estate accounts is stated in the briefs to have been the sum of $3,469.12. This plaintiff presented and had allowed in his favor against the property of the estate two claims, one for rugs purchased, $20, and a second for money advanced, $85.30. Immediately upon the order settling the estate being made and distribution being had, plaintiff commenced this action. In his complaint he alleged that in March, 1903, a contract was entered into between plaintiff and Hattie McIntire, widow of William F. McIntire, whereby the said plaintiff promised the said Hattie McIntire that he would attend to her business affairs, particularly her said real estate, and perform such personal services for said Hattie McIntire as she should from time to time request during the remainder of her natural life; that in consideration thereof the said Hattie McIntire promised and agreed that all of the estate of which she died possessed should thereupon be and become the property and estate of the said plaintiff, Frank C. Hoyt; that said Hattie McIntire then and there promised and agreed that she would, prior to her death, execute a last will and testament, or such other papers as should be necessary to carry out the terms of said contract on her part, and to assure the possession of said property to said Frank C. Hoyt; that said Hattie McIntire died on or about the 19th day of September, 1917, without having executed said will or other papers, and without having transferred said property or any part thereof to plaintiff; that said agreement was and is just, fair, and equitable in all its terms and conditions, and the consideration moving to the said Hattie McIntire from plaintiff was and is adequate; that said plaintiff fully kept and performed each and every of the terms and agreements on his part to be kept and performed from the making of said contract until the death of said Hattie McIntire; that during all of said time he had charge of her business affairs and the management of her property, and performed all such personal services as the said Hattie McIntire required from time to time, and remained in charge of her said property after her death until he delivered possession of the same to the public administrator; that all of said services so performed by plaintiff for said Hattie McIntire in her lifetime were and are of the reasonable value of $3,500, or thereabouts. The allegations which we have quoted comprise all of the substantial averments of the complaint. The trial judge, under those allegations, made, among others, this finding:

> "That certain of the said services so performed by plaintiff for said Hattie McIntire in her lifetime were of a nature and character not to be compensated for by money alone, and that all of said services so performed by plaintiff for said Hattie McIntire in her lifetime, so far as the same can be valued in money, were and are of the reasonable value of $3,500, or thereabouts."

[1, 2] One of the points made is that the judgment cannot be sustained because it is predicated upon a complaint which fails to state facts sufficient to constitute a good cause for the equitable relief demanded and adjudged. The particular point in this objection goes to the question as to the right of a plaintiff in the circumstances alleged to have specific performance if it appears that he might have been adequately compensated in money. It will be noted that nowhere in the complaint is there a statement of what the particular alleged "personal services," which plaintiff asserted that he had rendered to Hattie McIntire, were. He affirmatively alleged that the services as rendered were worth "$3,500, or thereabouts." This allegation follows a general one that the contract was fair and equitable in all its terms and conditions and that the consideration was adequate. As we understand the law, it is settled that in a complaint in an action to enforce an agreement to make a will and devise property in favor of the plaintiff, it must appear, either by direct averment or from a description of the character of the services rendered, that a money payment would not furnish adequate compensation to the plaintiff. The fact that the plaintiff has fixed a definite sum as being the value, "or thereabouts," of the services rendered, would not alone vitiate the statement of a good cause of action for the relief demanded, provided the complaint had contained such a description of the services which were performed as to enable a court to say that the value of such services could not be adequately measured in money terms. We quote from the decision in Flood v. Templeton, 148 Cal. 374, 83 Pac. 148:

> "Equity, it is true, does entertain contracts for specific performance to convey the whole or any portion of the promisor's property by will, but it decrees such performance, first, only upon clear proof of fairness, justness, and adequacy, and where the rights of innocent third parties are not imperiled; and, second, it does so only where the plaintiff cannot be compensated in money. These cases usually arise where the service is of some extraordinary nature which cannot be, and in the contemplation of the parties was never expected to be, paid for in money, as where home ties are broken, and minors go to live with an adult upon his promise that he will stand in loco parentis and will to them his property in return for their filial services during his lifetime. * * * So it will be found that in all of the cases in which specific performance of these agreements to leave property by will has been decreed by the courts, there has been present the element of peculiar personal services, fully performed and incapable of compensation in money" (citing authorities).

In Morrison v. Land, 169 Cal. 580, 147 Pac. 259, the Supreme Court, by the Chief Justice, said:

> "There is no dissent in the authorities from the proposition that one may make a valid contract with another to devise or bequeath property by his last will in a certain specified way. It is clear that in the event of a breach of such a contract, the party damaged has an action at law for the damage caused by such breach of the promisor, and in some cases this, by reason of the circumstances, may be his only remedy, for a resort to any equitable remedy can be had only where the circumstances are such as to make the case one within the well-settled principles relative to the proper exercise of equitable jurisdiction. Where the party damaged is restricted to his remedy at law for the breach, he must necessarily proceed upon the theory that he is a 'creditor' of the deceased, having a 'claim against the estate' 'arising upon contract,' within the meaning of those words as used in our probate law. * * *"

In our opinion, not only did the complaint in this action fail to disclose services rendered by the plaintiff of such a character as to entitle him to have specifically performed the contract alleged, but the effect of the affirmative allegation as to the value of such services makes it appear with reasonable certainty that plaintiff could have secured full redress by money claim against the estate of Hattie McIntire. Respondent admits that the general objection now made to the complaint was not waived by failing to demur (Code Civ. Proc. § 434), but does assert that because the defendants made denial of the allegation as to the value of the services they are estopped from questioning the sufficiency of the compaint in the regard mentioned.

[3] We do not think that the conclusion by any means follows. The defendants by their answer denied that services of the value stated or any value had been rendered, and by this denial assuredly they did not waive their right to question the complaint on the general ground that it failed to state sufficient facts to authorize equitable relief to be administered. The trial court evidently realized that it was necessary, in order to support the judgment, to make a finding that services had been performed which could not be valued in money, when it determined facts as we have shown in the finding quoted. The finding, however, lacks necessary support in the allegations of the complaint; and it appears to us also that, as appellants insist, it fails to find sufficient support in the evidence. Plaintiff testified that—

> Prior to the making of the agreement with Mrs. McIntire he had helped her around the house, mowed lawns, "and different things like that, little things, and I had been working in a grocery store and delivered groceries there; and there was a rubber elbow on the toilet that got a hole in it, broken, and I went to a hardware store and got another rubber elbow and put it on the toilet at that time. And she says, 'Frank, I haven't any people of my own, and you have been good to me, and if you will take care of things for me so long as I live, then whatever is left at the time of my death I will give to you.' I told her that I would do that; whatever she required me to do; take care of her, and do things for her."

The testimony further of the plaintiff was that he took up the study of the law at a school shortly thereafter; that he visited Mrs. McIntire on an average of probably two or three times a week, doing things about the house, cleaning the yard, fixing the fences, and some housework and washing; that that went on for a year or two, and then he looked after the making of certain contracts for her, made mortgage loans, and generally transacted her business as her representative; that about the year 1914 Mrs. McIntire became ill, and that he took medicines out to the suburban town where she was staying a number of times; that finally she became quite ill in 1917, and that he stayed at her house "quite a bit" nights, doing housework at times, and washing. He testified:

> "I went out nights after I would get through my work and stay overnight; and the neighbors helped her some. And then about a week or two before she went to the hospital she hired a woman who stayed there with her. * * * So I persuaded her, on the advice of her doctor, that she had better go to the hospital and rest up until her foot got in condition so she could get around. * * * Upon my advice she decided to go to the hospital. * * * I told her it would be difficult for me to see her very often out there [Glendale]; that if she wanted to see me, that I knew of a place in Hollywood that was a private hospital, a small hospital that she could go to and get very good care, and that seemed to please her and she decided to go there. And I took my machine and went and took her to that hospital in Hollywood. * * * I visited her there practically every day, and got whatever she needed in town, took it out to her and got things she wanted; alcohol for rubs and nightgowns and an air cushion; numerous things that I could not name definitely. It was paid for by her money. I never paid for anything for her out of my own pocket. She always paid me the money to get things for her, but she never paid me anything for any services rendered of any kind, that is, for whatever work I did, or car fare, or for traveling expenses, or anything like that. I took her out a great many times in an automobile the last three or four years; I took her a great many trips around the country. She never paid any expenses on account of anything like that, and she never paid anything of that sort, but, so far as the things she used herself or that I bought for her, she always paid for them. * * * Q. Now, Mr. Hoyt, what, in your opinion, was the value of the services you rendered to Mrs. McIntire from March, 1903, to the time of her death? A. Well, I would place the value of them at about $4,000."

[4] There was other testimony of a corroborative nature, consisting of alleged statements made by Mrs. McIntire to nurses and others, confirming the fact as to her having made the agreement alleged with plaintiff; and further as to the fact that plaintiff had been "more than a son" to her, and that deceased had said, "I will pay him well; anything left, it is for him when I am gone." Had this testimony stood alone, relating to the character of the services rendered, it perhaps might be proper to hold that the question as to whether the services were capable of being compensated for in money was one for the trial court. However, the plaintiff himself seems to have had it in his mind that the services had a particular and definite money value, for he testified, without apparent hesitation and without qualification, so far as the record shows, that in his opinion the services were worth, as stated, about $4,000. And so we think that the second point made by appellants, to wit, that the particular finding of the court herein referred to is not supported by the evidence, is well taken.

[5] Respondent's counsel insists that it is improper to review the evidence on an appeal from the judgment where it is not shown that

there has been a motion for a new trial. Even under the established Code practice, and before the inventive brain of some practitioner, ever seeking an easier way to practice law, had evolved the so-called alternative method, the statute permitted the review of evidence upon an appeal from a judgment where the appeal was taken within 60 days and the evidence was presented in a bill of exceptions. Section 956, Code Civ. Proc., before amendment of 1915 (St. 1915, p. 328); Perkins v. Cooper et al. (Sup.) 24 Pac. 377. The case cited was given a hearing in bank and later the decision made on another point, but its argument has not been discountenanced by any later expression of the Supreme Court. Under the alternative method, the reporter's transcript, prepared according to the requirements of section 953a, Code of Civil Procedure, serves all the purposes of a bill of exceptions; it being necessary, however, that the parties print in their briefs such portions of the records as they desire to call to the attention of the court.

For the reasons given, the judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

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50 Cal. App. 323

HACKLEMAN v. LYMAN. (Civ. 3331.)

(District Court of Appeal, Second District, Division 1, California. Dec. 8, 1920.)

1. Fraud 🔑58(4) — Evidence insufficient to show purchaser relied on vendor's representations.

In an action to recover damages for fraudulent representations, as a result of which plaintiff purchased land from defendant, evidence *held* insufficient to warrant finding that plaintiff, believing the representations to be true, relied thereon and was thereby induced to purchase the property.

2. Fraud 🔑20—Purchaser making full investigation presumed to have relied on own judgment.

If a purchaser of realty visits the land prior to sale and makes a personal examination of it, touching representations made as to its quality, character, or condition, he will be presumed to rely, in making the purchase, not on the representations, but on his own judgment, if the vendor does nothing to prevent his investigation being as full as he chooses.

3. Appeal and error 🔑553(2)—No bill of exceptions necessary under alternative method.

Under the alternative method of appeal no bill of exceptions is necessary.

4. Appeal and error 🔑294(1)—To secure review of sufficiency of evidence appellant need not present motion for new trial.

It is not necessary, to entitle appellant to review of the sufficiency of evidence to support the decision, that he first present to the trial court motion for new trial.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by L. B. Hackleman against C. A. Lyman. From judgment for plaintiff, defendant appeals. Reversed.

Lewis S. Riley and Chas. B. De Long, both of San Diego, for appellant.

E. R. Simon, of El Centro, for respondent.

SHAW, J. Action to recover damages for alleged fraudulent representations made by defendant to plaintiff, as a result of which the latter, in reliance thereon, was induced to purchase certain land. Judgment was rendered in favor of plaintiff for $450 and costs, from which the defendant has appealed.

It appears that defendant was the owner of 40 acres of unimproved land situated in Imperial Valley. The land was rough, and had never been ditched, leveled, bordered, or otherwise prepared for irrigation, without which it could not be cropped or cultivated. Negotiations were entered into between plaintiff and defendant which culminated in a purchase of the tract of land by plaintiff. As alleged in the complaint, the court found:

> That for the purpose of inducing plaintiff to purchase the land, defendant, during the negotiations, and "on or about the 15th day of May, 1916, and at various other times between that date and the 28th day of June, 1916, represented and stated to the plaintiff that the above-described land had had water over it, and that about 25 acres of said land was irrigable and could be put into a crop immediately after suitable ditches had been constructed and the land bordered;" "that all of said entire tract of land, excepting 12.2 acres, lies too high and at too great an elevation to be irrigated; that at the times said representations as aforesaid were made the ditches of the Imperial Eastside Water Company, a water company furnishing water for irrigation in the neighborhood of said land, ran to and adjacent to said tract of land; that all of said land, excepting 12.2 acres, lies above and is higher than the ditches of said water company, and it is impossible to bring water upon any portion of the 25 acres referred to by the defendant, excepting 12.2 acres thereof"

—followed by findings to the effect that at the time defendant made said representations he knew the same to be false and untrue and made them for the purpose and with the intent that plaintiff should rely thereon, and that plaintiff did believe said representations and relied upon the same, as a result of which he made the purchase.

The sole contention of appellant is that these findings are not supported by the evidence.

[1] Conceding that defendant did make the representations that the land had had water

on it and that 25 acres thereof was irrigable and could be put into crop immediately after suitable ditches had been constructed and the land bordered, all of which at the time he knew to be false and untrue, nevertheless legal fraud could not be predicated thereon unless it should be made to appear further that plaintiff, believing the same to be true, relied thereon and was thereby induced to purchase the property. Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 137 Pac. 240. Indeed, as to such facts the court found in favor of plaintiff; but, in our opinion, such finding, while necessary and material in support of the judgment, is not warranted by the evidence.

Disregarding all evidence offered on behalf of defendant, it appears from the testimony of plaintiff that after the making of the alleged misrepresentations he secured the services of William Orrick, who had had experience in leveling land and preparing it for irrigation, and with him went upon the land, where they spent two or three hours inspecting the same, at which time plaintiff consulted Orrick as to the cost of leveling "and whether or not the land would be irrigable." Orick testified that, "with a view of ascertaining whether or not the land could be irrigated," he and plaintiff walked all over it, after which they discussed the question as to whether the land could be irrigated and came to the conclusion that about 25 acres, when leveled, could be irrigated. It was apparent from the physical appearance of the land that it had not been cropped or irrigated. While inspecting the land, Orrick stated to defendant: "This land looks a little high to me; are you sure that it will irrigate?" to which defendant replied, "Yes." Orrick further states that he made a rough report to plaintiff and stated to him, "the land would have to be surveyed before it could be determined * * * which way the water would run"; that it did not look to him as though the water would run over the land from the service ditch designated by defendant; that the land looked higher than the ditch; and, in the presence of the plaintiff, he said: "I made the statement I didn't think water would run from the ditch on the land." "I made the remark, 'It don't look to me like the water would run out of that ditch onto the land.'" But further said, "When you get a surveyor and survey it, it might be different." Without such survey, Orrick said no man could tell positively whether the land could be irrigated. It further appeared that prior to the purchase plaintiff had resided in the valley more than ten years, during four years of which time he had been engaged in farming operations there and was familiar with the conditions which required land to be leveled, ditched, and bordered as a means of cultivating the same, and that water for such purpose was obtained by gravity through delivery ditches from the water company which assumed the duty of supplying lands with water. No statement was made by defendant that he had surveyed the land, without which, according to Orrick, no man could say just what part thereof could be irrigated. Hence plaintiff, having equal means of knowledge, and in the absence of any obstacle interposed by defendant to a full investigation of the matter, must be deemed to have known that defendant was in no better position to judge of the question than was Orrick or himself. It thus appears that, instead of relying upon the representations made by defendant, he, with the aid of Orrick, whom he had employed by reason of his experience in such matters and fitness for the service, made an independent examination, upon which he must be presumed to have acted, rather than upon the representations made by defendant.

[2] If a purchaser of real estate visits the property prior to the sale and makes a personal examination of it, touching representations made as to its quality, character, or condition, he will be presumed to rely, not upon the representations, but upon his own judgment in making the purchase, provided the vendor does nothing to prevent his investigation being as full as he chooses. Southern Development Co. v. Silva, 125 U. S. 257, 8 Sup. Ct. 881, 31 L. Ed. 678; Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; Wainscott v. Occidental, etc., Ass'n, 98 Cal. 253, 33 Pac. 88. In Colton v. Stanford, 82 Cal. 398, 23 Pac. 28, 16 Am. St. Rep. 137, the court says:

> "The power to cancel a contract is a most extraordinary power. It is one which should be exercised with great caution—nay, I may say, with great reluctance—unless in a clear case. A too free use of this power would render all business uncertain, and, as has been said, make the length of a chancellor's foot the measure of individual rights. The greatest liberty of making contracts is essential to the business interests of the country. In general, the parties must look out for themselves."

It conclusively appears herein that plaintiff was unwilling to accept as true the representations made by defendant as to the questions involved, and thereupon sought the services of Orrick to make an independent investigation and advise him as to the questions involved. In our opinion, the case comes squarely within the rule announced by Pomeroy in his work on Equity Jurisprudence (3d Ed.) § 893, which is as follows:

> "If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the

party receiving it has given to him sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled."

And again, in section 894, the same author says:

> "If, in a contract of sale, * * * representations are made by the vendor concerning some * * * qualities or attributes of the subject-matter which are open and visible, so that the falsity of the statement is patent to an ordinary observer, and it is made to appear that the purchaser, at or shortly before the concluding of the contract, had seen the thing itself which constitutes the subject-matter, then a knowledge of the facts is chargeable upon such party; he is assumed to have made the agreement knowingly, and cannot allege that he was misled by the false representations."

In Attwood v. Small, 6 Clarke & F. 232, it was said:

> "If a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or his advisors he cannot be heard to say he was deceived by the vendor's misrepresentations."

In our opinion, the testimony of plaintiff and that offered on his behalf brings the case squarely within the rules announced by the foregoing authorities. As shown by the evidence, plaintiff did not rely upon the representations made by defendant, but, without any interference on the part of defendant, made an independent investigation, and, after obtaining the opinion and advice from the expert whose services he sought, he purchased the land, and hence should not now be heard to claim that he was deceived by the false representations made by defendant.

[3, 4] The appeal was taken within 60 days from the rendition of judgment and, in lieu of a bill of exceptions, the record is presented by a typewritten transcript of the phonographic notes, as provided by section 953a, Code of Civil Procedure. No motion for a new trial was made in the court below, and because of this fact respondent insists that plaintiff is not entitled to a review of the question touching the sufficiency of the evidence to support the findings. Such appears to have been the rule under the practice prior to the adoption of the Code, as decided in Reed v. Bernal, 40 Cal. 628. Under section 939, Code of Civil Procedure, an appeal may be taken from any judgment within 60 days from the entry of said judgment, and, as provided by section 956, Code of Civil Procedure, the court, upon the taking of such an appeal from the judgment, may review the verdict or decision. The findings of the court as to ultimate facts constitute the decision, and, under section 647, Code of Civil Procedure, are deemed to have been excepted to. Under the alternative method of appeal, no bill of exceptions is necessary. Neither is it necessary, in order to entitle an appellant to a review of the sufficiency of evidence to support the decision, that he first present to the trial court a motion for a new trial. The contention is without merit. Hoyt v. Thomas et al. (Civ. 3440) 195 Pac. 260 (this day filed).

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(50 Cal. App. 157)

ENGELKEN v. JUSTICE COURT OF EDEN TP. et al. (Civ. 3348; S. F. 9689.)

(District Court of Appeal, First District, Division 2, California. Nov. 26, 1920. Hearing Denied by Supreme Court Jan. 25, 1921.)

1. Payment 🔑82(7) — Enforced satisfaction does not constitute "voluntary payment."

A "voluntary payment" means one made without compulsion, and one made on an illegal claim with knowledge of its illegality or groundlessness does not constitute "voluntary payment," and enforced satisfaction of a judgment is not "voluntary payment" thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Voluntary Payment.]

2. Payment 🔑82(2)—Whether payment is voluntary depends on facts of each particular case.

Whether payment of a judgment is voluntary depends on the facts of each particular case, as indicating an intention on the part of the payor to waive his legal rights.

3. Appeal and error 🔑1011(1)—Determination of trial court on conflicting evidence upheld.

A determination of the superior court on matters of fact and based on conflicting evidence must be upheld on appeal.

4. Justices of the peace 🔑122(5)—Notice of default must be properly directed.

A notice of a default judgment, sent by mail, but misdirected and never received, was not such a notice as is required by Code Civ. Proc. § 859, providing that a justice's court may relieve a party from a judgment by default taken against him by his mistake, etc., "but the application for such relief must be made within ten days after notice of the entry of the judgment."

In Bank.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by F. W. Engelken against the Justice Court of Eden Township and W. J. Gannon, Justice of the Peace. From a judgment refusing writ of prohibition, the plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

See, also, 189 Pac. 298.

J. C. Thomas, of Susanville, for appellant.

Charles Quayle, of Oakland, for respondents.

BRITTAIN, J. The plaintiff appeals from a judgment of the superior court in Alameda county refusing to prohibit the respondents from proceeding with an action originally commenced in the justice court.

In the justice court suit Engelken, the appellant, sued Manuel Faira in claim and delivery on an assigned claim from one Sanderlock for a nine year old Indian pony. The value of the pony was alleged to be $100. Manuel Faria, not Faira, was served with summons and complaint. The record shows that Sanderlock testified that he worked for Faria and for his work was to receive the pony. Thereupon default judgment was entered, not against Faira, but against Faria, for the pony, on in lieu thereof $100 and costs taxed at $7, on September 26, 1919. Notice of the judgment was immediately mailed by the justice of the peace to Manuel Faira and was thereafter returned by the postoffice undelivered. Execution on the judgment was issued October 2d. On November 7th the constable demanded payment of the judgment on the execution then in his hands for levy and Faria paid the $107, saying at the time to Engelken, who accompanied the constable with his attorney, "This is a hell of a game you are pulling off on me." On the following day Mrs. Manuel Faria called on the justice and was informed in regard to the judgment, and within ten days thereafter Faria filed affidavits with the justice setting forth, among other things, that he was unable to read the English language; that when he was served with the summons and complaint by the constable he explained his side of the controversy to the plaintiff, he was assured by the plaintiff that he was satisfied Sanderlock had no claim against him, and that he (Faria) understood from the conversation that nothing further would be done in the suit; that he had heard nothing further in regard to the matter until the constable demanded payment of the judgment under execution; and that he had a valid defense to the plaintiff's claim. Counter affidavits were filed by the plaintiff denying the statements contained in the affidavits of Faria. The prohibition proceeding was commenced in the superior court to prevent the justice of the peace from setting aside the default judgment.

Only two questions presented require determination. They are: First, whether or not the payment made by Faria was voluntary and in complete satisfaction of the judgment; and, secondly, if it was not, whether the justice court had power to vacate the default judgment under the provisions of section 859 of the Code of Civil Procedure.

[1-3] A voluntary payment means one made without compulsion and one made on an illegal claim with knowledge of its illegality or groundlessness. Amsden v. Danielson, 19 R. I. 533, 35 Atl. 70; Redmond v. City of N. Y., 125 N. Y. 632, 26 N. E. 727; Davis v. Kling, 77 Hun, 598, 28 N. Y. Supp. 1029. When payment is made under species of compulsion it is not voluntary. Jones Co. v. Board of Education, 30 App. Div. 429, 51 N. Y. Supp. 953. It is the established rule in this state that an enforced satisfaction of a judgment does not constitute voluntary payment. Patterson v. Keeney, 165 Cal. 466–467, 132 Pac. 1043, Ann. Cas. 1914D, 232. Whether payment of a judgment is voluntary or not depends upon the facts of each particular case as indicating an intention on the part of the payor to waive his legal rights. The determination of the superior court against the contentions of the plaintiff on the conflicting evidence presented upon this subject must be upheld.

[4] Section 859 of the Code of Civil Procedure provides that a justice's court may relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, "but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor." There is no claim on the part of the plaintiff that any other notice was given Faria than the notice mailed by the justice. That notice was not addressed to Faria, but to Faira. It was not delivered through the post office to Faria, but was returned undelivered to the justice of the peace. It is too plain for argument that a notice of a default judgment addressed to a person other than the judgment debtor is not such a notice as is required by section 859, Code of Civil Procedure, to start time running within which a motion to vacate the judgment may be made. Faira and Faria are not idem sonans. The first notice received by Faria was on the date the execution was presented to him, and within ten days of that time he gave notice of motion. It was within time and the justice court had power to hear and determine the questions arising upon his showing of any of the grounds specified in the statute. The writ of prohibition was properly denied.

It is maintained that the appeal should be dismissed because of the failure of the transcript to show that an appeal bond was filed, the appeal being under the old method. A dismissal would have the same effect as an affirmance of the judgment.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing in the Supreme Court after decision by the District Court of Appeal of the First appellate district, division 2, is denied.

The statement in the opinion of the District Court of Appeal that "Faira and Faria are not idem sonans" is not necessary to the decision, and, as we are not prepared to accept it as a precedent, we withhold approval thereof. The decision is fully supported by the facts that the defendant did not in fact receive any notice whatever of the rendition of the judgment and that the notice sent by mail was misdirected. The court had discretion in such a case to open the default and allow him to present his defense.

All concur.

(50 Cal. App. 184)

KENNEDY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

(Civ. 3364; L. A. 6794.)

(District Court of Appeal, Second District, Division 2, California. Nov. 26, 1920. Rehearing Denied Dec. 24, 1920. Hearing Denied by Supreme Court Jan. 25, 1921.)

1. Master and servant 🔑416—Industrial Commission has continuing jurisdiction over compensation award.

The Industrial Accident Commission has continuing jurisdiction on a showing of good cause to rescind, alter, or amend any decision or award made by it until 245 weeks from the date of injury, under Workmen's Compensation Act, § 20, subd. "a," notwithstanding section 55, subd. "b," and sections 64, 65, and 67.

2. Courts 🔑30 — Jurisdiction continues until final judgment.

It is elemental that, where a tribunal has jurisdiction over parties and subject-matter, the jurisdiction continues until final judgment shall have been entered.

3. Master and servant 🔑416—Continuing jurisdiction of Industrial Commission not limited by statute conferring power, "including" right to increase or diminish award.

The broad grant of continuing jurisdiction in the Industrial Accident Commission to rescind, amend, or alter any decision for a period of 245 weeks after the injury as conferred by the general terms of Workmen's Compensation Act, § 20, subd. "d," is not to be limited by the more particular reference in that section to the Commission's right "to review, grant, regrant, diminish, decrease, or terminate" any award upon the ground that the "disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated"; the word "including" in such section not being a word of limitation, but rather a word of enlargement, and in ordinary signification implying that something else has been given beyond the general language that precedes it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Include.]

On Hearing in Supreme Court.

4. Master and servant 🔑416—Industrial Commission has jurisdiction to amend award after expiration of time for rehearing.

In a proceeding under the Workmen's Compensation Act, where the Commission, on finding of injury in the course of and arising out of employment, made an award against the insurance carrier, which claimed that its policy did not cover the injury, but made no order relieving the employer and left the case undecided as to him, and the award against the insurance carrier was annulled by a court of competent jurisdiction, the Commission had jurisdiction to amend the award and insert the name of the employer in place of that of the insurance carrier, after the expiration of the time within which application could have been made for a rehearing under section 55, subd. "b," and sections 64, 65, and 67, and that without invoking the "continuing jurisdiction" expressly granted by section 20, subd. "d," since it had jurisdiction over the parties and subject-matter until final judgment was entered.

In Bank.

Proceeding by J. L. Millard and Mrs. Julia E. Millard under the Workmen's Compensation Act to obtain compensation for the death of a son, Byron J. Millard, opposed by P. R. Kennedy, the employer, and the Western Indemnity Company, insurance carrier. From an award of compensation against the employer, he brings certiorari. Award affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Swanwick & Donnelly, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

FINLAYSON, P. J. This is a petition by P. R. Kennedy for the review of an amended award made against him by the Industrial Accident Commission. Petitioner was the employer of Byron J. Millard, deceased, who was killed on October 9, 1918, while in petitioner's employ. The Commission awarded a death benefit to the applicants therefor, the parents of young Millard. The sole question presented is this: The applicants for the death benefit having failed to apply to the Commission, within the time provided by the statute, for a rehearing, did the Commission, nevertheless, have the power to amend the award after the expiration of the time within which application could have been made to it for a rehearing?

The facts necessary to an understanding of the question are these: The Western Indemnity Company, an insurance carrier, agreed to respond to any damage that might occur on account of injuries or death suffered by any employee of Kennedy in and during the course of and arising out of the operation of the trade, business, or work described in its policy of indemnity insurance. The injury that caused the death of young Millard was sustained in the course of and arose out of his employment by Kennedy, but did not occur in the course of, nor did it arise out of, the operation of the particular trade, business, or work described in the insurance policy. See Western Indemnity Co. v. Industrial Accident Commission, 185 Pac. 306, for a more detailed statement of the terms of the policy and of the facts respecting the cause of the injury.

Both Kennedy and the insurance carrier were made parties to the proceeding before the Industrial Accident Commission. The principal controversy there was whether the indemnity policy covered this particular injury or not. The Commission, one commissioner dissenting, determined that the injury that caused young Millard's death was covered by the insurance policy, and accordingly, on May 14, 1919, made an award against the insurance carrier, the Western Indemnity Company, awarding to the parents of young Millard a death benefit recoverable from the carrier. The Commission did not make any order relieving Kennedy from liability on the ground that it appeared from the proof that the insurance carrier, joined as a party to the proceeding, was liable for all of the death benefit, as it was authorized to do by subdivision 2 of subdivision "e" of section 30 of the Workmen's Compensation Act. Stats. 1917, p. 860. Instead, the Commission, apparently out of an excess of caution, probably anticipating that the award against the carrier might be annulled on a review thereof on certiorari, left the case undecided as to Kennedy, making no award against him and no final decision discharging him from liability. This course doubtless was adopted by the Commission to the end that, if the award against the insurance carrier should be annulled by a court of competent jurisdiction, it still would be possible to enter an award against Kennedy, as the employer.

Thereafter the insurance carrier, having applied in vain for a rehearing by the Commission, applied to the District Court of Appeal for a writ of review. The writ was granted, and the court, by decision rendered October 8, 1919—Western Indemnity Co. v. Industrial Accident Commission, supra—annulled the award against the insurance carrier on the ground that the policy did not cover the injury that resulted in the death of young Millard.

In due time the court's remittitur was sent down to the Commission, and on March 11, 1920, the Commission caused to be served on Kennedy, the petitioner here, a notice of its intention to amend its award of May 14, 1919, by substituting Kennedy in the place and stead of the Western Indemnity Company as the party liable under the award. On April 7, 1920, the Commission, over Kennedy's objection, amended the original award—the award of May 14, 1919, against the Western Indemnity Company—by making an award against Kennedy for the amount of the death benefit that it previously had adjudged to be due to the applicants on account of their son's death. In due time petitioner applied to the Commission for a rehearing. A rehearing was denied. Kennedy thereupon petitioned this court for a writ of review to annul the amended award so made against him. He is seeking for an annulment of the award against him upon the ground that the Commission had not the power thus to amend its award after the expiration of the time provided by the statute within which the applicants for the death benefit could have petitioned the Commission for a rehearing on the original award of May 14, 1919.

Sections 64 and 65 of the Workmen's Compensation Act relate to the matter of rehearings before the Commission. Section 64 provides that persons aggrieved by any award of the Commission may apply to the Commission for a rehearing in respect to matters determined by it of which they complain. That section likewise prescribes the procedure for making and serving the application for rehearing and for the determination thereof by the Commission. Section 65 states the grounds upon which applications for rehearing may be made, and provides that application for such rehearing by the Commission must be made by the aggrieved party "at any time within twenty days after the service of any final order or decision of the commission awarding or denying compensation, or arising out of or incidental thereto."

By section 67 it is provided that "within thirty days after the application for a rehearing [by the Commission] is denied, or, if the application is granted, within thirty days after the rendition of the decision on the rehearing, any party affected thereby" may apply to the Supreme Court or to a district Court of Appeal for a writ of review to determine the lawfulness of the award or final decision of the Commission.

By subdivision "b" of section 55 it is provided that all findings, decisions, and awards of the Commission shall be conclusively presumed to be lawful until and unless they are modified or set aside by the Commission, or upon a review by the courts as in the act specified, "within the time and in the manner herein specified."

As applied to a rehearing by the Commission on the application of an aggrieved party, the foregoing provisions are susceptible of but one construction. From the language of section 65 and subdivision "b" of section 55 it clearly appears that a party aggrieved by the award or final decision of the Commission, notwithstanding he may have good cause for a rehearing by that body, cannot, as strict matter of right, demand such rehearing unless, within 20 days after service of the decision awarding or denying compensation, he file with the Commission his application for a rehearing. These provisions of the act apply to rehearings that are initiated by a party to the proceeding. Under these provisions the right of a party thus to initiate proceedings for a rehearing is conditioned by his obligation to do so within 20 days after service of the Commission's final decision or award.

[1] But there are other provisions of the act under which, good cause appearing therefor, the Commission itself, on its own initiative, or on its attention being called to facts showing good cause, and at any time within 245 weeks from the date of the injury, may rescind, alter, or amend any decision or award made by it. The Commission is expressly given "continuing jurisdiction," during that period of time, to rescind, alter, or amend any order, decision, or award that it may have made under sections 6 to 31, inclusive, if there be good cause shown for such rescission, alteration, or amendment.

Subdivision "d" of section 20 of the act in force at the time of the injury that caused young Millard's death—the present Workmen's Compensation Act (Stats. 1917, p. 850)—reads:

> "The Commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor, such power *including* the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury."

(The word "including" has been italicized by us to call attention to the fact that the power conferred upon the Commission by the clause in which that word occurs is included within, and therefore is but a part of, the broader power conferred by the preceding words of the section as quoted by us.)

Under the above-quoted subdivision "d" of section 20 of the act of 1917, "continuing jurisdiction," for the full period of 245 weeks after the injury, is specifically conferred upon the Commission "over all its orders, decisions and awards." By virtue of such "continuing jurisdiction" the Commission, after notice to and an opportunity to be heard by the party in interest, is specifically empowered to "rescind, alter or amend any such order, decision or award made by it, upon good cause appearing therefor." This is a broad and general grant of "continuing jurisdiction." The act does not profess to say what shall be deemed to constitute "good cause" for the rescission, alteration, or amendment of any order, decision, or award. It does, however, declare, by positive legislative fiat that the act "shall be liberally construed * * * with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment." Section 69.

[2] Without attempting to define the "good cause," the existence of which is a prerequisite to the exercise by the Commission of its continuing jurisdiction to rescind, alter, or amend its orders, decisions, or awards—that had best be left to the gradual process of exclusion and inclusion as cases arise that involve an exercise of the power—we have no doubt that the facts in the instant case constituted "good cause" within the meaning of the statute. The findings of the Commission show that the applicants, the parents of young Millard, were entitled to payment of a death benefit and in the amount fixed by the Commission's findings. The findings, as they existed prior to the decision of the District Court of Appeal in Western Indemnity Co. v. Industrial Acc. Comm., supra, further show that Kennedy, the employer, is liable for that death benefit save only as such liability may be affected by the further finding that the Western Indemnity Company was the insurance carrier at the time of the injury and as such liable for the full compensation. The District Court of Appeal specifically adjudged that "the findings and award" against the Western Indemnity Company be annulled. By the court's annulment of the finding that the Western Indemnity Company was the insurance carrier and as such liable for the death benefit, the remaining findings, left unaffected by the court's decision, show on their face that Kennedy, and Kennedy alone, is liable. In other words, since the time when the decision of the District Court of Appeal became final, Kennedy's liability for the death benefit follows as a legal conclusion from the findings made and filed by the Commission. And yet, notwithstanding this fact, no decision was ever made by the Commission awarding or denying payment of compensation by Kennedy prior to the time when it amended its award on April 7, 1920, by substituting Kennedy for the Western Indemnity Company. Until then the proceeding, as to Kennedy, was left open and undetermined. Under this condition of the record, we enter-

tain no doubt that, in the exercise of its "continuing jurisdiction," expressly granted to it by subdivision "d" of section 20 of the act, to rescind, alter, or amend any order, decision, or award made by it under the provisions of sections 6 to 31, inclusive, the Commission had the power to amend its award by substituting Kennedy for the Western Indemnity Company as the person by whom the death benefit shall be paid and against whom the award should be made. Indeed, we doubt if, under these circumstances, it is necessary to invoke the "continuing jurisdiction" expressly granted to the Commission by the Workmen's Compensation Act. Never having entered judgment for or against Kennedy prior to the entry of the amended award of April 7, 1920, the Commission, aside from the "continuing jurisdiction" vested in it by subdivision "d" of section 20, always had jurisdiction to enter a judgment or decision for or against him, and therefore had jurisdiction to make its award of April 7, 1920, awarding young Millard's parents a death benefit payable by Kennedy. It is elementary that, where a tribunal has jurisdiction over parties and subject-matter, the jurisdiction continues until final judgment shall have been entered.

Counsel for petitioner place their main reliance upon the decision of our Supreme Court in Georgia Casualty Co. v. Industrial Acc. Com., 177 Cal. 289.[1] There it was held that the "continuing jurisdiction" given to the Industrial Accident Commission by the Workmen's Compensation Act of 1913 (subdivision 4, § 25, and subdivision "b," § 82) is given for the sole purpose of making such rescissions, alterations, or amendments of the original decision or award as may be required by the occurrence of any new fact or facts whereby the disability of the person in whose favor the award originally was made has been increased, diminished, or terminated. Counsel for petitioner, gratuitously assuming that the act of 1917 is susceptible of the same construction that the court in the Georgia Casualty Company Case put upon the act of 1913, argue against the Commission's jurisdiction to enter the amended award of April 7, 1920, upon the ground that the decision of the District Court of Appeal, whereby the findings and award against the insurance carrier were annulled, was not a new fact, occurring after the original award, whereby disability was either increased, diminished, or terminated.

The vice of counsel's argument lies in the assumption that the "continuing jurisdiction" conferred upon the Commission by the act of 1917 is no greater or other than that which had been conferred upon it by the act of 1913. Under the act of 1913 "continuing jurisdiction" was given to the Commission in general terms by subdivision "d" of section 25 (Stats. 1913, p. 293.) That subdivision read:

> "The Commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections twelve to thirty-five, inclusive, * * * and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the accident."

It was held in the Georgia Casualty Company Case that the broad grant of continuing jurisdiction thus conferred in general terms by subdivision "d" of section 25 of the act of 1913 was, in effect, limited by the language of subdivision "b" of section 82 (Stats. 1913, p. 317). That subdivision read:

> "Nothing contained in this section shall, however, be construed to limit the right of the Commission, at any time within two hundred forty-five weeks from the date of its award, and from time to time, after due notice and upon the application of any party interested, to review, diminish or increase, within the limits provided by this act, any compensation awarded upon the grounds that the disability of the person in whose favor such award was made has either increased or diminished or terminated."

In construing the several provisions of the act of 1913, and endeavoring to harmonize them, the Supreme Court held that these two sections—sections 25 and 82, disconnected in their respective positions in the act, but connected in their mutual reference to the powers of the Commission over its orders, decisions, and awards—should be read together, and should be so construed as to present one harmonious system for the re-examination by the Commission of the matters decided by it. The court said:

> "When these several sections are so read and construed together, it seems quite obvious that the provisions of subdivision 'b' of section 82, which permit the Commission within the period of 245 weeks after its award to rescind, diminish, or increase the same 'upon grounds that the disability of the person in whose favor such award was made has either increased or diminished or terminated,' contemplate a change in conditions arising after the making of the original award, *and by which the disability of the person in whose favor such award was made has been either increased, diminished or terminated*, and that under this subdivision of section 82 of the act the power of the Commission thus extended over the period of 245 weeks after the date of its original award is limited in its exercise to the consideration of such facts only as have arisen since the making of such award, and that it is only upon the proof of such facts that the Commission has jurisdiction to review, diminish or increase such award." (Italics ours.)

It is obvious that the court's reference to new facts that "have arisen since the making of such award" means such new facts as affect the disability of the person in whose favor the award was originally made, by increasing, diminishing, or terminating such disability.

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[1] 170 P. 625.

[3] No such narrow construction can be put upon the language of subdivision "d" of section 20 of the present act, whereby "continuing jurisdiction" is conferred upon the Commission. The sections of the act of 1913 that related to the Commission's continuing jurisdiction—section 25, subd. "d," and section 82, subd. "b"—could be harmonized only by construing the general terms of section 25 as limited by the more restrictive language of section 82. But the broad grant of continuing jurisdiction as conferred by the geneal terms of subdivision "d" of section 20 of the present act is not to be thus limited by the more particular reference in that section to the Commission's right "to review, grant or regrant, diminish, increase or terminate" any award upon the ground "that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated." True, subdivision "d" of section 20 of the present act is, to a large extent, a re-embodiment, mutatis mutandis, of subdivision "d" of section 25 and subdivision "b" of section 82 of the act of 1913; the provisions of these two sections of the act of 1913 being embodied, with few, but important, changes in subdivision "d" of section 20 of the act of 1917. But, though subdivision "d" of section 20 of the act of 1917 is largely a re-embodiment of subdivision "d" of section 25 and subdivision "b" of section 82 of the act of 1913, still subdivision "d" of section 20 of the present act is vastly different from a mere re-enactment of the corresponding provisions of the act of 1913. The present act, in subdivision "d" of section 20, declares, in general terms, that at any time within 245 weeks from the date of the injury the Commission "shall have continuing jurisdiction over its orders, decisions and awards * * * and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision, or award made by it upon good cause appearing therefor." This general grant, in itself unlimited save as to the time within which the power may be exercised, is followed by a more particular provision, namely, a particular reference to the power of the Commission to review, grant or regrant, diminish, increase, or terminate any award "upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated." But the language of this more specific or particular reference to the exercise of the Commission's "continuing jurisdiction," so far from limiting the preceding general grant of power, implies the very opposite. The use of the word "including" in the phrase "such power *including* the right to review," etc., indicates that the power that the Commission may exercise under its grant of continuing jurisdiction is more than the mere power to "review, grant or regrant, diminish, increase or terminate" an award on the ground that the disability has "recurred, increased, diminished or terminated." "Including" is not a word of limitation. Rather it is a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language that precedes it. Fraser v. Bentel, 161 Cal. 394;[2] In re Goetz, 75 N. Y. Supp. 750.[3] As here employed, the word "including" is used to express the idea that the specific power to review, grant or regrant, diminish, increase, or terminate an award upon the ground that the disability has recurred, increased, diminished, or terminated—a particular power specifically referred to in the section of the present act—is but a part of the larger and more comprehensive power conferred by the more general language of the immediately preceding clause of the section. One of the definitions of "include," as given by Webster, is:

> "To comprehend or comprise, as a genus, the species, the whole a part, an argument or reason the inference; to contain; to embrace."

For these reasons we conclude that the particular power conferred by that clause of subdivision "d" of section 20 which begins with the words "such power *including* the right to review" is but a part of, and not a limitation upon, the larger and more general power granted by the clause which confers upon the Commission "continuing jurisdiction" or power to rescind, alter or amend any * * * order, decision or award made by it upon good cause appearing therefor."

As we have seen, the general grant of power conferred upon the Commission by the more general language of subdivision "d" of section 20 of the present act is broad enough to include the amendment of the award that was made by the Industrial Accident Commission in the present instance. We conclude, therefore, that the award against petitioner should be, and it is, affirmed.

We concur: THOMAS, J.; WELLER, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4] The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 2, is denied.

In denying the application we desire to say that we are not to be understood as approving all that is said in the opinion as to the proper construction H of subdivision "d" of section 20 of the Workmen's Compensation Act (Stats. 1917, p. 850) with relation to the powers of the Industrial Accident Commission

[2] 119 Pac. 509, Ann. Cas. 1913B, 1062.

[3] 71 App. Div. 272.

in view of the "continuing jurisdiction over all its orders, decisions and awards" thereby given. Some of the language in the opinion with relation to the power of the Commission over its awards under this provision is rather broad, and we prefer to reserve any intimation of our opinion as to its correctness, deeming it in no way essential to the judgment of the District Court of Appeal. The conclusion of the District Court of Appeal finds full support in the facts of this case as stated in the opinion, without any necessity of invoking this "continuing jurisdiction" provision, as is fully shown and stated in the opinion.

All concur.

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50 Cal. App. 393

SNEARLY et al. v. HIESTAND et al.

(Civ. 3648.)

(District Court of Appeal, First District, Division 1, California. Dec. 14, 1920. Hearing Denied by Supreme Court Feb. 10, 1921.)

1. Quieting title ⚿47(2) — Inconsistency of finding as to possession held not fatal.

In action to quiet title, inconsistency of findings as to possession of the land *held* not fatal; plaintiff not being required to have possession.

2. Quieting title ⚿12(1)—Plaintiff not required to be in possession.

It is not necessary, in order to maintain an action to quiet title, that an owner should be in possession.

3. Appeal and error ⚿907(3)—On appeal on judgment roll, inconsistency between findings as to ultimate fact and probative facts held not fatal.

In vendor's action against purchaser in default to quiet title, inconsistency between findings that vendors were the owners of the property involved, and the purchasers had no interest therein, and findings as to probative facts, showing that vendors waived default, *held*, on appeal by purchasers on the judgment roll, not fatal to judgment for vendors, in absence of showing that such probative facts were the only facts proven at the trial, since on appeal on judgment roll alone findings must be construed to support judgment.

4. Trial ⚿398—Finding of ultimate fact not to be overcome by a finding of probative facts.

The finding of an ultimate fact cannot be overcome by a finding of probative facts, unless it clearly appears that the finding of the ultimate fact is entirely based on probative facts which are destructive of the former, or that the trial court made the finding of the ultimate fact as a conclusion from the particular facts found.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by George Snearly and another against McClellan B. Hiestand and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. J. O'Brien, of Los Angeles, for appellants.

Eden & Koepsel, of Santa Ana, for respondents.

KERRIGAN, J. This action was brought by plaintiffs to quiet title to the land described in the complaint. Defendants in their amended answer allege that the parties entered into an agreement, by the terms of which plaintiffs agreed to sell and defendants to purchase the property here involved for the sum of $2,400, payable as follows: $125 upon the execution of the agreement, and $50 thereafter monthly until the full sum of $900 was paid, and the assumption by defendants of a mortgage upon the property amounting to the sum of $1,500. That the defendants further agreed to pay all taxes assessed against the property and the interest on the mortgage from the date of the same. The agreement provided that time was of the essence of the contract, and in the event of failure to comply with its terms the plaintiffs would be released from all duty to convey, and defendants should forfeit all rights to any sums of money paid thereunder. The answer further alleged the payment by defendants of four different installments amounting to the sum of $350, together with the dates of payment, and a statement of certain amounts paid by defendants to plaintiffs to apply upon interest on the mortgage of $1,500. These payments were made at different dates between December, 1916, and April, 1918. They were seven in number, and aggregated the sum of $165. Possession in defendants was also alleged, and it was recited in the answer that none of the payments to apply on the principal sum due under the agreement were made when due, and that by the acceptance of such payments when overdue plaintiffs waived the condition in the agreement that time was of the essence thereof. By other recitals the defendants claimed that under the agreement final payment became due on the 11th day of March, 1918, and that plaintiffs had not tendered to defendants any deed to the property or a certificate of title as provided for in their agreement. The cause was tried, and judgment went for plaintiffs. A motion for a new trial was made and denied. The case is here appealed on the judgment roll alone.

[1, 2] Defendants rely for reversal upon the sole ground of uncertainty and inconsistency in the findings. In this behalf it is first claimed that the findings are inconsistent for the reason that in one portion thereof the court recites that plaintiffs were in possession and in another part that defendants were in possession of the property. Conceding this to be true, it can avail ap-

pellants nothing, for the finding upon the question is immaterial. It is not now necessary in order to maintain an action to quiet title that an owner should be in possession. Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517; Phillips v. Menotti, 167 Cal. 328, 139 Pac. 796.

[3, 4] Again it is claimed that the findings are inconsistent on the question of ownership. The record does not support this contention. Upon this question the court made a specific finding as follows: "That plaintiffs in the above entitled action are now and for a long time prior hereto have been the owners," etc.; and, further, "that the defendants have not any estate, right, title or interest whatever in or to said premises or any portion thereof;" and, again, "The court further finds that the plaintiffs above named are the owners of the said premises." The findings further show the existence of the agreement, the amount of payments made thereunder, together with the dates when made, the default of the defendants under the contract, and a recital that plaintiffs had not waived the conditions as set forth in the agreement by accepting payments after the same had become due, and that plaintiffs had not tendered a deed and the certificate of title provided for upon final payment. Appellant insists for this reason that the findings are contradictory and self-destructive, in that they clearly show that every payment upon the principal sum having been made subsequent to its due date, plaintiffs waived the condition that time was of the essence of the contract, and that the right of forfeiture provided for could only be restored by giving a definite and specific notice of adherence thereto, and, the findings not showing that such notice had been given, that they clearly show a waiver of this condition. It is further claimed that the finding that plaintiffs had not tendered a deed is fatal to respondents' case. We are cited to Stevenson v. Joy, 164 Cal. 279, 128 Pac. 751, and Boone v. Templeton, 158 Cal. 297, 110 Pac. 947, 139 Am. St. Rep. 126, as supporting appellants' contention. These cases lay down certain principles concerning the relative rights and duties of vendors and purchasers under installment contracts relating to the sale of land, but with which we are not concerned on this appeal. As above indicated, the findings show plaintiffs to be the owners of the land, and that defendants have no interest therein. These are findings of ultimate facts, based on evidence produced at the trial, and they cannot be overcome by the probative facts found by the court. The case is here on the judgment roll alone. The findings must be construed so as to uphold the judgment. In the absence of a bill of exceptions, or the evidence, this court is unable to say what facts were proven at the trial upon which the ultimate findings of fact are based. The finding of an ultimate fact cannot be overcome by a finding of probative facts, unless it clearly appears that the finding of the ultimate fact is entirely based on probative facts which are destructive of the former, or where it appears that the trial court made the finding of the ultimate fact as a conclusion from the particular facts found. Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201. Here there is nothing to show that the probative facts found are the only facts proven at the trial. If such were the case, appellants should have presented a bill of exceptions, so that we might examine the evidence. The record before us throws no light upon the subject, nor does it limit the effect of the ultimate facts found, every intendment being in favor of the judgment. Estate of Hill, 167 Cal. 59, 138 Pac. 690.

For the reasons given, the judgment is affirmed.

We concur: RICHARDS, J.; SEAWELL, Presiding Justice pro tem.

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50 Cal. App. 292

LOVELACE v. CRENSHAW et al.

(Civ. 3430.)

(District Court of Appeal, Second District, Division 1, California. Dec. 7, 1920.)

Vendor and purchaser 🔑212 — Assignee of contract held not to assume obligations of original vendor.

A grantee of land and assignee of contract of sale of such land *held* not to assume the obligations of the original vendor, the property being conveyed and the contracts assigned as security for an indebtedness of the original vendor to the grantee.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Joseph Lovelace against G. L. Crenshaw and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. L. Kilgore, of Los Angeles, for appellant.

Hickcox & Crenshaw and Harry W. Hanson, all of Los Angeles, for respondents.

JAMES, J. This action was brought in part to compel specific performance of a contract made by defendant Brent Investment Company, whereby said investment company agreed, in consideration of certain payments to be made to it, to convey to the plaintiff a certain parcel of real estate. Judgment was in favor of all of the defendants except the Brent Investment Company, and plaintiff has appealed therefrom. The judgment as to said investment company was for the recov-

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ery of damages only. So far as the appeal is concerned, the only complaint made by the plaintiff is that the defendant Crenshaw should have been required to respond under the judgment, on the ground that he had assumed the obligations of Brent Investment Company. This claim arises through the fact that, after the making of the contract between the Brent Investment Company and the plaintiff, the contract, together with a number of others of similar kind, was assigned to Crenshaw as security for an indebtedness owing by the Brent concern to said Crenshaw. A deed in ordinary grant form was also made for a like purpose by the Brents, conveying to Crenshaw the whole of the property involved. As a matter of fact, that property was at the time subject to a mortgage securing a large indebtedness of the Brents to others of the defendants. The evidence was clear to the point that both the assignment of the contracts and the making of the deed were acts done by the Brents to secure to Crenshaw the payment of money due from the former to the latter. To be sure, the contract holders, the plaintiff being one of these, made payments thereafter to Crenshaw, but by no act that the record discloses did Crenshaw assume the obligations of the original vendor. The legal condition resulting from these same facts was before this court and given full consideration in the case of Lewis v. Crenshaw et al., 191 Pac. 72, the only substantial difference being that the plaintiff there was a different contract holder. His contract, however, was of the same kind, affected a part of the same property, and was dealt with in the same manner as was the plaintiff's here. It will be unnecessary to repeat the discussion in that decision made, and we refer to it as containing expression of the views which we hold as to the points involved in this appeal. The contentions advanced in the Lewis Case were resolved against the plaintiff there.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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50 Cal. App. 377

DURBIN et al. v. HILLMAN. (Civ. 2108.)

(District Court of Appeal, Third District, California. Dec. 13, 1920. Hearing Denied by Supreme Court Feb. 10, 1921.)

1. Appeal and error ⟹173(6)—Objection that authorization of agent to buy was not in writing must be made below.

Though under Civ. Code, § 1091, contract for sale of personalty at a price in excess of $200 is invalid unless in writing, and though under section 2309 authority of an agent to enter into such a contract must be in writing, yet, the contract not being void if not in writing, but the requirement of the statute being waivable, and the agency and sale having been shown by oral testimony without objection, objection that the contract of authorization was invalid cannot be made for the first time on appeal.

2. New trial ⟹102(9) — Not authorized by showing forgetfulness of evidence without excuse.

A showing of forgetfulness of evidence, without any showing tending to excuse the forgetfulness, does not entitle one to new trial as for newly discovered evidence.

3. Appeal and error ⟹173(7)—Objection to agent acting in own name waived.

A principal is not relieved from liability on a purchase made by his agent in his own name, he not having at any time before appeal, from judgment against him, raised the point or repudiated the transaction on that account, though under Civ. Code, § 2322, general authority does not authorize an agent to act in his own name.

4. Appeal and error ⟹1151(2) — Judgment may be modified for excessive allowance of interest.

Judgment may be modified on appeal because of an allowance by the jury, carried into the judgment, of a year's interest in excess of the proper amount.

5. Interest ⟹66—Need not be prayed in a contested case.

The complaint need not contain a prayer for interest in a contested case, as any relief that is within the issues may be granted.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by P. J. Durbin and another against C. D. Hillman. Judgment for plaintiffs, and defendant appeals. Affirmed.

Walter H. Robinson, of San Francisco, for appellant.

Oliver O. Clark, George M. Pierson, and Claud B. Andrews, all of Los Angeles, for respondents.

PREWETT, Presiding Justice pro tem. The defendant brings this appeal from a judgment rendered against him for the purchase price of personal property at a price in excess of $200. The contract was in writing, and the actual purchase was effected through the medium of an agent. The authority of this agent was wholly oral. The defendant did not accept any part of the purchased property nor pay any part of the purchase price. He repudiates the sale and disclaims any authority in the agent to represent him. At no time until the hearing on this appeal has he based his action upon the absence of a writing. Every issue in the case has been resolved against the defendant by stipulation of the parties, save that of agency. The attorney for the defendant stated the stipulation as follows:

> "I would like to state that it is purely a question of agency. That seems to be the only issue in the case."

[1] The evidence in support of the sale and of the agency was abundantly sufficient to support the verdict if such evidence was competent for that purpose. It was all oral, but it was received without objection. The defendant chose to waive all other defenses and to rest his entire defense upon the single one as to the agency of the party purporting to represent him, waiving even, as we shall see further along, the defense that the authority of the agent was oral. It is not controverted that the authority of an agent to enter into a contract required by law to be in writing must itself be reduced to writing. Section 2309, Civ. Code. Although the only question reserved for the jury was the question of "agency," still we are inclined to hold that this limitation does not withdraw from the jury the issue as to the potency of the oral authorization to the agent. A denial by the defendant that the purported agent was in fact his agent necessarily implies a denial that he was such an agent as, in view of the provisions of said section, was clothed with authority to make the particular purchase.

The actual authority itself being derived from the very words which are relied upon to constitute the agency, that agency is valid only in proportion as the authority itself is valid. A person cannot be an agent to do nothing. But no objection was interposed to this oral evidence, nor is there in the entire record any suggestion on the part of the defendant that he desired or intended to rely upon a want of written authority. By his silence he waived this point. There appears to be nothing unlawful, immoral, or against public policy in such a waiver. There are certain classes of transactions which are at once void if certain formalities are not observed. Section 1091, Civ. Code. A void contract is a nullity—of no effect. It cannot be ratified, and any attempted ratification must in itself be the equivalent of an original contract. But those contracts that come under the provisions of the statute of frauds, other than those relating to transfers of interests or estates in real property, are only "invalid." We are not called upon to attempt to define the very difficult word "invalid," as used in section 1624 of the Civil Code, but it is sufficient for our purpose to say that it describes a condition that falls short of being void. Such contracts may be ratified, and it is held that the benefit of the statute may be waived. In Sweetland v. Shattuck, 66 Cal. 31, 4 Pac. 885, Mr. Justice Ross, speaking for the court, says:

> "Assuming that the agreement upon which the plaintiff relied for a recovery was required to be evidenced by writing, the plaintiff was permitted in the court below to give proof of the agreement without objection that it was not in writing. Such objection cannot be made here for the first time."

And from Schultz v. Noble, 77 Cal. 79, 19 Pac. 182, we quote the following extract:

> "It has been held, where an action was brought to enforce a contract required by the statute of frauds to be in writing, and parol proof of the contract was admitted without objection, that the contracting party could not have the proofs stricken out because it subsequently appeared that the contract was only a verbal one."

And quoting from another case in the same volume:

> "Conceding now that the contract declared on was void, by reason of the statute of frauds, because it was verbal, still, as no objection was made by plaintiff to the evidence when offered, it must be held that the right to invoke the statute of frauds was waived by the appellant, and it cannot now be invoked * * * as a reason why the judgment should be reversed or a new trial granted." Nunez v. Morgan, 77 Cal. 433, 19 Pac. 755.
>
> "But the statute of frauds * * * was * * * undoubtedly intended to establish mere rules of evidence. * * * In other words, the original object of the statute was unquestionably to lay down in express terms certain rules by which only certain contracts in themselves, perfectly legal and valid could be proved. The provisions of the statute * * * affected the remedy—that is, in effect deprived the party seeking to enforce the contract coming within their purview of his right of action if such contract were not in writing." In re Balfour & Garrette, 14 Cal. App. 261, 111 Pac. 615.

In this case a rehearing before the Supreme Court was denied. Its doctrines are peculiarly applicable to the instant case. Section 1973 of the Code of Civil Procedure does not render the contracts to which it relates ab initio void, and it reaches only the method of establishing the contract. This being so, the defendant lost all right to object for the first time on appeal that the contract of authorization was invalid because it was not reduced to writing. Our attention has been directed to no California case that questions the principle laid down by the foregoing authorities. We could add a number of cases not cited, all pointing to the same conclusion. It is true that in Feeney v. Howard, 79 Cal. 525, quoting from page 535, 21 Pac. 984, at page 988 (4 L. R. A. 826, 12 Am. St. Rep. 162), the commissioner states: "A parol contract within such a statute is void." If void, of course no measure or kind of proof could sustain or vivify it. But that case is not in conflict with the foregoing. The commissioner had before him a case involving estates in real property, and as applied to such estates his observation just quoted is true. Moreover, he was not considering the subject of the statute of frauds as to the general classes arising under section 1624 and section 1973, supra. No more is the more recent case of Gard v. Ramos, 23 Cal. App. 303, 138 Pac. 108, an authority to the contrary. The court in that case, it is true, did hold that the party did not waive the statute of frauds by failure to object to oral evidence of the terms of the contract. But in that case the oral evidence was offered as a part of a chain of proofs to show that the defendant had accepted delivery of part of the goods. The oral evidence was perfectly proper for that purpose, and it would have been inconsistent and unlawful for the court to have excluded it. As soon as it was seen that the proofs of delivery fell short, the defendant raised the point and was sustained by the trial court. In the case before us the learned trial judge must have held a view in harmony with the quoted cases, since he denied a motion for a new trial.

[2] The motion for a new trial was properly denied. The affidavits do not show any newly discovered evidence. Mere forgetfulness that the evidence existed without any showing that tends to excuse the forgetfulness does not entitle a party to a new trial. Converse v. Ferguson, 166 Cal. 1, 134 Pac. 977.

[3] The claim urged that the agent purchased the property in his own name is unimportant. It is true that this was in violation of the terms of section 2322 of the Civil Code, but the agent is not disputing the validity of the sale, and the defendant did not raise the point in the court below. He did not at the time of purchase or at any time afterward repudiate the sale upon that ground. Beyond all this, the point is covered by the terms of the stipulation.

[4, 5] The jury awarded just one year's interest in excess of the proper amount. This court may direct the proper modification of the judgment. Smith v. Johnson, 23 Cal. 65; Kerry v. Pacific Marine Co., 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65. The complaint contains no prayer for interest. This, however, is unnecessary in a contested case. Any relief may be granted that is within the issues. Lane v. Gluckauf, 28 Cal. 288, 87 Am. Dec. 121, and a long line of following cases.

The judgment is modified by deducting therefrom the interest for one full year, to wit, $142, and, as thus modified, the judgment is affirmed; the respondents to recover costs.

We concur: BURNETT, J.; HART, J.

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50 Cal. App. 345

DUNNE v. HINES et al. (Civ. 3668.)

(District Court of Appeal, First District. Division 1, California. Dec. 10, 1920. Hearing Denied by Supreme Court Feb. 7, 1921.)

1. Appeal and error 🔑933(4)—Order granting new trial presumably not granted for insufficiency of evidence.

Where order granting new trial did not specify that it was granted for insufficiency of evidence to sustain the verdict under Code Civ. Proc. § 657, authorizing a presumption of no such ground in such case, the appellate court on appeal from the order will not examine the testimony.

2. New trial 🔑6—Discretionary with trial court.

Much is committed to the discretion of the trial court in considering grounds for a new trial.

3. Railroads 🔑282(9)—Negligence in shunting cars in industrial yard held for jury.

The backing up of cars in an industrial yard without rear end light where there was evidence that deceased yard employee had been told of the approach of the cars *held* not negligence as a matter of law; the question being for the jury.

4. Death 🔑58(1)—Presumption of due care controvertible.

When death is caused without eyewitnesses, the presumption is that the decedent was exercising due and proper care for his own safety, but such presumption is controvertible.

Appeal from Superior Court, San Mateo County; John L. Hudner, Judge.

Action by Mary Dunne, as administratrix of the estate of Thomas Dunne, deceased, against Walker D. Hines, as Agent, under section 206, Transportation Act of 1920 (Southern Pacific Company), substituted for Walker D. Hines, as Director General of Railroads, and the United States Railroad Administration. Verdict for plaintiff, and from an order granting the defendant a new trial, plaintiff appeals. Affirmed.

Robert H. Borland, of San Francisco, for appellant.

Edward F. Fitzpatrick and A. Kincaid, both of Redwood City (Henley C. Booth, of San Francisco, of counsel), for respondents.

WASTE, P. J. Plaintiff, as administratrix of the estate of Thomas Dunne, deceased, brought this action against Walker D. Hines as Director General of Railroads of the United States Railroad Administration, to recover for the death of the decedent, alleged to have been killed through the negligent operation of cars belonging to the Southern Pacific Company, at a time while said Dunne was engaged in the performance of his duties as a laborer in the yard of the Pacific Coast Steel Company. The defendants filed an answer in which they denied all the allegations of the complaint, and stated that said decedent, Thomas Dunne, was killed through his own negligence and by colliding with the car of the defendants. Trial was had by jury, which returned a unanimous verdict for the plaintiff in the sum of $15,000. Judgment was entered accordingly. The defendants made a motion for a new trial, which was granted, from which order the plaintiff has appealed.

The motion for a new trial was based upon several grounds, to wit: Excessive damages; insufficiency of the evidence to justify the verdict; that said verdict was against law; and errors of law occurring at the trial. The order of the court was as follows:

> "It was never pretended by any one that the deceased was not killed by defendant's cars moving in the nighttime without lights or a lookout. This want of lights or a lookout is claimed by plaintiff to constitute negligence rendering the defendant liable for the death; and the court at plaintiff's request so instructed the jury thereby eliminating any other question or consideration and leaving nothing for the jury to do but fix the amount of the damage. The instruction was tantamount to a direction to find for plaintiff. A verdict so based cannot be sustained, and a new trial—regrettable though it be—must be granted. Accordingly the verdict is set aside, and a new trial of the above-entitled action is hereby ordered."

[1] "When a new trial is granted on the ground of the insufficiency of the evidence to sustain the verdict the order shall so specify; otherwise on appeal from such order it will be presumed that the order was not based upon that ground." Code Civ. Proc. § 657. It becomes unnecessary, therefore, for us to examine the testimony which was brought here by the alternative method. Respondent is not here contending that the verdict was excessive; hence our examination narrows to a consideration of certain instructions amounting, in the opinion of the trial court, to errors of law warranting the granting of the new trial.

On the night in question a number of gondola cars, in which scrap iron and steel had been hauled into the yards of the Pacific Coast Steel Company, were being unloaded by the use of an electric magnet suspended from a traveling crane, by means of which the scrap was transferred from the cars to a pile alongside of the track. Thomas Dunne, the decedent, was instructed by the night foreman to clean out the gondolas of any scrap iron which the magnet did not pick up, and also to clear the track between the cars and near the scrap pile, in order that the switching of the cars might not be obstructed. Such had been his particular duty for about a month, and he had worked in the yard for about twice that time. He was last seen alive by the night foreman about 1:30 o'clock on the morning of the 23d of August, 1918, at which time he was engaged in throwing scrap out of the cars, which were then spotted on the scale and crane track, about 10 or 11 car lengths from the scale. At that time the foreman told him to walk back along the track toward the scale, as soon as the cars were empty, and see that the track was cleared of all scrap so that the engine of the defendant could come in and move the cars. Some time later Arnall, the switching foreman, in charge of defendant's crew, went up this track to see if it was clear. He found Dunne working in one of the gondola cars, and told the decedent that "they were coming in on the track." He had warned Dunne a number of times about keeping out of the way of the trains and cars when they were being switched. The night in question was clear, and the decedent could plainly see from where he was working, a distance of several hundred feet along the track, in the direction from which the cars would come in.

Arnall then caused his crew to shunt eight cars over the scale, allowing them to drift, with no light on the front end, and with no brakeman in place to control the cars, or give warning of their approach. Fifteen minutes afterwards the switching foreman found the body of the decedent, lying at right angles to the track, face downward, nearly severed at the waist, with the head between the rails. Absence of a light and the brakeman or any one to give warning of the approach of the cars while switching was customary, and was admitted as a fact in the case.

The court instructed the jury, at the request of the defendant, that if the deceased had been notified that the cars were about to be operated on the track, it was not negligence for the defendant to operate the same without showing any lights, or having a man on the front of the car, or giving any other warning, and that their verdict should be for the defendants, unless the lack of the man or lights was the proximate cause, without his fault, of the decedent's death, while in another part of the charge, at the request of the plaintiff, the jury was instructed to find for the plaintiff if it found that the defendants carelessly, negligently, and without giving warning or displaying a light on the front of said cars, shunted or pushed a string of empty cars over and upon the decedent. The jury was further instructed, at plaintiff's request, that if at the time of the accident "the defendants were operating a switching engine and pushing cars ahead of said engine, and that at said time there was no light displayed on the head of the car of said train, or that by reason thereof" the decedent was killed, "the failure to display said light was negligence on the part of the defendant," and immediately following, also at the request of the plaintiff, "that it is negligence per se to set a single car in motion at a place where human beings are allowed and likely to be injured without having a lookout or workman thereon in a position to perceive or avoid danger to said persons and warn said persons of the approach of said cars." These instructions were followed by the giving of the following:

> "I instruct you that, if at the time of the accident in question the defendants, their agents or employees, were pushing, shunting, or otherwise propelling cars ahead of the switch engine belonging to the defendant, and that no light was displayed on the front of the first of said cars, and that no switchman or workman was riding upon said car in a position to see or give warning of the approach of said car, and that by reason thereof the said Thomas Dunne was injured, then I instruct you that your verdict should be for the plaintiff.
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> "I instruct you that at night a light must be put upon a moving and backing train sufficient to warn persons attempting to cross the track at lawful places of the approach of said train.
>
> "I instruct you that, if you believe from the evidence that Elmer Arnall was the foreman in charge of said switching crew, and that he, the said Elmer Arnall, had no notice or knowledge that the defendant Thomas Dunne was working on the said track in the vicinity where he was killed, and that he, the said Elmer Arnall, failed to place a light on the first car being pushed ahead of said engine or to place a switchman thereon, and that as a result of said failure so to do the said Thomas Dunne was injured or killed, then I instruct you that your verdict must be for the plaintiff."

[2, 3] These instructions not only misstate the law, but are contradictory, and directed a verdict for the plaintiff upon the finding by the jury of the various facts specified therein, without embracing all the things necessary to show the legal liability of the defendant, and to warrant the direction or conclusion that the plaintiff was entitled to a verdict. Pierce v. United Gas & Electric Co., 161 Cal. 176, 183, 184, 118 Pac. 700; Killelea v. California Horseshoe Co., 140 Cal. 602, 604, 605, 74 Pac. 157. Appellant contends that other instructions correctly state the law in these respects as favorably to the defendant as was warranted. But the giving of these other instructions if appellant be correct in her estimation of their effect, only serve to produce a still greater conflict in the instructions, and it is impossible for us to say which portion of the charge the jury followed in arriving at a verdict in favor of the plaintiff. The trial court was convinced that the jury was improperly influenced by the instructions, and much is committed to its discretion in considering such grounds for a new trial. Thompson v. California Construction Co., 148 Cal. 35, 38, 82 Pac. 367.

The instructions misstated the law. A court might be justified in declaring as a matter of law, that it was negligence, under some circumstances, for a railroad company to permit its cars, or even a single car, to move along its track, without having some one on the same to control its movements, or without a warning light; but the question presented by the case is an entirely different one. The cars were permitted to go along the track in an industrial yard, where no persons might be expected to be present except those who might be familiar with the customary conditions existing, and the mode of conducting the business of the place. If it was negligence to permit the cars to be operated as described, it was not such that the court could pronounce it negligence as a matter of law. Kelley v. C., M. & St. P. Ry., 53 Wis. 74, 9 N. W. 816. Whether it was negligence or not for the servants of the railroad company to shunt the cars onto the scale track, without stationing some one on the foremost car, to signal its approach to the decedent, or any other persons who might be on or near the track, and without having a light thereon, was controlled by all the circumstances under which the cars were operated, as disclosed by the testimony, and was purely a question of fact for the jury to determine. Carraher v. S. F. Bridge Co., 81 Cal. 98, 102, 22 Pac. 480; Southern Ry. Co. v. Daves, 108 Va. 378, 61 S. E. 748. The trial court, by its instructions, took the right and duty of deciding the question away from the jury. and its action was clearly erroneous. Ryan v. Oakland Gas, Light & Heat Co., 10 Cal. App. 484, 489, 102 Pac. 558.

[4] While it is true, as argued by appellant, that when death is caused under circumstances such as these, without eyewitnesses, the presumption arises that the decedent was exercising due and proper care for his own safety, such presumption is controvertible, and it still remains for the jury to say whether or not, under all the circumstances of the case, the acts on the part of the defendant complained of amounted to negligence. Crabbe v. Mammoth Channel G. M. Co., 168 Cal. 500, 506, 143 Pac. 714; Ross v. San Francisco-Oakland Terminal Rys. Co., 191 Pac. 703.

The order granting a new trial is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(50 Cal. App. 352)

In re McGUIRK'S ESTATE. (Civ. 3420.)

(District Court of Appeal, Second District, Division 1. California. Dec. 11, 1920.)

1. Wills 🔑34—Insanity to affect validity must involve mental incapacity or delusions.

Insanity of a testator to affect the validity of his will must be either of such a broad character as to establish mental incapacity generally, or some specific form thereof whereby testator is the victim of hallucination or delusion.

2. Wills 🔑324(2)—Evidence of testator's insanity insufficient to take case to jury.

On contest of a will for testator's insanity, evidence of eccentric conduct, etc., *held* insufficient to take the case to the jury.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

In the matter of the estate of Peter McGuirk, deceased, wherein Mrs. Lizzie Kersey contested admission of decedent's will to probate, and from judgment admitting it to probate appeals. Affirmed.

E. J. Emmons, of Bakersfield, Jackson Mahon, for appellant.

J. W. Wiley and R. B. Lambert, both of Bakersfield, for respondent.

SHAW, J. Peter McGuirk died on the 3d day of August, 1919, leaving an olographic will, dated June 7, 1918. Upon the presentation of the will for probate by Josephine H. Gunston, the sole legatee named therein, a contest thereof, upon the ground that at the time of the execution of the will the deceased was not of sound or disposing mind or memory and was incompetent to make a will, was filed by Mrs. Lizzie Kersey, a sister of deceased. The case was tried before a jury and, at the conclusion of contestant's evidence, the court granted a nonsuit and rendered a judgment admitting the will to probate, from which contestant has appealed.

[1] Appellant concedes the well-recognized rule that insanity of a testator, in order to affect the validity of his will, must be either of such a broad character as to establish mental incapacity generally, or some specific form thereof, by reason of which the testator is the victim of hallucination or delusion. Estate of Chevallier, 159 Cal. 168, 113 Pac. 130; Estate of Collins, 174 Cal. 670, 164 Pac. 1110. No claim is made that the testator, when he made the will, was subject to delusions; but it is insisted that—

> "The testator was mentally incompetent to execute a will because of the broad and general character of his unsoundness of mind, an unsoundness of mind that first became marked some 25 years prior to the execution of the will (when he had a stroke of paralysis), and which grew worse and became more marked from year to year up to the death of the testator."

[2] It appears from the evidence introduced that at the time of his death Peter McGuirk was about 62 years of age, unmarried and without other heirs than his brothers and sisters, all of whom were of mature age. All of the witnesses testified that in their opinion deceased was, at the time when he made the will, of unsound mind. The facts upon which such persons based their conclusions, and without which their opinions could in no event be of any weight (Estate of Dole, 147 Cal. 190, 81 Pac. 534), are that, in 1894 testator had a stroke of paralysis, prior to which time he was an active man, both mentally and physically; that as a result of such affliction his physical condition was impaired, and thence to the time of his death a marked change was noted in his disposition and conduct towards other persons, including his mother, towards whom he used abusive language, and on one or two occasions, during altercations, tried to strike her with a cane or poker; that on one occasion, while camping in the mountains, he was partaking of a meal consisting of macaroni and beans, among which were worms and maggots. While physically unable to dress or care for himself without assistance, he, in 1910, put in a bid for a contract to carry the mail, and in 1912 ran for supervisor. He frequently stated his neighbors were trying to rob him, and both the living and the dead were made the subject of his curses. In conversation he would change from one subject to another, and frequently, for considerable periods of time, would engage in talking to himself, acted indecently in the presence of ladies, and once or twice mistook a niece for her cousin. In talking about his land, he, in the opinion of the witness, placed an exorbitant value thereon. No attempt was apparently made to show the time to which in their testimony the witnesses referred with relation to the time of making the will. His conduct from which the witnesses concluded that he was of unsound mind covered a period of 20 years, and the evidence is to the effect that deceased grew worse mentally and physically from the time he had the stroke to the time of his death some 25 years later. Andrew McGuirk, a brother of deceased, testified that he was led to believe that testator was of unsound mind because he refused to buy a piece of land which his mother advised him to purchase, and in failing to do so he made a mistake; that he abused his brother and applied vile epithets to him, both before and after he was paralyzed, but did not abuse him as much before the affliction as he did afterwards. The deceased for several years prior to his death lived at the house of the contestee, and she nursed, cared for, and as-

sisted him in the transaction of his business, and doing such things which by reason of his physical infirmity he could not readily do for himself. He kept a bank account, and frequently drew checks thereon; and for some four years prior to his death transacted business with the contestant as a lessee of his land, which she occupied as a tenant, and to whom he executed a contract or option to buy the same. As stated, the will was in his own handwriting, but copied from one prepared by his attorney under his instructions, and to whom he said he wanted it worded so as to carry out his intentions, and so there would be no technicality upon which they could break it.

The foregoing constitutes a fair statement of the evidence most favorable to contestant, and the question presented thereon is whether it was such as to have demanded of the trial court that it deny the motion for nonsuit and submit the question to the determination of the jury.

That the testator was unmindful of the presence of ladies when engaged in his duties to nature, used intemperate and profane language on all occasions, was eccentric, and said and did things inconsistent with what might be deemed conventional rules, may be readily conceded. Nevertheless, and assuming further that his conduct justified the inference that his mental faculties were impaired and weakened to an extent which warranted the conclusion, as stated by witnesses, that he was of unsound mind, there is nothing in the evidence which tends, either directly or inferentially, to prove that his testamentary act was in the slightest degree influenced or affected by the condition of mind which prompted him to say and do things upon which the witnesses based their opinion. "The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld." Estate of Chevallier, 159 Cal. 168, 113 Pac. 130. Under the circumstances, and due to the fact that the testator had, for years preceding the making of the will, made his home at the house of the contestee, who had during such time looked after his wants and cared for him when occasion demanded it, and assisted him in the transaction of his business affairs and the handling of his property, the value of which appears not to exceed $8,500, it was most natural that he should make her the recipient of his bounty. The facts herein are quite similar to those involved in Estate of Collins, 174 Cal. 663, 164 Pac. 1110, wherein the will of the deceased in that case was attacked, as here, upon the contention that decedent was not of sound and disposing mind at the time of the execution of the will. The appeal therein was from an order revoking the probate of the will, and upon a review of the evidence, which was much stronger in favor of the contestant than that here presented, the Supreme Court reversed the order.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

50 Cal. App. 201

MALTBY v. CONKLIN et al.

(Civ. 3482; L. A. 6266.)

(District Court of Appeal, First District, Division 2, California. Nov. 29, 1920. Hearing Denied by Supreme Court Jan. 28, 1921.)

1. Vendor and purchaser ⟹254(1)—Foundation of doctrine of vendor's lien stated.

The foundation of the doctrine as to lien of a vendor is in the principles of equity and moral justice that a person who has acquired the estate of another ought not in conscience, as between them, to be allowed to keep it and not pay the consideration money.

2. Vendor and purchaser ⟹251—Vendor's lien does not exist while vendor has title.

So long as a vendor retains title, he has an express lien for unpaid purchase money, and a vendor's lien does not exist until he has parted with title.

3. Estoppel ⟹52—No waiver of right until it exists.

One cannot impliedly waive a right before such right exists.

4. Vendor and purchaser ⟹266(8)—Vendor's lien held not waived by conveyance.

Vendor's lien was not waived by an agreement contained in a contract of sale to retain the title to the property as security for the payment of the purchase price, and hence vendor had a vendor's lien on the property where he conveyed it to the vendee before payment of the purchase price, under Civ. Code, § 3046.

5. Vendor and purchaser ⟹301 — Remedy of vendor on failure of purchaser to pay.

A vendor retaining the title may sue at law for the balance of the purchase money or file his bill in equity for the specific performance of the contract and take an alternative decree that, if the purchaser will not accept the conveyance and pay the purchase money, the premises be sold to raise the money, and that the vendee pay any deficiency remaining after the application of the proceeds arising upon such sale.

6. Vendor and purchaser ⟹265(1)—Grantee without consideration held to hold subject to vendor's lien.

Persons to whom land was conveyed by the vendee without consideration for the purpose of sale to another had no standing in equity in an action by one to foreclose a vendor's lien.

7. Vendor and purchaser 🔑280(3)—Waiver of vendor's lien cannot be shown unless pleaded.

In action against grantees of vendee to enforce a vendor's lien, defendants could not urge that plaintiff's acceptance of a mortgage from the vendee deprived plaintiff of his vendor's lien, where defendants did not plead a waiver of the vendor's lien.

8. Vendor and purchaser 🔑281(1)—Lien presumed to exist as incident of sale.

A vendor's lien is presumed to exist and is an incident of the transaction of sale in all cases unless the intention of the vendor that it shall not exist be clearly manifested by his acts or declarations, and the burden of proof is upon the vendee or his successors to show such intention.

9. Pleading 🔑236(1) — Permitting amendments within discretion of trial court.

The permitting or refusing of amendments to pleadings is a matter within the judicial discretion of the trial court.

10. Pleading 🔑229—Amendments only allowed in furtherance of justice.

Amendments to pleadings are only allowed in furtherance of justice, under Code Civ. Proc. § 473.

On Hearing in Supreme Court.

11. Vendor and purchaser 🔑266(8)—Taking of unrecorded mortgage waiver of vendor's lien.

Taking by vendor of an unrecorded mortgage was a waiver of his vendor's lien.

12. Appeal and error 🔑1041(3) — No complaint of refusal to permit amendment which would not have changed result.

Court did not err in refusing to permit an amendment to an answer where the final result would have been exactly the same.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Guy Maltby against J. Conklin, Jr., and wife and Lorenzo F. Miller and others. From an adverse judgment, the last-named defendant and others appeal. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

W. C. Wilde, of San Diego, for appellants.

W. R. Andrews, of San Diego, for respondent.

LANGDON, P. J. This is an appeal by the defendants Lorenzo F. Miller, Hattie E. Miller, A. G. Wilde, and Mark Wilde, from a judgment for plaintiff. The action was brought to have ascertained the amount of the purchase price due to plaintiff from defendants J. Conklin, Jr., and Sara Conklin for certain real property in San Diego, and to have said amount declared a lien upon the said premises; also to have whatever interests the defendants, other than the Conklins, might have in the property declared to be subsequent and subject to the said lien of plaintiff. Plaintiff also prayed for a sale of the property under his lien, and for general relief.

The facts of the case are: On May 11, 1915, plaintiff entered into a contract with the defendants Conklin under which it was agreed that plaintiff would sell to said Conklins lot 11 in block 17, Ocean Beach, San Diego, for the sum of $752.05. A copy of this contract is attached to the complaint. It contains the provisions above mentioned and the further provision that the title to the property is to remain in the vendor until the full purchase price is paid, and that a deed to the property executed by plaintiff should be placed in the hands of an escrow holder with instructions to deliver the same to defendants Conklin upon the payment of all installments of the purchase price; but in the event of default in any particular by said defendants the deed to be returned to the vendor and the purchase contract canceled. In pursuance of said contract, plaintiff executed the deed provided for therein, and placed the same, together with the contract of purchase and sale with the escrow holder. Plaintiff also placed the defendants Conklin in possession of the property. On September 23, 1916, while Conklins were in possession of the property, and with no further payment than the initial payment of $10, plaintiff delivered to defendants Conklin a deed to said property. No further payments were ever made upon the purchase price. It is further alleged that the purchase price has not been secured to plaintiff otherwise than by the personal obligation of the Conklins. It was alleged that the defendants Miller acquired the property without consideration, and with full knowledge of plaintiff's lien and claim for the purchase price thereof, and that the other defendants Wilde acquired their interest under a deed of trust, with full knowledge of all the facts.

[1-4] The first contention of appellants is that the demurrer to the complaint should have been sustained, as the complaint does not state a cause of action. This is based upon the argument that it appears by the complaint that the vendor's lien upon the premises was waived by the agreement contained in the contract to retain the title to the property as security for the payment of the purchase price, and that this lien, having been once waived, could never be revived again by relinquishing the security so provided to be retained. Therefore appellants argue, when a deed was actually given to the Conklins by the plaintiff, without the payment of the purchase price, the plaintiff was merely waiving the security which he had reserved to himself in lieu of the vendor's lien, and consequently he was left with no security whatever, neither the vendor's lien

nor the lien reserved by the written contract. We think there is no merit in this contention. The foundation of the doctrine as to the lien of a vendor is in the general principles of equity and moral justice that a person who has acquired the estate of another ought not in conscience, as between them, to be allowed to keep it and not pay the consideration money. Selna v. Selna, 125 Cal. 357, 58 Pac. 16, 73 Am. St. Rep. 47. So long as the vendor retains title, he has an express lien for unpaid purchase money. Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272. A vendor's lien does not exist until the vendor has parted with title. Avery v. Clark, supra, 87 Cal. 625, 25 Pac. 919, 22 Am. St. Rep. 272. It is apparent that one cannot impliedly waive a right before such right exists. In the present case, when the contract was made for the sale of the property, reserving the title in the vendor until full performance by the vendee, there was as yet no equitable vendor's lien in existence because the title had not yet been conveyed; that being true, the vendor did not by entering into this contract waive his vendor's lien. The law implies no lien from a mere contract to pay the purchase money; and, where the vendor has title, he has it without any occasion for a lien. Vance Redwood Lumber Co. v. Durphy, 8 Cal. App. 664, 671, 97 Pac. 702. It was not until later when he transferred to the defendants the legal title, without payment of the consideration, that the law created for him a vendor's lien. Section 3046, Civ. Code; Dingley v. Bank of Ventura, 57 Cal. 467, 471; Tripp v. Duane, 74 Cal. 85, 91, 15 Pac. 439. The complaint sets out no transaction occurring subsequent to the time of the creation of the equity of the vendor's lien which indicates a waiver of such lien.

[5] A situation somewhat similar to that presented by the present case was considered in the case of Finnell v. Finnell, 156 Cal. 589, at page 597, 105 Pac. 740, at page 743, 134 Am. St. Rep. 143. In that case it appeared that the vendor had at first demanded a mortgage from the vendee as security for the unpaid purchase price, but later withdrew that demand and conveyed to the vendee without such security being given him. The court said in discussing this matter:

> "The fact that plaintiff asked his father to give a mortgage as security for the balance of the purchase money and that his father declined to do so certainly does not show any disposition on plaintiff's part to waive any security given him by the law. It shows, on the contrary, that he did desire to obtain, if possible, a written contract of security, and the utmost shown by his subsequent willingness to convey without obtaining this is that he withdrew his demand for such a contract, not that he waived anything given him by the law."

Likewise in the present case the transaction shown in the complaint indicates that the plaintiff abandoned his right to have an express lien upon the property, but does not indicate that he also relinquished the less valuable right of a vendor's lien. As stated by the court in Sparks v. Hess, 15 Cal. 194, in the case of a vendor's lien, the vendor has parted with the legal and equitable title, and possesses only a bare right, which is of no operative force or effect until established by the decree of the court; while in a case of retention of the legal title as security for the purchase money the vendor's position is in some respects similar to what it would have been had he executed a conveyance to the vendee and taken from him a mortgage upon the property. A vendor retaining the title may in like manner sue at law for the balance of the purchase money, or file his bill in equity for the specific performance of the contract, and take an alternative decree that, if the purchaser will not accept the conveyance and pay the purchase money, the premises be sold to raise the money, and that the vendee pay any deficiency remaining after the application of the proceeds arising upon such sale.

It therefore appears that the express lien which the plaintiff was entitled to insist upon under the contract was a larger right than the implied vendor's lien. By a conveyance of the property without payment of the consideration, plaintiff waived this larger right, but certainly he did not thereby waive the lesser right to a vendor's lien. We are of the opinion, therefore, that the complaint states a cause of action against the defendants.

The evidence and findings show that the appellants Lorenzo F. Miller and Hattie E. Miller, his wife, received the property without consideration and with full knowledge of the transaction between the plaintiff and his vendee, Conklin. The record shows that Lorenzo F. Miller was a brother of Sara Conklin, wife of the plaintiff's vendee. When the Conklins left the state of California, Miller undertook to dispose of this parcel of land together with the improvements thereon, and to pay the plaintiff the amount due upon the purchase price. This clearly appears from the correspondence between the parties and from the findings of the court. For this purpose, Miller asked that the legal title to the property be conveyed to him so that he might execute a deed to a purchaser, which he claimed to have found. Solely for this purpose a deed was sent to him conveying the property to him. No consideration was paid for the execution of this deed, and Miller was instructed not to record the same unless the anticipated sale could be consummated. He, however, did record the deed, making himself the record owner. He never consummated any sale, but later executed a deed of trust upon the property for $235, in favor of the defendants Wilde, to secure a loan which he obtained from them upon the property. At the time he secured this loan he represented to the Wildes that he was the absolute owner of the property, and the court has found that the Wildes had no notice of the real facts and were bona fide incumbrancers for value without notice.

[6] Because of this finding, the Wildes are protected in the decree, and are given a lien for the full amount of their loan with interest, which lien is, by the decree, made superior to the lien of the plaintiff. The Wildes are fully protected to the extent of their interest, and the decree provides for the payment to them of the full amount due them before the plaintiff can enforce his lien upon the property. We cannot see, therefore, how they have any equitable standing here to urge the many technical objections which appear in their brief. And as for the Millers, as found by the trial court, and stated most forcefully by said court in rendering its decision, they have no standing whatever in a court of equity. They never had any rights in the property; they are entitled to nothing; and their conduct, as disclosed by the record, precludes them from receiving any consideration in an action of this kind.

The vendees, J. Conklin, Jr., and Sara Conklin, did not contest plaintiff's claim of lien. They defaulted in the trial court and have not appealed from the judgment. Lorenzo F. Miller, held merely the bare naked title to the property for a specific purpose. He never had any equitable title to the property, and the agreement under which he was given the legal title was for the benefit of the plaintiff, and Miller violated this agreement. The other defendants (A. G. and Mark Wilde), as before stated, have been protected by the decree to the extent of the money advanced by them.

[7, 8] There is one other matter urged by appellants which we shall discuss briefly. Upon the cross-examination of the plaintiff the attorney for Miller and Wilde brought out the fact that the reason the transfer of the legal title to the property had been made by the plaintiff to Conklin before the payment of the full purchase price was that plaintiff, at the time of said transfer, was involved in a lawsuit, and wished to divest himself of title to the property to avoid payment of any judgment that might be obtained against him. Appellants urge that it appears from the evidence that, in pursuance of this design, plaintiff deeded to Conklin the property in controversy, and also another piece of land, and took a note secured by a mortgage upon both parcels of land, as payment therefor. He never intended to, and never did, put this mortgage upon record, and never enforced nor relied upon the same. Appellants urge that this acceptance of the mortgage deprived plaintiff of his vendor's lien. However true this would be as an abstract proposition of law, there are several reasons why appellants' contention is without merit upon the record before us here. First, appellants, under the facts shown here, are not concerned with the motives of plaintiff in deeding his property to Conklin without the full payment of the consideration. They are not his creditors nor his grantees, and have no interest in the property, save and except the interest of Wilde in the sum of $235, which has been fully allowed in the decree. Furthermore, appellants did not plead a waiver of the plaintiff's lien, and the evidence regarding the note and mortgage, relied upon by appellants to establish a waiver, was admitted over the objections of the plaintiff. A lien is presumed to exist and is an incident of the transaction of sale in all cases unless the intention of the vendor that it shall not exist be clearly manifested by his acts or declarations, and the burden of proof is upon the vendee or his successors to show such intention. Finnell v. Finnell, supra; Selna v. Selna, supra. The trial court denied the motion of appellants, made at the close of the trial and argument, to amend their pleadings so as to set up the alleged waiver. In denying this motion, the trial judge stated that the amendment was objected to, and in view of the default of the Conklins, the vendees, and the evidence regarding the interests and equities of the other parties before the court, the allowance of such an amendment would not be in furtherance of justice.

[9, 10] The permitting or refusing of amendments to pleadings is a matter within the sound judicial discretion of the trial court. Cheney v. O'Brien, 69 Cal. 199, 10 Pac. 479; Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673; Fitzgerald v. Neustadt, 91 Cal. 600, 27 Pac. 936; Trower v. City and County, 157 Cal. 762, 769, 109 Pac. 617. Amendments are only allowed in furtherance of justice. Section 473, Code Civ. Proc.; Kirby v. Superior Court, 68 Cal. 604, 606, 10 Pac. 119.

And this discussion of the equity and justice of the situation presented by the record leads us to a compelling reason for the affirmance of the judgment. It is that an examination of the entire record convinces us that no injustice has been done any of the appealing defendants, and that full and substantial justice has been done between the parties. To reverse this judgment would be to override all of the equities apparent in the record, and to make mere technicalities and obvious subterfuge prevail over right and justice.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 2, is denied.

[11, 12] In denying a hearing, we desire to say that we do not agree with any possible intimation, if there be such, in the opinion of the District Court of Appeal that the taking by the plaintiff of the unrecorded mortgage was not a waiver of any vendor's lien. But such waiver was not pleaded, and the trial court was justified in refusing the defendants leave to amend for the purpose of pleading it. If such leave had been granted, the only result would have been to show merely that the plaintiff had a mortgage lien instead of a vendor's lien. The final result, in other words, would have been exactly the same.

All concur, except SLOANE, J., absent.

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50 Cal. App. 296

LAKESIDE DITCH CO. et al. v. PACKWOOD DITCH CO. (Civ. 2193.)

(District Court of Appeal, Third District. California. Dec. 7, 1920.)

1. Corporations 🔑503(3) — Defendant corporation not entitled to absolute right of removal of case to county of residence.

Where a corporation is sued in a county other than wherein it has its place of business and therefore where it "resides," as permitted by Const. art. 12, § 16, subject to change of venue "as in other cases," it has no absolute right to removal to the county of its residence under Code Civ. Proc. §§ 395, 397, providing for trial where defendant resides, and for change to the proper county, but can only secure a removal, "as in other cases," on same ground legally recognized other than that of residence in another county.

2. Venue 🔑68—County in which title shows action to have been brought prima facie proper county.

The presumption is, in the absence of an affirmative showing in that particular, that the county in which the title of the action shows that it is brought is, prima facie, the proper county, where the court in which the action is brought has jurisdiction of the subject-matter thereof.

3. Corporations 🔑503(3)—Allegation held to disclose that contract was made in county in which action was commenced.

In action against corporation for its proportionate share of expenses incurred by association of which it was a member, due under a contract to pay proportionate share thereof, allegation of complaint that "said association is located in Tulare county, and does its business therein, and said transactions took place therein," *held* sufficient, on motion for change of venue, to disclose that the contract sued on was made in such county.

4. Venue 🔑70 — Complaint cannot be challenged for insufficiency of facts by affidavit on motion for change of venue.

The complaint cannot be challenged, on motion for change of venue, either for insufficiency of the facts or insufficiency of the statement of the facts by an affidavit of merits or any affidavit filed in such a proceeding, and may be considered on such motion only in so far as it may throw, or tend to throw, light on the question whether the action should or should not be removed.

5. Corporations 🔑503(3)—Payments to association presumed on motion for change of venue payable at its place of business.

In action on contract of defendant corporation to pay its proportionate share of expenses incurred by association of which it was a member, it will be presumed, under Civ. Code, §§ 1488, 1489, on motion for change of venue, that the payments were to be made at the principal place of business of the association, in the absence of a showing of an agreement to make payments at some other place.

6. Pleading 🔑8(3)—Allegation that transactions took place in county held statement of fact.

Allegation of complaint that "transactions took place" in county in which action was brought *held* a statement of fact, and not a statement of a legal conclusion.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Lakeside Ditch Company and another against the Packwood Ditch Company. From an order denying its motion for change of venue, the defendant appeals. Affirmed.

C. W. Pendleton, of Los Angeles, for appellant.

Larkins & Bailey and Farnsworth, McClure & Burke, all of Visalia, for respondents.

HART, J. This is an appeal from an order of the superior court of Tulare county denying appellant's motion for a change of the place of trial from the county of Tulare, Cal., to the city and county of San Francisco, Cal.

On July 26, 1919, plaintiffs commenced an action in the superior court of the county of Tulare, in which they demanded judgment against the defendant in the sum of $9,054.23, together with attorney's fees and costs. The action is based upon a certain contract between the plaintiff and the defendant and certain other corporations. Within the time allowed by law appellant filed a demurrer to said complaint, and at the same time filed a notice of motion and a demand for a change of the place of trial of said action from the county of Tulare to the city and county of San Francisco. Said motion and demand were supported by an affidavit made by the defendant's president, who therein deposed that the principal place of business of the defendant was, at the time of the commencement of the action, and at all times thereafter, in the city and county of San Francisco, and that deponent, having fully stated the facts of the case to the defendant's attorney, was advised by the latter that defendant has a "good and substantial defense upon the merits of said action," etc. It will be observed that the sole ground upon which the demand for a change of the place of trial of the action was based is that of the residence of the defendant.

The contract is set out in the complaint in hæc verba. It appears that the plaintiffs, the defendant and a number of other corporations owning in severalty certain canals and ditches have been for a long period of time, and were at the time of the commencing this action, "appropriating, diverting, and using water from that certain natural water course known as the St. Johns river, and the branches, continuations, and extensions thereof." All the corporations referred to, including the plaintiffs and the defendant, for the purpose of protecting their respective rights to the water flowing in said river from wrongful interference by other parties and effecting a proper division of said waters between them, entered into said contract. The preamble of said contract declares that "it will be necessary to clean out and improve the channels of each of said streams [the St. Johns river and the Kaweah river, from which the former is supplied], and for such purpose to expend large sums of money," and, furthermore, that "it may become necessary to institute or defend actions at law in the courts for the protection and preservation of the rights of the parties hereto or some of them in and to the waters of said streams." It is then provided in the contract that the parties thereto shall constitute an association composed of one representative and an alternate selected from the stockholders of each of the corporations making and subscribing to the contract to act for and in behalf of said corporations, and that "the representatives so selected shall have the power to fully carry out all the provisions of this agreement," each such representative being vested with full power to bind his principal or principals "in all matters pertaining to this agreement."

The contract, after outlining the method for effecting the permanent organization of the association (designating the officers thereof and the method of their selection), and setting forth in detail the quantity of waters each of the said corporations shall be entitled to use, which is regulated, of course, according to their respective rights as to quantity and priority of appropriation, provides that said association may for and on behalf of the parties to the said contract incur any expense necessary to keep the waters rightfully entitled to flow in the St. John's river flowing therein down to the head of the several ditches of the parties to the agreement, and to cause said waters to be delivered to the respective ditches of said parties, "and to take all steps and incur all necessary expense to enforce and protect the rights of said parties to the waters of said river and to the use thereof, and to commence or defend any action or actions at law for said purpose in their own, joint or several names, or as said association may deem best, which expense the parties hereto agree to pay; provided, that no expense shall be incurred for any action which may arise between any of the parties to this agreement." The twelfth article of the agreement provides as follows:

> "And it is further agreed that each of the parties to this agreement, and each of those who may hereafter unite with them, shall pay and bear such a proportion of the expenses incurred by this association as the number of feet of water to which each is entitled to have turned to him or it, according to the terms of this agreement, bears to the whole number of feet of water to which all are entitled."

The sixteenth article provides:

> "Said association shall hold such special meetings, and at such place or places, as it may determine in its by-laws, but a regular meeting of such association shall be held once each year in the city of Visalia, county of Tulare, and state of California."

It is alleged in the complaint that the defendant, through and by one George H. Castle, acting under a duly executed power of attorney from defendant, entered into and became a party to the above-mentioned contract; that, after the said association was formed, it found the channel of the St. John's river in such a condition from obstructions, etc., that it was with difficulty that the waters of said river could be carried to the intakes of the ditches and canals of the parties to the said contract, and that a large amount of work, including the construction of a cement dam, had to be done, and was actually done, to get the waters rightfully flowing in said river to the heads of the ditches of the said parties, including that of the defendant's canal; that the association, to protect its rights, has been compelled to and has, at different times since the formation of said association, brought and defended suits at law in the names of the members of said association, and was compelled to and did expend large sums of money for such purposes; that a suit by the association, in the names of the members thereof, including defendant as one of the plaintiffs therein, was initiated in June, 1916, in the superior court of Tulare county, against the Lindsey-Strathmore Irrigation District to enjoin the latter from further pumping waters rightfully entitled to flow in the St. John's river, which pumping of water by said district wrongfully interfered with the legal right of the members of said association in the waters of said stream; that the defendant knew of the work done above mentioned by the association to facilitate the flow in said river of the waters rightfully belonging to said stream when said work was done, and knew of the suits at law prosecuted and defended by said association for and in behalf of the members thereof when said suits were commenced and were pending and tried, and that defendant acquiesced in and accepted the benefits of the work done and acquiesced in the course of the association in prosecuting and defending the several suits referred to. It is alleged that the aggregate pro rata share, under the terms of said contract, of the defendant for the expenses so incurred by said association is the sum of $9,054.23, for which, as above stated, judgment is prayed. It is further alleged:

> "That said association is located in said county of Tulare and does its business therein, and said transactions took place therein, and said cause of action arose therein."

It is also alleged that within six months prior to the commencement of this action the said association notified the defendant of its share of the expenses incurred as above explained, demanded payment by defendant of said aggregate sum, but that defendant has refused, and still refuses, to pay said amount or any part thereof.

[1] The plaintiffs contend that the place of trial of the action is fixed by section 16 of article 12 of the Constitution, which reads:

> "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

The position of the defendant is twofold, viz.: (1) That the defendant is, by virtue of section 395 of the Code of Civil Procedure, entitled to have the case tried in the city and county of San Francisco, which is its principal place of business, and therefore where it "resides," within the meaning of said section; (2) that, conceding that the action may be commenced and tried in any of the counties referred to in section 16 of article 12 of the Constitution, other than the county in which the defendant resides, the plaintiffs have not shown by their complaint that the contract upon which recovery is sought was either made or to be performed or that the obligation or liability arising thereon arose or the breach of said contract occurred in Tulare county. Section 395 of the Code of Civil Procedure provides that in all cases other than those specified in the three "preceding sections" the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action, or if it be an action for injury to person, or property, etc. (referring to particular kinds of torts), the action must be tried in the county where the injury occurs or in which the defendants or some of them reside at the commencement of the action. Said section, it is hardly necessary to say, includes all personal actions, save certain other personal actions in some way involving or affecting real property, and which may, in the absence of a better designation, be termed quasi personal. Grocers', etc., Union v. Kern County Land Co., 150 Cal. 466, 89 Pac. 120.

The section of the Constitution above quoted herein declares, it will be observed, that a corporation may be sued in any one of several counties, subject to the power of the court to change the place of trial as in other cases—that is, as in the cases mentioned in section 397 of the Code of Civil Procedure—to wit: (1) The county where the contract is made; (2) in the county where the contract is to be performed; (3) in the county where the obligation arises or the breach of the contract occurs; (4) in the principal place of business of the corporation.

The present action obviously does not involve or affect in any sense or measure the title to land. It in no way bears any relation to the title to or an interest in land. It is one which, while not strictly so, is in its practical effect for the enforcement of a contract for the payment of money. Hence it is purely and simply a personal or transitory action, and, being such an action, it clearly comes within the class of actions referred to by section 16 of article 12 of the Constitution, and is therefore, as to the matter of venue, governed by said section of the organic law. In other words, the plaintiffs had the right to commence the action in the county where the contract was made or where it was to be performed, or where the obligation arose. Lewis v. S. P. C. R. R. Co., 66 Cal. 209, 5 Pac. 79; National Bank v. Superior Court, etc., 83 Cal. 491, 24 Pac. 157; Trezevant v. Strong Co., 102 Cal. 47, 36 Pac. 395; Whitney & Co. v. Sellers' Com. Co., 130 Cal. 188, 62 Pac. 472; Miller & Lux v. Kern Co. Land Co., 134 Cal. 586, 66 Pac. 856; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90; Grocers', etc., Union v. Kern County Land Co., 150 Cal. 466, 89 Pac. 120; Cook v. Ray Manufacturing Co., 159 Cal. 694, 115 Pac. 318. And, having the right, under the constitutional provision in question to commence the action against the corporation in the county where the contract sued on was made or performed or the liability of the defendant arose, they have the right to have the action tried or prosecuted to a finality in that county, unless the place of trial is changed for some other sufficient reason than that of the residence of the corporation defendant. Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413, and the cases above cited.

Prior to the case of Grocers', etc., Union v. Kern, etc., Co., 150 Cal. 466, 89 Pac. 120, supra, the cases, of which there are many, in effect uniformly held that section 16 of article 12 of the Constitution applied to any and all actions against corporations. The case of Miller & Lux v. Kern County Land Co., 134 Cal. 586, 66 Pac. 856, which involved an action for damages for alleged injury to real property, expressly held that the provisions of the Constitution as to the place of trial applied in that case. Both the plaintiff and the defendant were corporations, and the principal place of business of both was in the city and county of San Francisco. The action was brought in the superior court in and for the city and county of San Francisco, and the defendant's motion to have the place of trial changed to Kern county, wherein the land alleged to have been injured was situated, was denied. The claim was that, under section 392 of the Code of Civil Procedure, which provides that actions for injuries to real property must be tried in the county where the subject of the action, or some part thereof, is situated, the venue of the action was in Kern county. The Supreme Court affirmed the order, and held, substantially, that but for section 16 of article 12 the place of trial of the action would be Kern county, where the land charged to have been injured was situated, but further held that the section of the Constitution "is in the nature of a Code provision in regard to procedure, and is obviously self-executing and differs from a statutory provision only in that it cannot be repealed, nor can its scope and operation be limited by a statute. So far as it conflicts with the statute," continued the court, "the statute must give way." But, in the Grocers' Union Case, supra, the question whether section 16 of article 12 of the Constitution, in so far as it might purport to apply to actions affecting the title to or an interest in real property, was in contravention of the inhibition of the Fourteenth Amendment to the Constitution of the United States, in that it denied to corporations a right, accorded to natural persons, to have an action affecting the title to or an interest in real property tried in the county where such property is situated, was raised for the first time, and it was held in that case, after an exhaustive review of the question, that, since the provisions of a statute in regard to the venue of an action "involve rights in respect to which the Fourteenth Amendment of the Constitution of the United States forbids arbitrary discrimination," section 16 of article 12 of our own Constitution was, to the extent that it purported to apply to actions affecting the title to or interest in land, unjustly discriminatory and violative of the inhibition of said Fourteenth Amendment. That case, however, does not hold that section 16, article 12, does not apply to and govern in the matter of venue in transitory actions against corporations. To the contrary, the opinion, if not expressly, by clear inference, recognizes the validity of that section of the state Constitution in so far as it applies to purely personal actions against corporations; and in the later case of Cook v. Ray Manufacturing Co., supra, the court, in an opinion by the late Chief Justice Beatty, holds that corporations are, as to venue in transitory actions, subject to the provisions of section 16 of article 12, and that, so far as such actions are concerned, that provision of the Constitution is paramount to the Code sections respecting the place of trial thereof. And in that case one of the points directly raised involved a consideration of the question whether "section 16 of article 12 of the Constitution of California, as heretofore construed, is, in its applicaton to transitory actions, such as this, violative of a right secured to our domestic corporations by the Fourteenth Amendment to the federal Constitution." The Chief Justice reviewed the Grocers' Union Case, which was cited by the appellant in the Cook Case as in support of an affirmative answer to the question. The learned writer of the opinion, as seen, answered the question negatively, and pointed out in characteristically clear and forceful language the distinction and the reasons supporting the distinction between the Grocers' Union Case and the case then considered by him and decided by the court. After giving the reasons which obviously prompted the incorporation of section 16 into the Constitution, he said, in holding that said provision applied to an action such as the one he was considering in that case:

> "Here it appears that there were at the time our Constitution was adopted weighty considerations justifying the discrimination as to actions arising out of breach of contract. The same conditions which prevailed at that time still continue, though modified to some extent by the fact that other places outside of San Francisco are now the principal places of business of many large corporations formed since the adoption of the Constitution, which, however, may be held to have accepted as one of the conditions of their corporate existence the particular provision of our Constitution here in question. If the views above stated are correct, this case is governed by the principle affirmed in Cincinnati St. Railway Co. v. Snell, 193 U. S. 30 (24 Sup. Ct. 319, 48 L. Ed. 604)—the principle, that is to say, that the Fourteenth Amendment safeguards only fundamental rights, and not the mere form which the state may deem proper for their enforcement. That was a case involving a discrimination made by a statute of the state of Ohio between corporations and natural persons as to the venue of personal actions, and the statute was upheld

by the Supreme Court of the United States without any dissenting opinion."

It is thus to be seen that the rule in California with respect to the place of trial of transitory actions against corporations is as it is declared in section 16 of article 12 of our state Constitution. The result is that a corporation against which such an action is brought has no absolute right to have the action either commenced or removed to the county in which it has its principal place of business, which is the county of its residence, merely upon that ground or for that reason, but can only secure a removal "as in other cases" or upon some ground, legally recognized, other than the fact that its residence is in a county other than the county in which the action has been commenced. See, also, in addition to the cases above named, Eddy v. Houghton et al., 6 Cal. App. 85, 87, 91 Pac. 397.

[2] It now remains to be seen whether it is sufficiently made to appear that the venue of the present action is in Tulare county. And first we remark as to this proposition that the record furnishes no direct predicate for the conclusion that the venue is not in that county. In other words, there is nothing affirmatively appearing in the complaint that indicates that Tulare county is not the legally proper place for the commencement and trial of the action, unless it be true, as the counsel for the appellant contends, that the fact that the complaint fails directly to aver or show that the contract sued on was either made or was to be performed in said county must be regarded as a sufficient ground or reason for inferring and so holding that the venue is not in the county named. But, as to this latter proposition it is to be said that, in the very logic of the situation, it is groundless. The presumption is, in the absence of an affirmative showing in that particular, that the county in which the title of the action shows that it is brought is, prima facie, the proper county, where the court in which the action is brought has jurisdiction of the subject-matter thereof. Chase v. S. P. C. R. Co., 83 Cal. 468, 472, 23 Pac. 532. If, therefore, the only showing of venue in this case was in the title of the action, there would be at least a prima facie showing of venue in Tulare county which would be sufficient to cast the burden upon the defendant to show that the contract was not made nor to be performed, or that the breach thereof by it or its liability by reason of the breach thereof did not occur or arise in said county. This necessarily follows from the proposition, before stated, that a corporation defendant is not entitled as of right, as in cases of transitory actions in which the defendants are natural persons, to have an action against it removed from the county in which it is commenced to the county of its residence, where the action is brought in a county other than that in which its principal place of business is. The defendant here did not undertake to discharge the burden thus resting upon it. It relied merely upon the mere fact that its residence was in the city and county of San Francisco.

[3-5] But we think the complaint itself sufficiently discloses that the contract was made in the county of Tulare. As seen, the contract is set out in full in the complaint. and immediately following are the averments of the facts constituting the gist of the action against the defendant, after which it is alleged, as above shown, that "said association is located in Tulare county and does its business therein; and said transactions took place therein, and said cause of action arose therein." These averments are not denied or controverted in the affidavit of merits filed by defendant or at all. They would undoubtedly be held, under a challenge by a demurrer, to involve an insufficient statement of the facts sought thereby to be stated. for they do not involve a direct statement that the business of the association was at all times done or carried on in Tulare county. In this connection, though, we may remark that the complaint, on a motion for a change of venue, cannot be challenged either for insufficiency of facts or insufficiency of the statement of the facts by an affidavit of merits or any affidavit filed in such a proceeding. That pleading can be considered only in so far as it may throw or tend to throw any light upon the question whether the action should or should not be removed, and, so considering the averments just mentioned, we think that, taken all together, they involve a statement of facts and circumstances sufficient, upon a motion to change the place of trial, to warrant the inference that all the business of the association was, from its organization to the time of the commencement of this action, transacted in Tulare county. From the allegation that the association is "located in Tulare county," it is fairly inferable that its place of business is in that county, and it is naturally to be implied that where a corporation's or an association's place of business is located is where all the business to carry on which it was organized or formed is transacted. Moreover, the contract as set out in the complaint binds the parties thereto to pay their respective proportions of the expenses necessarily to be incurred in carrying out the objects and purposes of the association, and it is to be presumed that these payments were to be made at the principal place of business of the association in the absence of a showing that it was agreed that they should be made at some other place. Civ. Code, §§ 1488, 1489. In Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90, there was no express stipulation or agreement as to

where the contract declared upon was to be performed, and the question as to the proper place for the trial of the action was therein submitted for determination. It is not necessary to restate the facts of that case here, it being sufficient to say that the question of venue therein was required to be determined, as thus far we are determining the question here, upon such circumstances as arise from the contract itself, and those under which it was made, considering also the respective residences of the parties. The court said, quoting from the syllabi:

> "In a suit upon the contract of a corporation where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed by the light of pertinent Code provisions, indicate that the parties expected or intended it to be performed."

As we have tried to show, the circumstances in this case, considered in the light of the provisions of the Civil Code last above referred to, clearly indicate, we think, that it was the intention of the parties that the contract involved herein was to be performed in Tulare county.

But a complete reply to the proposition, it seems to us, is in the allegation that "said transactions took place therein"—that is, in Tulare county. The counsel for appellant, however, declares that that allegation involves a legal conclusion, but adds that, if it were necessary to concede that it involves the statement of a fact, it can be of no advantage to the plaintiff, since, as he contends, it refers to "the transactions" conducted by the St. Johns River Association, and does not include the transactions of the appellant.

[6] Conceding that the objection that the averment involves the statement of a legal conclusion is important or material in the consideration of this appeal, we are not reluctant to say that the allegation does not involve the statement of a legal conclusion, but contains the statement of a fact. It is, indeed, much less a legal conclusion, in our opinion, than would be the averment that the contract was made and to be performed in Tulare county, which allegation, although, in a sense, a conclusion of law, would be permissible as involving the statement of an ultimate fact to be proved to warrant an adjudication that the contract was so made and to be performed. What is said in Ellis v. Central Cal. Traction Co., 37 Cal. App. 390, 395, 174 Pac. 407, is in point upon this proposition.

The objection secondly urged against the said averment, to wit, that "the 'transactions' referred to are those conducted by the St. Johns River Association, and does not include the transactions of the appellant," involves, practically, an admission that the complaint sufficiently alleges that all that was done by said association in furtherance of its ends or purposes, as indicated by the contract evidencing its formation, was in Tulare county, and this would include the work it performed, or caused to be performed, to facilitate the flow of waters in the said river to the extent to which they were entitled to flow in said stream, and also the defense and prosecution of suits at law to defend and protect the respective rights of the members of the association, including the defendant, in the waters of said river. Obviously, the admission that said averment constitutes such a statement is tantamount to an admission that the complaint contains the allegation that the contract was made and to be performed, and any obligation or liability arising by reason of its breach by the defendant arose in Tulare county. Nothing further can be said as to the scope and effect of said allegation than what is necessarily involved in the said admission of counsel, but if there might arise in the mind of any one any doubt as to the correctness of our construction of the admission of counsel to the effect that the allegation in question refers to all the transactions of the association, including the making of the contract and the carrying out of its terms by the association, we feel no hesitation in saying that the allegation in question should and is to be construed to refer to all the transactions mentioned in the complaint. The allegation is general, and we can conceive of no sound or just reason for holding that it refers to, or was intended to refer to, particular transactions only as distinguished from all the transactions concerning which the complaint speaks.

Our conclusion is, as must be apparent from the foregoing discussion, that the order of the court below denying the defendant's motion is upon the record as it appears here, entirely justified.

The order is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

50 Cal. App. 277

MEIER v. GOLDEN STATE AUTO TOUR CORPORATION. (Civ. 3480.)

(District Court of Appeal, First District, Division 2, California. Dec. 7, 1920. Hearing Denied by Supreme Court Feb. 3, 1921.)

1. Death 🔑64—Testimony of invalid mother suing for death of adult daughter as to nature of witness' ailments admissible.

In an invalid's mother's action for death of her daughter under Code Civ. Proc. § 377, testimony of the mother as to the nature of her ailments during the seven years before the daughter's death, during which the latter had taken care of her, was admissible, though the mother was permitted to testify with undue particularity of detail about her various ills.

2. Dismissal and nonsuit 🔑47—Motion for nonsuit as to element of damages in action for death properly denied.

In an action by administratrix for death of her daughter, denial at the close of plaintiff's case of defendant's motion for nonsuit as to damages on the part of the daughter's divorced husband was proper; in a negligence case there can be no motion for nonsuit as to a single element of general damages, which is a matter to be corrected by instructions.

3. Appeal and error 🔑1002—Finding on conflicting evidence binding on appellate court.

Where the evidence was conflicting on a point of fact, the appellate court is bound by the determination of the jury, unless they were misled, to appellant's prejudice, by error in the instructions.

4. Carriers 🔑246—Person traveling in autobus presumed to be passenger for hire.

A person traveling in an autobus used for carrying passengers, in the absence of countervailing circumstances, is presumed to be a passenger for hire.

5. Appeal and error 🔑1064(1)—Instruction in action for death of autobus passenger if erroneous held harmless.

In an invalid mother's action for death of her daughter through the negligence of the driver of an autobus on which the daughter was a passenger, in view of the circumstances, if there was error in the instruction that, if the jury reached the conclusion that the daughter was riding on the bus without payment of fare, then she was entitled to demand of the bus company that she be not willfully or recklessly injured, such error did not warrant reversal of judgment for plaintiff mother.

6. Death 🔑104(4)—Instruction that jury could consider pecuniary loss to family not erroneous.

In an action for death, the trial court, after instructing that there could be no recovery for sorrow, did not err in adding, "Yet you have the right to take into consideration the pecuniary loss suffered by the members of the family occasioned by her death, including the loss to them of the comfort, society, and protection of the decedent."

7. Death 🔑104(6)—Instruction on recovery for death of adult daughter injured after interlocutory decree of divorce held sufficient.

In a mother's action for death of her daughter, whose husband had secured interlocutory decree of divorce for desertion, the trial court properly instructed that the existence of such decree did not dissolve the marriage, and did not err in failing to instruct that in the computation of general damages the jury should make no award on behalf of decedent's husband.

8. Death 🔑99(5)—$5,000 not excessive award for death of adult daughter.

Award of $5,000 to plaintiff, an invalid mother, for death of her adult daughter, 23 years old, *held* not excessive.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by Eleanor Meier, as administratrix with the will annexed of the estate of Ione Smith, deceased, against the Golden State Auto Tour Corporation, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

Adair & Winder, of Riverside, for respondent.

BRITAIN, J. The defendant appeals from a judgment for $5,000 entered on the verdict of a jury as damages for the death of Mrs. Ione Smith, aged 23 years, as the result of injuries sustained by her while a passenger on an automobile stage, negligently operated by an employee of the appellant in its business as a common carrier of passengers. The action was prosecuted under the provisions of section 377 of the Code of Civil Procedure, by the mother of Mrs. Smith, in her capacity as administratrix of her daughter's estate with the will annexed.

The appellant admits the character of its business and that its employee in charge of its stage was negligent. The evidence shows beyond cavil that he did not exercise ordinary, nor indeed any, care or diligence to avoid the railroad crossing collision in which he was instantly killed, and Mrs. Smith, the only other person on the stage, received the injuries which shortly thereafter caused her death. The appellant contends that Mrs. Smith was not a passenger for reward, and that under the pleadings there was no right of recovery if its contention in this regard can be sustained. At the time of the accident Mrs. Smith was in good health. She was married, but within a very short time after her marriage she had returned to her mother's home. Her husband had procured an interlocutory decree of divorce on the ground of desertion, but the statutory period required before final decree could be entered had not elapsed at the time of her death.

Except for the brief interval following her marriage, for a period of seven years Mrs. Smith had cared for her invalid mother, who was suffering from organic disease of the heart, and who had undergone several severe surgical operations, two of them for cancer. Mrs. Smith occupied the sleeping room of her mother, and was frequently called upon to render her attentions at night. She bathed her mother daily, fed her, assisted her in walking, and attended upon her in other ways. She also aided her father, and from her earnings had aided an elder sister to gain a special education so that she might be self-supporting. She had also a younger brother. The plaintiff waived claim of the brother and sister to participate in damages. The value of decedent's estate was a little over $100.

[1] The appellant's first contentions concern claims of error in rulings on evidence. There is a general argument upon the character of the evidence, but, except in three instances, there is no reference to either specific evidence or rulings. While the mother of Mrs. Smith was on the witness stand she was permitted to state, over objection, the nature of her ailments during the seven years her daughter had taken care of her. The appellant argues that the evidence of dependency should have been strictly confined to the condition existing at the time of the injury, but under section 377 of the Code of Civil Procedure such damages are to be given "as under all the circumstances of the case may be just." Among other circumstances which were proper to be considered were those showing the close, continuous, and unusual care given by Mrs. Smith to her invalid mother, and it was only in connection with the character of the mother's sickness that the circumstances could be shown. It may be conceded that, as against the objections which were made during the examination of Mrs. Meier, she was permitted to testify with undue particularity of detail about her various ills. There was a general objection to a question in which the physician of Mrs. Meier was asked to explain Mrs. Meier's physical condition during the seven years preceding the death of Mrs. Smith, which was properly overruled. Before that, without objection, the witness had testified about an apoplectic stroke prior to a surgical operation about five years before, and that following the operation Mrs. Meier was confined to her bed for fully three years. After the single objection noted above, the witness testified concerning the matters disclosed by the evidence of Mrs. Meier. Under these circumstances the error in overruling objections to her evidence, if there was error, became negligible. From the evidence introduced without objection it appears that Mrs. Smith had been rendering services to her mother such as a nurse would have rendered, and of which her mother was deprived by her death. The family physician was permitted to testify that Mrs. Smith for seven years prior to her death was normal physically, and that after her death her sister was not strong physically, and that her condition incapacitated her from caring for her mother in the proper way. There was no motion to strike out the physician's conclusions, but objections to the questions concerning the health of Mrs. Smith's sister and the effect of her condition upon her ability to render her mother service were overruled, as was an objection to a question concerning the ordinary average charge for practical nurses at Hemet, where Mrs. Meier lived. These were circumstances to be considered in determining what damages would be just.

[2] Special damages were not claimed. At the close of the plaintiff's case a motion for nonsuit as to any damages on the part of Mrs. Smith's husband was denied. The ruling was proper. This court knows of no authority to support a motion for nonsuit in a negligence case as to a single element of general damages. That is a matter to be corrected by instructions, and the court's instruction upon this subject in this case is considered with other instructions later in this opinion.

[3] The argument that the verdict is not sustained by the evidence and that the judgment is against law is directed to the relative credibility of the evidence on the part of the plaintiff and defendant concerning whether or not Mrs. Smith became a passenger for hire on the stage which was wrecked. On behalf of the plaintiff was the positive testimony of an agent of the defendant that he sold to Mrs. Smith a ticket for the stage just before he saw her enter it, and on behalf of the defendant negative evidence that the ticket was not found on the body of the driver after his death. There was other evidence on the part of both parties tending to support one or the other side of the issue. There was a conflict in evidence at most, and on appeal this court is bound by the determination of the jury, unless, by error in the instructions, the jury was misled to the prejudice of the defendant.

[4, 5] Instructions on several branches of the case are attacked. Those concerning the defendant's theory that Mrs. Smith was not a passenger, but a trespasser, are first considered. The plaintiff alleged that Mrs. Smith was a passenger for reward. The defendant denied the allegation concerning the payment of fare, denied she was a passenger for reward, and denied she was a passenger. The stagedriver had been instructed not to permit any one to ride without payment of fare. In view of the testimony of the defendant's agent that Mrs. Smith had paid her fare, the theory of the defendant that she was riding free at the invitation of the

driver had no support in the evidence. Even though the evidence of the agent could be wholly disregarded, the utmost that could be said of the negative circumstances proved by the defendant is that they might have warranted an inference based upon a suspicion. The court instructed the jury that a person traveling in an autobus used for carrying passengers is, in the absence of countervailing circumstances, presumed to be a passenger for hire. This is a correct statement of law, and, in view of the evidence of the sale of a ticket, did not injure the defendant. By the next instruction the jury was properly told that a common carrier might demand fare either at starting or at any subsequent time. The court had previously instructed the jury upon the duty of carriers of passengers for hire, and had read the provisions of section 377 of the Code of Civil Procedure, which provide for damages in a suit permitted to be brought by the personal representation of a person killed by the wrongful act or negligence of another. By an instruction, numbered 7, the jury was informed "that a carrier of persons without reward must use ordinary care and diligence for their safe carriage," and instruction numbered 8 was as follows:

> "The court instructs the jury, that, if from the evidence you arrive at the conclusion that Ione Smith was, at the time of the accident, riding upon defendant's autobus or stage without payment of fare for such passage, then she was entitled to demand of defendant that she be not willfully or recklessly injured."

It is argued that the giving of these two instructions constituted fatal error, and also that an instruction requested by the defendant should have been given. The requested instruction was to the effect that, unless Mrs. Smith was a passenger for hire, the plaintiff was not entitled to recover. The only evidence upon the subject of the admitted negligence was that the driver of the stage approached the crossing at a high rate of speed, and without stopping, reducing speed, or apparently giving any attention to the signals of a heavy freight train visible for a considerable distance from the road, ran upon the crossing, where the stage was struck by the locomotive. The impact was such that the heavy iron fixtures and bars on the front of the locomotive were bent in the direction in which the automobile was traveling, thus indicating the force or momentum with which it struck, and hence its high rate of speed. From these facts, which were not disputed, the only possible deduction to be drawn was that the driver of the stage was reckless and did not exercise the ordinary care and diligence required of a carrier of passengers without reward. Civ. Code, § 2096. As has been stated, there was no evidence to support the defendant's theory that Mrs. Smith was a mere trespasser on the stage. Under section 377 of the Code of Civil Procedure the gravamen of the action was the fact of the death of Mrs. Smith by negligence while she was a passenger, not whether or not she paid her fare. Whether or not she was a gratuitous passenger, or one for reward, was important only in considering the degree of care required by the carrier. When it was shown to have used none, its liability for damages for her death became fixed. Upon application the court would no doubt have permitted an amendment to the complaint by adding the purely formal allegation that Mrs. Smith was a passenger, or by striking out the allegation in regard to her having paid her fare; but this was unnecessary. The defendant undertook to disprove the allegation that Mrs. Smith was a passenger for reward by circumstantial evidence that she had not purchased a ticket, and that she was a mere trespasser at the invitation of the driver of the stage in violation of the defendant's orders. It wholly failed to prove the driver's invitation or violation of its orders, and it made no offer of evidence that Mrs. Smith had knowledge of its orders to the driver. No notices were shown to have been published. The universal custom prevailing in the operation of railroads by which train employees are prohibited from carrying passengers without fare or tickets is such that all are charged with notice of it. The use of automobiles for the carriage of passengers is not yet greatly differentiated from a similar use of wagons and carriages of an earlier period, when the owner himself might be the driver, and either he or his hired driver might upon occasion give a wayfarer "a lift" or even invite a friend to ride with him when his conveyance was not crowded. The reasons of public policy which caused legislation against passes given in return for political services rendered to great railroad corporations have not yet been shown to apply to drivers of auto stages operating for the most part on comparatively short routes and carrying comparatively few passengers. For these reasons the case of Sessions v. Railroad Co., 159 Cal. 599, 114 Pac. 982, and similar cases relied upon by the appellant are clearly differentiable. There was an entire absence of evidence to show that Mrs. Smith collusively agreed with the driver of the stage to defraud the defendant, or had any knowledge of the limitations of his agency in control of the auto stage. So far as the evidence showed, she was rightfully on the car as a passenger, and her personal representative was entitled to damages for her death by the negligence of the carrier's agent. His negligence was of such a character as to support a verdict for damages, even though she was a gratuitous passenger. The evidence that she had paid fare was ample to support the case pleaded by the plaintiff.

[6] Under these circumstances, if there was error in the instructions, it was of such a character as does not warrant a reversal. The contention that, after fully instructing the jury that there could be no recovery for sorrow, the court erred in adding, "Yet you have the right to take into consideration the pecuniary loss suffered by the members of the family occasioned by her death, including the loss to them of the comfort, society and protection of the decedent," is without merit.

[7] So also is the contention that the court should have instructed the jury that in their computation of general damages they should make no award on behalf of the husband of Mrs. Smith. The court properly instructed the jury that the existence of the interlocutory decree of divorce did not dissolve the marriage. The circumstances concerning the marital relationship were before the jury, which no doubt gave proper consideration to them in reaching the amount of general damages awarded not to any particular heir, but to the personal representative of Mrs. Smith's estate. The instructions as a whole correctly stated the law as it applied to the facts disclosed at the trial, and were in no sense misleading.

[8] The verdict is attacked as excessive in amount. The rule that appellate courts should not set aside judgments on this ground, particularly where, as in this case, there has been a motion for new trial, unless the award of damages is so high or so low as to shock the conscience, has been pointed out so frequently and declared so vigorously that it may be accepted as axiomatic. In this case it cannot be said that an award of $5,000, under the circumstances disclosed by the record, was excessive, or large enough to shock the conscience of any reasonable person.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

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50 Cal. App. 88

LAPIQUE v. PLUMMER et al. (Civ. 3231; L. A. 5755.)

(District Court of Appeal, Second District, Division 2, California. Nov. 20, 1920. Hearing Denied by Supreme Court Jan. 18, 1921.)

1. Evidence 🔑43(1) — Judicial notice taken of court records.

The District Court of Appeal will take judicial notice of its own records.

On Hearing in Supreme Court.

2. Pleading 🔑8(11)—Allegation that plaintiff is successor in interest of certain persons held a conclusion.

A complaint, starting out with a statement that plaintiff is the successor in interest, etc., of certain persons, *held* only a legal conclusion, not showing that plaintiff was a party in interest, although he referred to his "grantors and predecessors," but did not name them in the complaint, nor show in what manner he acquired his title from them.

3. Mortgages 🔑605 — Complaint held not to show compliance with judgment requiring payments on a mortgage.

A complaint in an action to restrain defendants from in any manner interfering with plaintiff's possession of land under a judgment under which plaintiff's predecessor was required to make certain payments *held* not to show compliance by plaintiff or predecessor with the terms of the judgment with relation to such payments on an instrument therein decreed to be a mortgage.

4. Appeal and error 🔑1180(2) — Reversal of order denying new trial held to vacate judgment.

Where plaintiff appealed from an order denying her motion for a new trial, a judgment of the Supreme Court that "the order appealed from is reversed and the cause remanded for a new trial" had the effect of vacating and rendered for naught the judgment entered in the court below, notwithstanding a prior affirmance of such judgment, and such judgment could not thenceforth be effective for any purpose.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by John Lapique, successor in interest of the estate of Maria Espiritu Chijulla De Leonis and her son, Juan J. Menendez, against Eugene R. Plummer and Maria L. Dunnigan. Judgment for defendants, and plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

John Lapique, of Orange, in pro. per.

THOMAS, J. This is an appeal on the judgment roll alone from a judgment entered after the sustaining of a demurrer to plaintiff's complaint without leave to amend.

We regret that there is no appearance in this court by respondents.

By the complaint it is alleged that this plaintiff is the successor in interest of one Maria Espiritu Chijulla De Leonis and her son, Juan J. Menendez; that plaintiff's "grantors and predecessors," on March 2, 1895, commenced an action in the superior court of Los Angeles county against one Laurent Etchepare, praying for an accounting, for the setting aside of a power of attorney, and for a conveyance of certain described property, and on December 23, 1895, caused attachment to be levied on certain real property, which levy was made and the return of the sheriff thereon filed; that said "attachment is still in full force and effect"; and that thereafter the case was tried and judgment entered, wherein it was adjudged and decreed that the deed executed by the plaintiff to the defendant in that action was executed to secure a present indebtedness and prospective advancements by the latter to the former, and hence, while in form a deed, it was in fact a mortgage, further decreeing that the plaintiff there, upon the payment to the defendant of the sum designated in the judgment, with interest thereon, be entitled to a reconveyance of the said property, free and clear of all incumbrances that may have been placed thereon by said defendant, and also providing that in case said defendant refuse to accept said sum and reconvey said property that plaintiff might make such payment to the clerk of the court, in which case the latter was authorized to make such reconveyance. The date of the entry of this judgment was June 3, 1901.

The complaint next alleges that on June 7, 1901, Etchepare died intestate in Los Angeles county; that thereafter, by proceedings in the superior court, Frank E. Walsh was appointed administrator of the estate of said Etchepare, and in due time qualified as such, letters of administration being issued to him, and that he entered upon his duties as such administrator, continuing as such until his discharge by the court on September 15, 1908; that by reason of the instrument construed and found by the court to be a mortgage, the said Etchepare and, since his decease, Walsh, as administrator of his estate, "have been in possession of the real property described in said action, from the 31st day of July, 1894, down to the 9th day of March, 1917"; that, on October 30, 1901, Walsh, as such administrator, appealed from the judgment referred to, the same being, on September 10, 1903, by the Supreme Court affirmed; and that the judgment of June 3, 1901, thereupon became, and now is, final.

The complaint then sets forth that the defendant Plummer herein "appeared as agent for plaintiff's grantors and predecessors in said action," and that as such he (and others not parties to this action) "failed, refused and neglected to foreclose said mortgage," or to pay said defendant or Walsh, as administrator of said estate, the sum adjudged to be due plaintiff in that action, but, by reason of the possession as already set forth, the said defendant Etchepare, and, since his death, Walsh, the administrator, have collected the rents from the property involved, converting the same to their own use, and that said agent (Plummer) and others are "wholly insolvent and wholly unable to pay" same to this plaintiff; that the said Maria De Leonis "died intestate in Los Angeles county on or about the 10th day of April, 1905, leaving her last will" in favor of her only son and heir, Juan J. Menendez; and that this will "was duly admitted to probate on or about March 10, 1908, and a decree of distribution duly given and made in said estate," which is still in full force and effect. It is further alleged that, with the intent of defrauding this plaintiff, certain persons, not parties to this action, and the defendant Plummer, who is alleged to have been the agent or attorney of Walsh, not a party here, "commenced, prosecuted, and defended * * * a large number of actions, in the matter of the De Leonis estate," in an effort to render ineffectual the judgment of June 3, 1901; that on August 15, 1916, defendant Plummer commenced an action against this plaintiff to quiet title to the land affected by and described in the judgment of June 3, 1901; that this action was tried and judgment entered against the defendant therein, who is plaintiff here; "that under and by virtue of the judgment of June 3, 1901, his (plaintiff's) grantors and predecessors are the owners in fee simple and in possession of said property; that these defendants "threaten" to do various things in reference to the property; and that defendants herein are insolvent. Then follows an allegation of tender by plaintiff of the sum designated in the judgment of June 3, 1901, to the clerk of court, "as provided in said decree," with an averment that defendants herein "are now and have been since June 3, 1901, in the use and occupation of said real property, and tenants in possession, and liable to account to plaintiff for the value of its use and occupation." Finally, appears a prayer that the defendant Plummer be restrained from in any manner "obtaining" a judgment in the action prosecuted by him against this plaintiff; that the defendants in this action be restrained from in "any manner tending to render the attachment [or final decree or judgment] ineffectual," or interfering with plaintiff's "possession"; and that it be decreed that plaintiff is the owner in fee, that he has been in exclusive possession of said property at all times since March 9, 1917, and that he is entitled to the possession and occupancy thereof.

A general demurrer to this complaint was by the court sustained without leave to amend; and in due time the judgment from which this appeal is taken was entered.

In presenting his appeal to this court, appellant has undertaken to lighten our labors with the explanation in his brief that the action was conceived and the complaint filed to accomplish the following ends: (1) To prevent a multiplicity of judicial proceedings; (2) to "prevent" a cloud upon plaintiff's title; (3) to prevent defendants, in the action instituted by Plummer, from rendering the judgment of June 3, 1901, ineffectual and void; and (4) to prevent "collusion." With this "explanation" in mind, we proceed to a consideration of the sufficiency of the complaint.

As some famous or notorious jurist is said to have observed, "the complaint is full of fatal errors, and the only question to be decided is, 'Are there enough?'" One of these fatal errors—apparently immaterial in the mind of the pleader—is that the complaint nowhere shows plaintiff to be a party in interest. It is true he starts out with a statement that he is the successor in interest, etc., of certain persons; but that is a legal conclusion, and is nowhere supported by an allegation of fact. It also is true that plaintiff does refer to his "grantors and predecessors," but they are not named in the complaint, nor is it shown in what manner plaintiff deraigns title from them.

The complaint consists almost entirely of legal conclusions, without any supporting allegations of fact. There is no allegation that the orders contained in the judgment of June 3, 1901, have been complied with. The allegation with respect to this phase of the case shows no payment or tender of the amount named in that judgment to the defendant therein, nor does it set forth any reason or excuse for such tender or attempted payment to the clerk of court in the first instance. Finally, the complaint shows on its face that both parties to this action, as well as their predecessors in interest, "now are and have been since June 3, 1901, in possession," etc., of the property in question. The foregoing, in our opinion, will suffice to support the conclusion that the lower court's ruling in sustaining the demurrer was correct.

Appellant has brought up no bill of exceptions showing that he asked for and was denied leave to amend, or that he proposed any particular amendment to this complaint; nor does he present any argument, were such proper otherwise, even indicating that he could, if given the opportunity, remove any of the defects found in his complaint. Under these conditions, there was no abuse of discretion by the learned trial judge.

[1] In the instant case appellant appears in propria persona, and that he is a perennial litigant is proverbial. We take judicial notice of our own records, and find that the books contain many actions in which he appears, causing us to believe that he is of the opinion, at any rate, that he has a grievance which ought to be corrected. Practically all of these cases were decided against him. In view of these facts we have deemed it best to go into the whole case, notwithstanding the same might have been disposed of in but a few sentences. As we have said in Lapique v. Walsh, 188 Pac. 1021; we repeat here:

> "We are always anxious to get at an appreciative understanding of appellants' troubles, whether real or imaginary; but it must be confessed that in this case we have studied the record on appeal—if such it may be termed—in vain to find any connected legal history of the transactions involved."

Without further discussion, we cite as authority for our conclusion upon all the points here urged the discussion and citation of authorities appearing in the case of Lapique v. Walsh, No. 3232, 195 Pac. 296, this day decided, and hold that the record is entirely insufficient to support any contention, attempted to be raised on this appeal, that the complaint does not state a cause of action against these defendants, or either of them, and that therefore the demurrer was properly sustained.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2, 3] The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 2, is denied. It is true that, as stated in the opinion of that court, the complaint nowhere shows plaintiff to be a party in interest. It is manifest that his general allegation of ownership contained in paragraph 22 of his complaint is a mere legal conclusion, based solely upon the specific facts previously alleged, and must be treated as such. There is no allegation of fact therein showing that he has acquired the interest of either Maria Espiritu Chijulla De Leonis or her son, Juan J. Menendez. It is also true, as stated in the opinion, that the complaint does not show compliance by the alleged predecessors in interest of plaintiff or the plaintiff himself with the terms of the judgment of the superior court of June 3, 1901, with relation to payment of the amount due on the instrument decreed thereby to be a mortgage.

[4] We deem it proper to make the following statement with regard to this case. The complaint of plaintiff shows fully that all his alleged rights are founded upon this judgment of June 3, 1901, which judgment, upon an appeal therefrom by the defendant, was affirmed by this court on September 10, 1903. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813. The complaint further shows, however, that the plaintiff took an appeal to this court from an order made after judgment, and that a decision thereon was given by this court, which is reported in volume 145 of our reports, at page 200, 78 Pac. at pages 637, 638. Reference to that decision shows that the appeal was one by the plaintiff from an order denying her motion for a new trial in said action, and the judgment of this court, given October 29, 1904, was that "the order appealed from (denying a new trial) is reversed, and the cause remanded for a new trial." This general order necessarily had the effect of vacating and rendering for naught the judgment of June 3, 1901; and this notwithstanding the prior affirmance of the judgment. See Brison v. Brison, 90 Cal. 323, 327, 27 Pac. 186; Houser & Haines Mfg. Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660;

People v. Bank of San Luis Obispo, 159 Cal. 82, 112 Pac. 866, Ann. Cas. 1912B, 1148. It is thus made to appear that the judgment upon which plaintiff founds his whole claim was vacated by the judgment of this court given October 29, 1904, and could not thenceforth be effective for any purpose.

All concur, except LENNON, J., absent.

50 Cal. App. 82

LAPIQUE v. WALSH et al. (Civ. 3232; L. A. 5756.)

(District Court of Appeal, Second District, Division 2, California. Nov. 20, 1920. Hearing Denied by Supreme Court Jan. 18, 1921.)

1. Tender 🔑22 — Proper tender under judgment decreeing instrument to be mortgage held not alleged.

Where judgment, decreeing an instrument a mortgage, provided for tender of amount due to defendant, but if defendant should refuse to reconvey that such tender be made to the clerk of the court, a complaint, simply alleging that a tender of a certain amount was made to the clerk of the court, was insufficient, where it was not averred that tender had been made to defendant and been refused.

2. Mortgages 🔑605 — Offer to set off judgments held not proper tender of amount due on instrument declared a mortgage.

An offer to offset one judgment against another *held* not a proper tender under a judgment decreeing an instrument to be a mortgage and providing for a reconveyance to plaintiff on tender of payment of amount owing defendant.

3. Appeal and error 🔑948—Denial of leave to amend on sustaining demurrer assumed to be no abuse of discretion.

On appeal by plaintiff from a judgment entered after demurrer by defendant without leave to amend, where appellant has not brought up any bill of exceptions showing that he asked for and was denied leave to amend, or that he proposed any particular amendment to his complaint, and nothing appears in appellant's brief assuming such presentation proper, which might even indicate his ability to remove any defects which might be found in the complaint, it must be assumed that there was no abuse of discretion by the trial court in making the order sustaining the demurrer without leave to amend.

4. Mortgages 🔑213 — Ejectment not maintainable against mortgagee in possession.

Ejectment will not lie by mortgagor or his successors against a mortgagee in possession or his successors.

On Hearing in Supreme Court.

5. Pleading 🔑8(11)—Allegation of ownership held conclusion.

Allegations of ownership in complaint in ejectment *held* based solely on specific allegations of fact set forth and to be mere legal conclusions of the pleader.

6. Mortgages 🔑605 — Complaint held not to show payment on mortgage.

A complaint, in ejectment by one claiming under a judgment declaring an instrument to be a mortgage and requiring payment of amounts due mortgagee, *held* not to show compliance with the requirement of the judgment of a payment to the defendant of the amount found due on the mortgage, and hence—right of possession.

7. Ejectment 🔑65—Complaint held to sufficiently show, as against general demurrer, making of valid decree of distribution of estate.

A complaint in ejectment *held* to sufficiently show, as against a general demurrer, the making of a valid decree of distribution of the estate of a decedent to persons under whom plaintiff was claiming.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by John Lapique, successor in interest, etc., against Frank E. Walsh, as administrator of the estate of Laurent Etchepare, deceased, and another. Judgment for defendants, and plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

See, also, 188 Pac. 1021.

John Lepique, of Orange, in pro. per.

H. M. Barstow, O'Melveny, Milliken & Tuller, and Roy V. Reppy, all of Los Angeles, for respondents.

THOMAS, J. An appeal on the judgment roll alone from a judgment entered after the sustaining of a demurrer to plaintiff's complaint without leave to amend.

The action appears to be one wherein plaintiff seeks the ejectment of defendants from certain premises, with damages. The complaint shows that on June 3, 1901, judgment was entered in the superior court of Los Angeles county decreeing that a certain purported deed executed by one Miguel De Leonis to one Laurent Etchepare was in fact a mortgage given to secure a then existing debt; that the former, on payment to the latter of the sum of $2,444.09, with interest, was entitled to a reconveyance of the property described in said instrument; and, should said Etchepare refuse to accept such payment and reconvey the property as adjudged, that the clerk of court execute such conveyance accordingly. This judgment, according to the complaint, "has not been reversed, vacated, or set aside, and is now in full force and effect." It next is alleged that, during the pendency of that action—prosecuted by the widow of De Leonis—Etchepare died, being succeeded therein by the defendant here, Walsh, as administrator of Etchepare's estate; that Walsh, as such administrator, thereupon took possession of the real estate in question, as well as the rents, issues, and profits thereof; and that the latter not only "refused, failed, and neglected to collect said mortgage for the sum of $2,444.09, with interest thereon, * * * and refused, failed, and neglected to reconvey" said real property, but also, with others named here as codefendants, "commenced, prosecuted, and defended a large number of actions to render the final decree and judgment [above mentioned] wholly ineffectual, before a conveyance in said action." It also is shown that on September 15, 1908, Walsh, as administrator, moved the probate court, ex parte for his discharge as such administrator which motion was duly granted. The order so made, plaintiff claims, was void, the court having been without jurisdiction to make the same.

On April 10, 1906, Mrs. De Leonis died testate in Los Angeles county, leaving surviving her an only son and heir Juan J. Menendez, who thereupon qualified as executor of her estate. Plaintiff avers that on March 10, 1908, Menendez filed his account as the executor of said estate, whereupon, after hearing, the court distributed to said executor, as heir, the estate of said deceased, "whether described in the decree of distribution or not"; that on March 12, 1912, said Juan J. Menendez conveyed "all his right, title, and interest in and to said plaintiff's estate" to the plaintiff herein, John Lapique, who is now the owner and holder thereof; that on February 28, 1917, this plaintiff delivered to the clerk of said court a certified copy of the decree and judgment first above set forth, together with certified copies of various other judgments, liens, and incumbrances claimed by him to be subsequent and subject to the judgment first referred to, as well as an affidavit showing the amount due from the plaintiff to defendant therein, accompanying the same by a notice to said clerk of court directing and commanding him to reconvey the real property already referred to and fully described in the instrument which was in form a deed, but in fact a mortgage, tendering and offering to pay to said clerk the sum of $5,452.35, the same being "an offset of one judgment against another" for said amount, leaving a deficiency judgment in said action "against the defendant and his administrator" on said date, in favor of plaintiff herein, in the sum of $12,795.89; that said offer and tender were by said clerk peremptorily rejected; that on July 31, 1894, the defendants in that action ousted plaintiff's grantors and predecessors in interest from said real estate, and that ever since the latter have been out of possession thereof by reason of the alleged wrongful and unlawful possession of such defendants. Wherefore plaintiff claims damage for such wrongful withholding and exclusion, for the value of the use and occupancy of the premises in question during all of said time, and for the recovery of possession thereof.

The foregoing recital of events leading up to the commencement of the action now before us constitutes our understanding of the facts herein as gleaned from the record on appeal, and will suffice to disclose at least two fatal errors in the complaint filed herein, the presence whereof afforded the lower court abundant authority for its action in sustaining the general demurrer without leave to amend, viz.: (1) There is no showing in the complaint that the provisions of the judgment of June 3, 1901, have ever been complied with by the plaintiff herein, or by any of his predecessors in interest; (2) there is no showing that a petition for distribution was ever filed in the matter of the estate of Mrs. De Leonis whereon the probate court might legally base a decree distributing her estate to plaintiff's grantor, Juan J. Menendez, a part of, which estate, according to the complaint, is the property involved in this action.

[1, 2] As to the first point: Nowhere in the complaint does there appear an allegation that any tender or payment of any kind was ever made by anyone to the defendant in the action first referred to herein, as provided by the terms of the judgment entered June 3, 1901; and it was only under such circumstances that a tender and payment was authorized to be made to the clerk of the court. Obviously this was an essential averment, failing in which the complaint must be deemed deficient in its statement of a cause of action for possession of the property in controversy. And even though the tender to the clerk, as made by plaintiff, was legal and proper—though we hold it was not—still, attention is called to the fact that the latter attempted a compliance with the judgment in a manner not contemplated or directed thereby—not by the payment of money, as therein provided, but by the alleged "offsetting of one judgment against another."

As to the second point, it is elementary that no decree of distribution could be granted, or distribution of the estate of which Menendez was executor and the only heir ordered, simply upon the filing and hearing of an "executor's account," as appears from the complaint to have been done. The mere suggestion of such a situation eliminates plaintiff as a proper party in interest herein.

[3] Respondents contend, and we think correctly, that appellant has not brought up any bill of exceptions showing, for instance, that he asked for and was denied leave to amend, or that he proposed any particular amendment to his complaint. Nor is there anything presented in appellant's brief—assuming such presentation proper—which might even indicate his ability to remove any defects which might be found in the com-

plaint. It will therefore be assumed, in the absence of such showing, that there was no abuse of discretion by the trial court in making the order complained of. Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290; Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516; Aalwyn v. Cobe, 168 Cal. 165, 142 Pac. 79.

[4] Further, the complaint shows upon its face that plaintiff is not entitled to the relief prayed. For example, it shows an outstanding mortgage, with the successor in interest of the mortgagee in possession under such mortgage. Under these circumstances ejectment will not lie by the mortgagor or his successors against the mortgagee in possession. Specht v. Specht, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Brandt v. Thompson, 91 Cal. 462, 27 Pac. 763; Sellerbach v. Allenberg, 99 Cal. 69, 33 Pac. 786; Boyce v. Fisk, 110 Cal. 113, 42 Pac. 473; Cory v. Santa Ynez Land, etc., Co., 151 Cal. 778, 91 Pac. 647; Puckhaber v. Henry, 152 Cal. 419, 93 Pac. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844.

We have carefully read and considered the transcript and briefs herein, as well as all the points which, according to our understanding of his exasperatingly ambiguous record, appellant has attempted to raise. Our conclusion is that the complaint does not state a cause of action, that the record is entirely insufficient to support any of the contentions attempted to be made (Lapique v. Walsh, 188 Pac. 1021), and that the order here attempted to be questioned was properly entered.

Judgment affirmed.

We concur: FINLAYSON, P. J., WELLER, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [5, 6] The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 2, is denied. As in the case of Lapique v. Plummer, L. A. 5755, 195 Pac. 293, in which a similar application is this day denied, it is manifest that the general allegations of ownership contained in the complaint are based solely on the specific allegations of fact set forth therein, and must be treated as mere legal conclusions of the pleader. The complaint fails to show right to possession on the part of the plaintiff even under the terms of the judgment of June 3, 1901, on which the plaintiff relies, as in L. A. No. 5755, as the whole basis of his claim, in that it fails to sufficiently show compliance with the requirement as to the payment to the defendant therein of the amount found due on the mortgage, a condition precedent to transfer by the defendant of the property, and, of course, to right of possession in plaintiff's predecessor in interest or in plaintiff. The attempted belated tender of February 28, 1917, to the clerk of the superior court was not such compliance, both for the reasons given in the opinion of the District Court of Appeal and because of the unexplained delay.

[7] We are inclined to the conclusion that the complaint sufficiently showed, as against a general demurrer, the making of a valid decree of distribution of the estate of Mrs. De Leonis to Juan Menendez, and do not concur in the conclusion of the District Court of Appeal on this question, but that conclusion is not essential to the maintenance of the judgment given by that court.

This complaint does not show, as does the complaint in L. A. No. 5755, the granting of the new trial in the action in which the judgment of June 3, 1901, was given, with the consequent vacating of that judgment. For that reason the demurrer must be considered without reference to that fact, and we have so considered it.

All concur, except LENNON, J., absent.

184 Cal. 742

McKAY v. McKAY. (S. F. 8967.)

(Supreme Court of California. Jan. 27, 1921. Rehearing Denied Feb. 26, 1921.)

1. Money lent 🔑6—Answer held to sufficiently negative existence of loan.

Where complaint was phrased in language of common count for money loaned and cash advanced for the use and benefit of defendant's decedent, defendant's answer, expressly denying an indebtedness in any sum whatever between the decedent and plaintiff "either on account of any of the matters referred to in plaintiff's complaint or otherwise, or at all," *held* to sufficiently negative the existence of a loan to the decedent, and hence proof was required on the part of the plaintiff as to the fact of the making of the loan.

2. Evidence 🔑89—Presumption that money paid was due disputable.

The presumption to the effect that money paid by one to another was due to the latter is disputable (Code Civ. Proc. § 1963).

3. Trial 🔑165—Evidence viewed in light most favorable to plaintiff on motion for nonsuit.

On a motion for nonsuit the evidence adduced in support of plaintiff's case and every presumption and inference that may be fairly deduced therefrom must be viewed in the light most favorable to the plaintiff's case and against the motion for nonsuit.

4. Executors and administrators 🔑221(6)—Evidence held to establish existence of loan by wife to deceased husband.

In an action by wife against husband's estate, evidence *held* to warrant an inference that plaintiff was not indebted to decedent, and that money received by him was loaned to him, and that he intended to account therefor to her at some later time.

5. Husband and wife 🔑49¾(5)—Husband receiving money from wife held presumptive debtor.

Under Civ. Code, §§ 158, 2219, 2235, the fact of the receipt by the husband of his wife's money presumptively makes him her debtor and imposes upon him the legal duty of returning it to her, and no affirmative proof is required on the part of the wife to show that the husband received the money as a loan, and not as a gift, to the contrary, the burden is upon the husband or his heirs claiming the money to show circumstances entitling him or them to retain the same.

6. Evidence 🔑88—Presumption of want of consideration in transaction with wife, held to prevail over other presumptions.

The presumption that any advantage obtained by a husband from a wife was obtained without consideration and under undue influence must, in the absence of any rebutting evidence, prevail over the presumption that money paid by one to another was due to the latter.

7. Executors and administrators 🔑221(6)—Evidence sufficient to support inference that money lent to decedent was not repaid.

In an action by a wife against estate of husband to recover money lent to husband, where plaintiff established advances and loans to the husband, failure of the decedent's cashbook to disclose a repayment, together with the fact that no receipts for a repayment were found among decedent's effects, *held* sufficient to compel the denial of a motion for nonsuit on the ground that plaintiff had not established nonpayment of the debt.

8. Executors and administrators 🔑221(1)—Burden on defendant to show repayment of loan from claimant to decedent.

In an action by wife against the estate of her husband to recover money alleged to have been lent to him, the plaintiff having proved advances and loans to the husband, the burden of proving repayment by decedent rested upon defendant.

In Bank. Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by Elizabeth M. McKay against David McKay, as executor of the last will and testament of Angus McKay, deceased. Judgment for defendant, and plaintiff appeals. Reversed.

See, also, 183 Pac. 574.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

LENNON, J. Plaintiff below, appellant here, instituted this action against the executor of the last will and testament of her deceased husband for the sum of $2,400, claimed as a balance due to her for moneys alleged to have been loaned and advanced by her to her husband during his lifetime. The proved facts of plaintiff's case are these: Upon five different occasions between November, 1908, and July, 1914, decedent received from plaintiff, out of her separate property, sums varying in amounts from $400 to $1,000. These facts, because of defendant's objection to any testimony by plaintiff "as to any matter or fact occurring before the death of such deceased person" (Code Civ. Proc. § 1880, subd. 3), were established primarily by documentary evidence. This evidence consisted of plaintiff's bank passbooks which showed certain withdrawals from her bank account, decedent's passbooks showing deposits of identical amounts in his bank account at about the same time as the withdrawals from plaintiff's bank account, and a cashbook kept by decedent containing debit entries of the same sums and date as the deposits. In addition to this evidence, the receipt of said sums by decedent was an admitted fact in the case. Upon this the plaintiff rested.

There being no evidence whatever as to the purpose for which these sums were transferred to decedent and no direct evidence of an indebtedness of either party to the other, the trial court simply applied to the established and admitted facts of the plaintiff's case the presumption "that money paid by one to another was due to the latter." Code Civ. Proc. § 1963, subd. 7. Therefore, upon defendant's motion, the trial court entered a judgment of nonsuit upon the ground that plaintiff's evidence failed to show that the decedent was indebted to plaintiff at any time in any sum whatsoever, and that, assuming that there was evidence of an indebtedness, the evidence failed to show that it was not paid by the decedent. From this judgment the plaintiff appeals.

[1] The defendant's answer, by merely denying the indebtedness and failing to deny specifically the facts out of which the indebtedness is claimed to have arisen, did not admit the existence of the loan inferentially alleged in the complaint. The complaint is phrased in the language of the common count for money loaned and cash advanced for the use and benefit of said decedent, and therefore, while directly averring an indebtedness, it only indirectly avers the existence of a loan or advance of cash by plaintiff as the origin of said indebtedness. Defendant's answer expressly denies an indebtedness in any sum whatever between the decedent and plaintiff "either on account of any of the matters referred to in plaintiff's complaint or otherwise, or at all," and further expressly denies that "said sum of $2,400, or any other sum, is or ever was due or owing from defendant to plaintiff." In view of the fact that the making of the loan was only alleged by indirection in the complaint, the denials of the answer must be held to sufficiently negative the existence of a loan, and hence proof was required on the part of the plaintiff as to the fact of the making of said loan.

We are of the opinion that the proven and admitted facts of the plaintiff's case, aided by the presumption flowing therefrom, which will be discussed hereafter, establish the existence of the loan to decedent by plaintiff and thereby make out a case for the plaintiff sufficient to overcome the motion for nonsuit.

[2-4] The presumption relied upon by respondent to the effect that "money paid by one to another was due to the latter" is a disputable presumption (Code Civ. Proc. § 1963), and upon a motion for nonsuit the evidence adduced in support of plaintiff's case and every presumption and inference that may be fairly deduced therefrom must be viewed in the light most favorable to the plaintiff's case and against the motion for nonsuit. Estate of Arnold, 147 Cal. 583, 82 Pac. 252; Rauer v. Hertweck, 175 Cal. 278, 165 Pac. 946. In this behalf it is apparent that, when considering the motion for nonsuit, certain inferences favorable to the plaintiff and naturally arising from the plaintiff's evidence were ignored by the trial court. Thus decedent's cashbook, admittedly in his own handwriting and offered and received in evidence, contained not the slightest indication of an advance of any considerable sum by decedent to plaintiff, either previous or subsequent to the transfer of the money in question from plaintiff to decedent. In view of the exactness with which decedent's cashbook was shown to have been kept, both by intrinsic evidence and the testimony of respondent, who was fairly familiar with certain business affairs of decedent, and in view of the minuteness of the entries therein, which even included small items of household expense, it may readily and rightfully be inferred that, had plaintiff previously become indebted to decedent for the sums turned over to him by her, the cashbook would have shown the origin of such indebtedness. The evidence also tends to show that plaintiff was in affluent circumstances, possessing considerable cash of her own, and from this fact an inference is fairly deducible that she was not indebted to her husband. Therefore, whatever its weight upon a trial on the merits, the evidence adduced in support of plaintiff's case may justifiably be said, when considered in the light most favorable to plaintiff upon and for the purpose of a motion for a nonsuit, to warrant the inference that the plaintiff was not indebted to decedent, that the money received by him was loaned to him, and that he intended to account therefor to her at some later time.

[5] The presumption that "money paid by one to another was due to the latter," relied upon by respondent, cannot control in the presence of the established and admitted facts of the plaintiff's case. Pursuant to the provisions of sections 158, 2219 and 2235 of the Civil Code, transactions between husband and wife are covered and controlled by the rule applicable to transactions between trustees and beneficiaries, which is to the effect that, where the trustee obtains an advantage from the beneficiary, the presumption is that such advantage was secured without consideration and as the result of undue influence. It is the settled rule that the fact of the receipt by the husband of his wife's money presumptively makes him her debtor and imposes upon him the legal duty of returning it to her, and no affirmative proof is required on the part of the wife to show that the husband received the money as a loan, and not as a gift. To the contrary, the burden is upon the husband, or his heirs claiming the money, to show circumstances entitling him, or them, to retain the same. White v. Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; Worm-

ley's Estate, 137 Pa. 101, 20 Atl. 621; Stickney v. Stickney, 131 U. S. 227, 9 Sup. Ct. 677, 33 L. Ed. 136.

[6] In the instant case the plaintiff, as the wife of decedent, proved the payment by her to the decedent of considerable sums of her own money. We therefore have before us, as the trial court had, a situation out of which two presumptions operating as evidence might arise, namely, that money paid by one to another was due to the latter, and that any advantage obtained by a husband from a wife was obtained without consideration and under undue influence. It is evident that the latter presumption must, in the absence of any rebutting evidence, prevail over the former, for not only is it the less general of the two, but the very reason for the existence of this particular presumption is to afford relief in just such contingencies as the present, namely, when there has been a transfer of money from the wife to the husband. The result is that the fact of the relationship of the parties creates a presumption of lack of consideration and undue influence which, until it is overcome by other evidence, is paramount to the general presumption, which would arise under ordinary circumstances upon mere proof of payment, to the effect that money is due to the person to whom it is paid. Wilcox v. Wilcox, 171 Cal. 770, 774, 155 Pac. 95. Of course, it is possible that the circumstances accompanying or following a transfer from the wife to the husband might be of such a nature as to overcome this presumption as to undue influence, and thus revive the general presumption as to the purpose of payment specified in subdivision 7 of section 1963 of the Code of Civil Procedure. Pasadena, etc., Bank v. Bryson, 189 Pac. 816. No such circumstances appear, however, in the present case.

It follows, then, that, transfers of money by plaintiff to her husband having been proven and admitted, a prima facie case was made out for the plaintiff. It thereupon devolved upon the representative of decedent's estate to prove that a valuable consideration therefor was given by decedent or that the money in question was a gift to the decedent, free from that undue influence which is otherwise presumed. White v. Warren, supra.

[7, 8] It was contended by counsel for defendant that, assuming the advances and loans had been established and the indebtedness proven, the nonsuit should be granted because of plaintiff's failure to prove the nonpayment of the debt. The failure of the cashbook to disclose a repayment by decedent, together with the fact that no receipts for a repayment were found by defendant among decedent's effects, were sufficient to have compelled the denial of the motion for nonsuit on this ground. Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221. Moreover, it was unnecessary for plaintiff to prove the allegation of nonpayment. If there had been a repayment by decedent, the burden of proving it rested upon defendant. Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Hurley v. Ryan, 137 Cal. 461, 70 Pac. 292; Stuart v. Lord, 138 Cal. 672, 72 Pac. 142.

For the reasons stated, the nonsuit was erroneously granted, and therefore the judgment entered thereon is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOANE, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

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184 Cal. 687

MEYER v. MEYER. (L. A. 6097.)

(Supreme Court of California. Jan. 18, 1921. Rehearing Denied Feb. 14, 1921.)

1. Divorce 🔑184(10)—Finding as to adultery not disturbed.

The trial court's finding of adultery, where supported by evidence, will not be disturbed.

2. Divorce 🔑184(10)—Finding as to connivance conclusive.

Where the evidence, at most, showed only facts from which a possible inference might be drawn that plaintiff wife planned to bring about the adultery of her husband, the determination of the trial court against such inference was final.

3. Divorce 🔑256—In case of husband's adultery, wife may be allowed a sum made a charge against the community property.

Under Civ. Code, § 146, authorizing the court granting a divorce for adultery to divide the community property as it deems best even to the extent of assigning it all to the innocent party, it was proper for the court, instead of dividing the property, to award to plaintiff wife a sum of money and make its payment a charge upon defendant's property by requiring defendant to give a mortgage upon it for that amount.

4. Divorce 🔑240(5)—$18,000 alimony to wife with seven children assigned from community estate held not excessive.

Under Civ. Code, § 146, contemplating that in cases of divorce for adultery more than half the community property shall be assigned to the innocent party, the exact amount being left to the court's discretion, an allowance of $18,000 to the innocent wife who is given the custody of seven minor children by the marriage *held* not excessive.

5. Divorce 🔑227(1)—Where motion for attorney's fees is continued, allowance in decree must be based on needs of wife at beginning of action.

Where an application for attorney's fees in divorce was made before trial and continued by consent to the trial, the amount should be based on the wife's needs for attorneys' services at the beginning of the action.

6. Divorce ⚷282—Objection to allowance of attorney's fees should be made in trial court.

An objection to the allowance of attorney's fees should be made to the trial court if it is to be reviewed.

Department 1.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Victoria Meyer against Camille Meyer for divorce. Interlocutory decree granted to plaintiff, and from an alimony award of community property, the defendant appeals. Decree affirmed.

Appel & Hatch and D. P. Hatch, all of Los Angeles (Ansel Smith, of Los Angeles, of counsel), for appellant.

Joseph Scott and A. G. Ritter, both of Los Angeles, for respondent.

LAWLOR, J. The plaintiff and defendant were wife and husband respectively. The plaintiff obtained an interlocutory decree of divorce on the ground of the defendant's adultery. As an incident of the divorce, the decree awarded the plaintiff $18,000 as her share of the community property. The defendant appeals.

[1] The defendant's first contention is that the evidence is not sufficient to sustain the finding of adultery. It is unnecessary to detail the evidence. Suffice it to say that its character was such as amply to sustain the finding. The defendant himself admitted conduct on his part of a very questionable character at best, and there was other evidence which, if believed, as it evidently was by the trial court, could hardly leave any doubt as to what took place.

[2] The defendant's second contention is that the plaintiff brought the defendant and alleged co-respondent together for the purpose of having the latter induce the defendant to commit adultery with her. The court found to the contrary, and the evidence, at most, showed only facts from which a possible inference might be drawn that the plaintiff planned to bring about the adultery. The evidence was not such as to require such inference to be drawn, and, this being the situation, the determination of the trial court as to the effect of the evidence is final.

[3] The third point is concerned with the division of the community property. Section 146, Civil Code, authorizes the court which grants a divorce for adultery to divide the community property between the parties in such proportions as it may deem just, even to the extent of assigning it all to the innocent party. In this case it appeared that there was community property in the state of Washington consisting of real estate of the value of $25,000. This real estate was not divided in kind by the decree, nor was its sale and a division of the proceeds directed, but the defendant was directed to pay the plaintiff $18,000, and its payment was made a charge upon the property by requiring the defendant to give a mortgage upon it for that amount. The authority of the court so to charge a lien upon the property is questioned. The language of section 146 mentioned is that upon divorce the community property may be "assigned" to the respective parties in such proportions as the court deems just. It is evident that under this language the court could have assigned to the plaintiff an interest in the community property to the extent of $18,000. This, in effect, is all that it did do by the decree in question. The point furthermore is settled contrary to defendant's contention by the authority of Gaston v. Gaston, 114 Cal. 542, 46 Pac. 609, 55 Am. St. Rep. 86. Mayberry v. Whittier, 144 Cal. 322, 78 Pac. 16, cited in his behalf, was concerned with a very different state of facts, and is not in point.

[4] It is also contended by the defendant that the assignment of $18,000 to the plaintiff was excessive. The statute contemplates that in cases of adultery or extreme cruelty more than one-half of the community property shall be assigned to the innocent party· the exact amount even up to all of such property being left to the discretion of the court. We cannot interfere with the exercise of this discretion unless it has been abused, and we see no reason for concluding that it was abused in this case. For one thing, the seven minor children of the marriage, the custody of whom was given to the plaintiff, would by themselves come pretty close to justifying an award of all the community property to the plaintiff if the court had seen fit to make it.

[5, 6] The last contention of the defendant is that the decree is erroneous in allowing the plaintiff $500 for attorney's fees, the point being that no allowance was necessary in order that the plaintiff might further prosecute her case, since the case had practically come to an end. The fee in fact was apparently allowed, not for future legal services, but for services already rendered. The answer to the point is that the allowance was made in response to an application made before trial and continued by consent until the trial. It is not questioned but that the making of an allowance would have been proper when the application was made. This being true, when the application is continued by consent, it is fairly to be taken that it is continued upon the basis of the court making an allowance, if any, as of the time of the making of the application. Furthermore, no objection whatever to the allowance was made in the trial court by the defendant. If he had objection, he should have made it.

Decree affirmed.

We concur: SHAW, J.; OLNEY, J.

(184 Cal. 710)

ADAMS v. WHITE BUS LINE et al.

(L. A. 6401.)

(Supreme Court of California. Jan. 20, 1921.)

1. Judgment 🔑833—Judgment in action for tort assignable.

While a cause of action for a tort is not assignable, such a claim, when merged in a judgment, becomes a debt and may be assigned.

2. Judgment 🔑878(2)—Order of payment and execution of assignment immaterial in determining whether judgment was assigned or satisfied.

The order in which money was paid, where there was a payment of the amount of a judgment and an assignment executed, does not control in determining whether a satisfaction or an assignment of the judgment resulted, if it was one transaction and the intent was to constitute an assignment.

3. Judgment 🔑878(2)—Payment by and assignment to joint tort-feasor gives no right of contribution.

There is no right of contribution between defendants whose concurrent negligence has made them jointly liable in damages, and, where one of several joint wrongdoers pays a judgment obtained against them all, he acquires no right of contribution by taking an assignment of the judgment in the name of a man of straw, notwithstanding Code Civ. Proc. § 709.

4. Insurance 🔑606(5)—Insurer of joint tort-feasor not entitled on payment to be subrogated to right of insured.

Where indemnity company for a bus line paid a judgment obtained against the bus line and another arising out of concurrent negligence of the bus line and such other person, it was not entitled to be subrogated to the rights of the insured against the other defendant.

Department 2.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Mary I. Adams against the White Bus Line and another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

E. B. Drake, Edward E. Kelley, and R. T. Lightfoot, all of Los Angeles, for respondent.

SLOANE, J. In this case the plaintiff, Mary I. Adams, obtained judgment against the defendant White Bus Line, a corporation, and defendant George P. Stiles, jointly, for injuries inflicted by the concurrent negligence of defendants. The defendant White Bus Line carried indemnity insurance with the Western Indemnity Company, an insurance corporation. This company paid the amount of the judgment to plaintiff, and at its request the company, instead of entering satisfaction, assigned this judgment to one Powell, manager of defendant White Bus Line.

After this payment had been made to plaintiff, the defendant Stiles applied to the court in which the judgment was pending for an order directing the entry of satisfaction of said judgment on the ground that the payment by the indemnity company to the plaintiff satisfied the judgment as to both defendants.

This appeal is taken by defendant White Bus Line from the order of the court directing such entry of satisfaction.

In considering this appeal the Western Indemnity company may as well be eliminated as a factor in the case. There was no privity or relation between it and the plaintiff or the defendant Stiles, and its payment to the plaintiff was no more than the act of the insured, the White Bus Line. The insurance company was not entitled to have the judgment kept alive, as it had no recourse against either of the defendants. The status of the parties is the same as if the White Bus Line had itself advanced the amount of the judgment and taken an assignment from plaintiff on its own initiative.

It is apparent from the evidence that the money was paid on account of the White Bus Line, and the assignment was to its manager and for its benefit. It will hardly be claimed that any further recourse could be had under this judgment against the White Bus Line.

The obvious purpose of the assignment was an attempt to keep the judgment alive against the codefendant, Stiles.

[1, 2] If the case were such that contribution could be enforced between the defendants, the transaction might have proved effective as an assignment. While a cause of action for a tort is not assignable, such a claim, when merged in a judgment, becomes a debt and may be assigned. Black on Judgments, vol. 2, § 942; 15 R. C. L. p. 774; Charles v. Haskins, 11 Iowa, 329, 77 Am. Dec. 148; Mackey v. Mackey, 43 Barb. (N. Y.) 58; Freeman on Judgments, vol. 2, § 425. It was clearly enough the intention of the parties here that the payment should result in an assignment, and not in a satisfaction. The order in which the money was paid and the assignment executed does not control if it was one transaction and the intent was to have it constitute an assignment.

[3] But the generally accepted doctrine is that there is no right of contribution between joint tort-feasors. Although in some jurisdictions an exception has sometimes been made when the act sued on occurred in the exercise of a lawful business and was merely negligent, and not willful or malicious. Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320; First Nat. Bank v. Avery Planter Co., 69 Neb. 329, 95 N. W. 622, 111 Am. St. Rep. 541. The great weight of authority, however, is against the right of contribution between defendants whose concurrent negligence has made them jointly liable in damages. The rule appli-

cable to this case is stated in Harbeck v. Vanderbilt, 20 N. Y. 395:

> "Where one of several defendants against whom there is a joint judgment pays to the other party the entire sum due, the judgment becomes * * * extinguished, whatever may be the intention of the parties to the transaction. It is not in their power, by any arrangement between them, to keep the judgment on foot for the benefit of the party making the payment. If, therefore, in such a case the latter take an assignment to himself, or, unless under special circumstances, even to a third person for his own benefit, the assignment is void and the judgment satisfied."

Where one of several joint wrongdoers pays a judgment obtained against them all, he acquires no right of contribution by taking an assignment of the judgment in the name of a man of straw. Boyer v. Bolender, 129 Pa. 324, 18 Atl. 127, 15 Am. St. Rep. 723.

It has been sought in this state to avoid this rule on the theory that the provisions of section 709 of the Code of Civil Procedure were intended to apply to joint tort-feasors. Such an interpretation of that section was denied in Forsythe v. Los Angeles Ry. Co., 149 Cal. 569, 87 Pac. 24. Discussing this point, it is said in the opinion by Mr. Justice McFarland:

> "It is beyond doubt the well established * * * rule that there is no right of contribution between joint tort-feasors. Appellant contends that this rule has been changed by section 709 of the Code of Civil Procedure; but we do not think so. That section does not pretend to deal with the matter of the right of contribution between tort-feasors. Its plain intent is to simply provide that, when there is a judgment against two or more defendants who are entitled to contribution from each other and one pays the whole or more than his proportion thereof, 'the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment. * * *' It certainly cannot be said that the Legislature, while enacting section 709 as a part of the law of procedure, necessarily intended to change, or did change, the fundamental principle that there is no right of contribution between joint tort-feasors."

To the same effect, Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 Pac. 379.

In the case at bar the plaintiff was a passenger upon a stage of the defendant White Bus Line. The injury to plaintiff was caused by a collision between this stage and an automobile driven by the other defendant, Stiles. They were joined in the action as being jointly and severally liable for the accident. They were both found negligent and were held liable for this concurrent negligence. Under this state of facts it is clear that neither could recover in an independent action against the other, as the negligence of each contributed to the damages resulting from the collision.

[4] This lack of an independent cause of action or a right of contribution, of course, also answers appellant's suggestion that the indemnity company, having paid the liability incurred by the White Bus Line, was entitled to be subrogated to its rights as against the other defendant. That question has already been litigated, with the result that, both being negligent, neither has a claim against the other. The plaintiff was entitled to one judgment and one satisfaction, and this she has had, with the result that the judgment was paid and defendant Stiles was entitled to an entry of satisfaction.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

(184 Cal. 691)

DAVIS v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY et al. (S. F. 9528.)

(Supreme Court of California. Jan. 19, 1921.)

1. Venue 🔑80—Statute requiring dismissal after change on failure to pay costs within year held mandatory.

The provision of Code Civ. Proc. § 581b, that, where an action was not originally commenced in the proper county but is transferred, the costs and fees of transmission of the pleadings and papers must be paid by plaintiff within one year from the time when pleadings or papers arrive in the custody of the clerk, is mandatory, being addressed not only to the parties but to the court, which loses jurisdiction.

2. Venue 🔑80—Dismissal for failure to pay fees upon change may not be set aside.

Where a court has dismissed a cause after transfer upon change of venue for plaintiff's failure to pay costs thereof within one year, it is not authorized, under Code Civ. Proc. § 473, to set aside such dismissal because of the neglect of plaintiff's attorney to make such payments, where it clearly appears that the payment was not made within the time.

3. Prohibition 🔑3(5)—May be granted by Supreme Court though right of appeal existed at time of application to district court.

Though an order of the superior court vacating its dismissal of a cause for failure to pay costs on change of venue was appealable under Code Civ. Proc. § 963, subd. 2, as a final order after judgment, so that the district court might for that reason have refused application for prohibition against the vacating order, yet, the superior court being without jurisdiction to make such order or to further proceed, as it proposed to do, and further prosecution of the action being expensive and inexpedient, the Supreme Court, on transfer to it for rehearing, might, in its discretion, grant prohibition.

In Bank.

Application of P. M. Davis for writ of prohibition to the Superior Court of Alameda County and A. F. St. Sure, judge thereof, to prevent further proceedings in a pending action. Writ granted.

Frank L. Hain, of Oakland (Richard M. Lyman, Jr., of Oakland, of counsel), for petitioner.

Street & Street, of San Francisco, for respondents.

SHAW, J. This cause was begun in the District Court of Appeal of the First district, and after decision by the Second Division of that court its judgment was vacated and the cause transferred to this court for rehearing.

The proceeding is for prohibition to prevent the superior court from further proceeding in an action before it, wherein Angie M. Davis and others were plaintiffs and the petitioner, P. M. Davis, was the defendant. The complaint in that action purported to state a cause of action for the reformation and enforcement of a certain written agreement. In its nature it was a personal action. P. M. Davis, the defendant in the action, was a resident of the county of Alameda. He appeared to the action in the county of Kern and procured an order of that court granting a change of venue to the county of Alameda on the ground that the defendant was a resident of that county and that the county of Alameda was the proper county for the trial of the cause. Thereafter the pleadings and papers in the case were transmitted to the clerk of the superior court of the county of Alameda and were delivered to him on May 22, 1917. The costs of filing the same anew in the county of Alameda were not paid by the plaintiff, or at all, within one year from the time they were received by the clerk as aforesaid, nor until after the making of an order dismissing the action. On October 22, 1919, on motion of the said defendant, petitioner herein, the superior court of the county of Alameda made and entered its order dismissing the said action upon the ground that said plaintiff had not paid the fees for filing the pleadings and papers anew in the superior court of Alameda county, as provided in section 581b of the Code of Civil Procedure. Afterwards, on December 16, 1919, the plaintiff, Angie M. Davis, paid to the clerk the fees for filing the pleadings and papers anew, and thereupon moved the court to vacate and set aside its order dismissing the action, on the ground that the same was made through the mistake, inadvertence, and excusable neglect of said plaintiffs. The superior court granted this motion, made an order setting aside the previous judgment of dismissal, and it subsequently allowed the plaintiffs to file an amended complaint and proposes to proceed with the cause as if there had been no dismissal thereof.

[1] Section 581b, aforesaid, provides as follows:

> "No action heretofore or hereafter commenced, where the same was not originally commenced in the proper county, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore or hereafter commenced must be dismissed by the court to which the same shall have been transferred, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, where the costs and fees of transmission of the pleadings and papers therein to the clerk or justice of the court to which it is transferred, or of filing the papers anew, have not been paid by the plaintiff for one year after the time when such pleadings or papers shall have arrived in the custody of such clerk or justice."

It will be observed that this provision is mandatory in its nature and that it is addressed not only to the parties but to the court, declaring that the court must of its own motion dismiss such an action where the costs have not been paid within the year specified. It is exactly the same in this respect as the provision of subdivision 7 of section 581 as amended in 1889 (Stats. 1889, p. 398) and now incorporated in section 581a by the act of 1907 (Stats. 1907, p. 712), which provides as follows:

> And "no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and * * * served and return thereon made within three years after the commencement of said action."

The only difference is that the statute of 1889 used the word "shall" in the direction that the court shall dismiss the action upon its own motion or on motion of any party interested, whereas section 581b used the word "must" in that connection. By the statutes of 1907, incorporating the provision in section 581a, the word "must" is substituted for the word "shall" previously used therein. The two sections are therefore in all respects identical, and are to be considered as having the same effect in the cases for which they respectively provide. In the case of Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470, the court had under consideration the effect of subdivision 7 of section 581 in a case where the summons had been issued when the action was commenced but had not been returned or filed within three years thereafter. After quoting the language of the Code aforesaid, the court declared that it was prohibitory and not merely directory; that the courts were required to dismiss actions where the condition of the statute had not been complied with; and that the right of the plaintiff to prosecute the action had been lost by the failure to return and file the summons. In a similar case (Swortfiguer v. White, 141 Cal. 576, 75 Pac. 172) the court says that—

> The "action was practically put an end to, and it was the imperative duty of the court to have dismissed it at the expiration of three years from its commencement; and the substitution of the appellant in place of the former plaintiff in that action, the French bank, over four years after the commencement of the action, and the filing of a so-called amended supplemental complaint thereafter could not revive the former action so as to change the result." 141 Cal. 579, 75 Pac. 173.

In Modoc L. & L. Co. v. Superior Court, 128 Cal. 255, 60 Pac. 848, where the summons was not returned within three years, it was said that—

> "The court is deprived of jurisdiction to take any other action than to dismiss the cause, whether one day or many years elapse before its attention is called to the subject."

White v. Superior Court, 126 Cal. 245, 58 Pac. 450, was a proceeding in prohibition in the case aforesaid, entitled Swortfiguer v. White. The application was made on the ground that the summons had not been served or returned within the three years, as required in subdivision 7 of section 581 above quoted. It was held that the court had no power to proceed further in the case and that the writ of prohibition should issue. After saying that the conduct of the petitioner in that case was wholly indefensible, the court said:

> "But it remains true that he is only claiming what the law commands, and his case is no worse than that of any debtor who pleads the statute of limitations against a just demand."

To the proposition that the petitioner had a plain, speedy, and adequate remedy by appeal, and that therefore prohibition would not lie, the court said:

> "Such remedy by appeal is, perhaps, plain, but can hardly be called speedy or adequate. Petitioner has a present right to the dismissal of the action as against himself * * * and such right cannot be protected or enforced by an appeal from a possible judgment in the action to foreclose."

[2] These authorities govern and settle the present case. Respondent argues that the court had jurisdiction under section 473 of the Code of Civil Procedure, to set aside the judgment of dismissal, and that its order to that effect is therefore conclusive, except upon direct appeal. It may be conceded for the sake of the argument that if the judgment of dismissal had been set aside on the ground that, although the fees had been paid in time, it was given by reason of some inadvertence and neglect of the plaintiff whereby she had failed to appear, or, having appeared, had failed or had been prevented from showing facts which would have justified a refusal to give that judgment, and she had, on the motion to vacate it, shown that she had good grounds on the merits for opposing the dismissal, the superior court would have had jurisdiction to vacate the judgment of dismissal, and that the order to vacate it could not be attacked by a proceeding in prohibition.

But that is not the case we have before us. The only answer that could have been made to the application for dismissal in the present case, and the only ground that would have been sufficient to warrant a vacation thereof after such judgment was given, would be that the fees for filing the pleadings and papers had actually been paid within the year allowed by section 581b, or, possibly, that the plaintiff had been prevented from making such payment by some fraud or other conduct of the defendant that would have created an estoppel against him to claim the benefit of the provisions requiring a dismissal. There was no attempt to set forth any such ground. It was admitted that the fees were not paid until after the year had expired. The only showing in regard to the failure to pay them was that the attorney for the plaintiff, who resided at Taft in Kern county, had retained an attorney in Oakland to represent the plaintiff and had sent him the money to pay such fees, and that the Oakland attorney had received the money but had failed to pay the fees therewith, or at all. It was not claimed that the defendant had done anything to induce the failure to pay, or that he was aware thereof, or of any other thing done in the attempt to pay.

It appears therefore, as matter of law, from the facts disclosed by the moving papers, that the fees had not been paid in time. This being the case, it follows, under the plain provisions of section 581b and the principles established by the decisions above cited in regard to the meaning and application thereof, that the superior court had then no power or jurisdiction to entertain the motion or to do anything in the action except to dismiss it. If there had been no judgment of dismissal at that time, the only duty resting upon the court and the only power it had, from the admitted facts, was to enter a judgment of dismissal. And this was a continuing duty and the sole power of the court even after it had made the order vacating the dismissal. Instead of then giving leave to plaintiffs to amend their complaint it should have dismissed the action. It had no power to do anything else. The merits of the action are not material to the question. As has been said, the case is similar in this respect to a statute of limitations. White v. Superior Court, supra.

[3] With regard to the remedy by appeal the facts are that the order vacating the judgment of dismissal was made on January

2, 1920; that it was a special order made after final judgment and was appealable; and that the right of appeal expired on March 2, 1920. Code Civ. Proc. §§ 963, subd. 2. On that day the present proceeding in prohibition was begun in the district court by the filing of the petition upon which that court issued an order to show cause. While the existence of the right of appeal at that time might have been a sufficient reason for that court to have then refused to entertain the petition (Glougie v. Superior Court, 169 Cal. 675, 147 Pac. 972) yet, in view of the fact that the superior court was then and ever since has been without power or jurisdiction to proceed further in the action, as we have shown, but nevertheless proposes to do so, and that further proceedings of any kind, except to again dismiss the action, would be void, we are disposed to grant the writ, rather than put the parties to further vexation and useless expense by further attempts to prosecute it. The question is largely one of discretion, and we deem it the better policy to terminate the proceedings forthwith.

Let a peremptory writ of prohibition issue forbidding the said superior court or any judge thereof from proceeding further in the action therein above referred to, wherein Angie M. Davis et al. are plaintiffs and P. M. Davis is defendant.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

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184 Cal. 732

NELSON v. TROUNCE et al. (L. A. 6438.)

(Supreme Court of California. Jan. 27, 1921.)

1. Schools and school districts 🔑81(2)—Statute requiring contractor's bond applies to contract with board of education of San Diego.

St. 1897, p. 201, as amended by St. 1911, p. 1422, requiring the board of education to exact bond from school contractors for benefit of materialmen and laborers, *held* applicable to the board of education of the city of San Diego, notwithstanding St. 1905, p. 918, Charter of San Diego, art. 7, § 3, providing that the duties and powers of the board of education shall be such as are now or may hereafter be enjoined and conferred on the boards of education in city and school districts by the laws of the state of California, and Pol. Code, § 1617 et seq., prescribing duties of boards of education without requiring execution of such bond.

2. Schools and school districts 🔑81(2)—Filing of claims by materialmen and laborers held sufficient for recovery on contractor's bond.

Code Civ. Proc. § 1187, requiring mechanic's lien claims to be filed within 90 days after expiration of 30-day period following cessation from labor on the building, is not applicable to the filing of claims of materialmen and laborers under St. 1897, p. 201, as amended by St. 1911, p. 1422, requiring such claims to be filed as a condition to recovery on school building contractor's bond; the filing of claims for material furnished or labor performed for school contractor within 90 days after completion of the contract being sufficient.

3. Trial 🔑388(4)—Finding of fact as to fact admitted in answer not necessary.

Court is not required to make a finding of fact as to fact admitted in the answer.

4. Schools and school districts 🔑85—Board completing contract need not apply to claims of materialmen and laborers difference between contract value of work done and amount theretofore paid contractor.

Where on school contractor's default the board of education completed the contract, and in so doing exhausted the entire balance of the contract price not paid the contractor prior to the default, and with the consent of the contractor's surety paid the subcontractors and materialmen directly, there was nothing due the contractor not paid, and the board was not required to apply the difference between the contract value of the building at the time of its abandonment by the contractor and the amount theretofore paid the contractor to the claims of materialmen and laborers for material furnished to and labor performed for the contractor.

5. Appeal and error 🔑1050(1)—Admission of default judgment to prove materialman's claim held not prejudicial to surety.

Where actions by materialmen and laborers on school contractor's bond were consolidated, the offer in evidence and filing in such action by a materialman required to litigate his claim therein of a default judgment recovered against the surety in another action in support of such materialman's claim *held* not prejudicial to the surety, where the surety was liable on its bond, and there was no dispute as to the amount due to such materialman.

Department 2.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Olaf Nelson against Harry D. Trounce, the Chicago Bonding & Surety Company, and another, in which the Chicago Bonding & Surety Company and others filed cross-complaints. Judgment for plaintiff and for cross-complainants other than the Chicago Bonding & Surety Company, and the Chicago Bonding & Surety Company appeals. Appeal dismissed as to some of the unnamed cross-complainants, and judgment affirmed as to plaintiff and some of the other unnamed cross-complainants.

Miller, Thornton, Miller & Watt, of San Francisco, for appellant.

R. L. Horton, of Los Angeles, Ray M. Harris, Ward, Ward & Ward, J. Weinberger, Hoff & Chatterson, Clifford C. Pease, Wright, Winnek & McKee, Sweet, Stearns & Forward, and Hendee, Rodabaugh & Mark, all of San Diego, and Swanwick & Donnelly and G. E. Delevan, Jr., all of Los Angeles, for respondents.

WILBUR, J. This action was begun by the plaintiff to recover upon a bond given by the defendant Chicago Bonding & Surety Company for the payment of laborers and materialmen upon a contract for the building of Garfield school, executed by the board of education of the San Diego school district as owner with the defendants Harry D. Trounce and William Stoecker, copartners. The defendant bonding company, having been sued in a number of actions by materialmen and laborers, asked that all these actions be consolidated, and that the parties be required to file their claims by way of cross-complaint in this action. The court made such an order, and the various parties filed their cross-complaints, whereon judgments aggregating $12,293 were rendered, from which the bonding company appeals.

The contract price for the erection of the school building was $38,440. The bond in accordance with the statute was for half that amount or $19,220. The bond is in the usual form, recites the giving of the contract and the amount thereof, and in the condition thereof is the following:

> "Now, therefore, if the said principals fail to pay for any materials or supplies furnished for the performance of the work contracted to be done, or for any work or labor done thereon of any kind, we, the said surety, will pay the same in an amount not exceeding the sum specified in this bond, to wit, the sum of nineteen thousand two hundred twenty dollars ($19,220.00), which said sum is one-half of the contract price of said work, provided that all such claims shall be filed as required by section 2 of an act of Legislature approved March 27, 1897, entitled 'An act to secure the payment of the claims of materialmen, mechanics, or laborers employed by contractors upon state, municipal, or other public work,' in pursuance of which enactment, as amended by an act approved May 1, 1911, the foregoing bond is given."

The contractors abandoned the work on the 15th of March, 1915. Worked ceased upon the building for more than 30 days, and thereafter the board of education completed the work; the building being fully completed October 18, 1915. At the time the contractors abandoned the work they had been paid 75 per cent. of the value of the work and labor done, and the building was 48 per cent. completed. The difference between the value of the building estimated according to contract rate and the amount paid to the contractors at the time of its abandonment was $4,612.80.

The appellant raises three points on the appeal: First, that the bond is void for the reason that the law requiring the execution of this bond (Stats. 1897, p. 201, amended 1911, p. 1422) did not, it is claimed, apply to contracts executed by the board of education of the San Diego school district; second, that the claims of the various parties were not filed within time for the reason that the contract was completed within the meaning of the bonding statute 30 days after March 15, 1915, and that all the claims which were filed on the theory that the completion of the building was the time when the 90 days for filing claims began were therefore too late; third, that the amount of the value of the building at the time of its abandonment over and above the amount paid the contractor ($4,612.80) should be applied to the claims.

Was the bond void?

[1] In 1905 the charter of the city of San Diego was amended with reference to the duties and powers of the board of education as follows:

> "The duties and powers of the board of education shall be such as are now, or may hereafter be enjoined and conferred on boards of education in city and school districts by the laws of the state of California." Stats. 1905, p. 918, art. 7, § 3, Charter of San Diego.

Appellant's contention is, in effect, that the powers and duties of trustees of common school districts and of boards of education in city school districts are defined in Political Code, § 1617 et seq., and that the charter by reference incorporates only these provisions of the Political Code therein; that these provisions thus incorporated in the charter do not require a bond, hence, as the giving of such a bond is, it is contended, a municipal affair, the charter provision controls over the general laws under which the bond was given, and, as no bond is required, the bond is void. If this position as to the charter is correct, appellant's position finds some support in the case on which it relies, namely, Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 159 Pac. 600. It is a sufficient answer to this contention to point out that the charter does not refer to any particular Code or Code section defining the duties and powers of boards of education, but to the laws of the state of California. That law as contained in the Statutes of 1911, p. 1422, requires boards of education to exact a 50 per cent. bond from contractors for the benefit of materialmen and laborers, and hence by the foregoing provision of the San Diego charter was included therein.

Were the respondents' claims filed in time?

[2] The statute under which the bond was given requires that verified claims be filed with the board of education within 90 days after the "completion of the contract." Appellant points out that the statute does not say the completion of the building or structure. Section 1187 of the Code of Civil Procedure with reference to mechanics' liens and the filing of claims and stop notices ex-

pressly provides that "cessation from labor for 30 days upon any contract or on any building" shall be "deemed equivalent to completion for all the purposes of this chapter." Appellant therefore claims that the school contract was completed April 14, 1915 (that is, 30 days after work ceased on March 15, 1915), and that the claims filed with the board of education were too late, being filed more than 90 days thereafter. But section 1187, Code of Civil Procedure, by its express terms is confined to the provisions of the Code with relation to mechanics' liens contained in that chapter of the Code. As the statute under which the bond here involved was given is not contained in that chapter, the words "completion of the contract" should therefore receive their ordinary acceptation. This contract was completed when the building was finished in accordance with its terms on October 18, 1915. Consequently all the claims of the respondents were filed within time.

[3] The appellant in his opening brief calls attention to the fact that there is no finding that cross-complainant T. B. Pennick filed a verified claim within the time provided by law. But it appears that in the answer of cross-defendant, the appellant, the filing of this claim was expressly admitted, and therefore no finding of fact was necessary.

[4] Appellant's third contention is that the sum of $4,612.80, which represents the difference between the contract value of the building at the time of its abandonment by the contractors and the amount theretofore paid the contractor under its terms, should have been applied by the board of education to the claims of the respondents. The board of education completed the contract, and in so doing exhausted the entire balance of the contract price. There was therefore nothing due to the contractor at any time that has not been paid. The course adopted by the board of education in the completion of the contract, namely, the agreement on behalf of the board of education to pay the subcontractors and materialmen directly, was assented to by the appellant. There is nothing in the point made by the appellant.

[5] In addition to the foregoing contentions, which apply to all the claims, appellant specially complains of the judgment in favor of Pacific Sewer Pipe Company. It appears that at the time this action was commenced by Olaf Nelson the Pacific Sewer Pipe Company had brought an action in the superior court in Los Angeles county upon the bond. The order of consolidation in this case secured by the appellant directed that all the persons named by the appellant in its cross-complaint as defendants, including the Pacific Sewer Pipe Company, be required to litigate their claims in this suit, and that such claims and actions be consolidated and joined. In accordance therewith, the respondent Pacific Sewer Pipe Company filed its answer and cross-complaint in this action October 19, 1916, setting up the same cause of action then pending in Los Angeles county. On January 31, 1917, a default judgment was taken in the action in the superior court of Los Angeles county, and that judgment was subsequently offered in evidence in this case in support of the allegations of its supplemental cross-complaint, filed by leave of court January 8, 1918, showing the recovery thereof. The appellant was not prejudiced by this irregular procedure; for, as we have seen, the appellant was liable on its bond for the claim, and there is no dispute as to the amount.

Since the foregoing was written the appellant has filed an application for the dismissal of the appeal as to the respondents T. B. Pennick, W. J. Bailey & Co., Pacific Coast Steel Company, Taylor-Rossman Hardware & Supply Company, Pacific Sewer Pipe Company, Hammond Lumber Company, Julius Brombacher, L. A. Wright, and Los Angeles Denison Block Company.

The appeal is dismissed as to the above-named respondents upon motion of the appellant, and as to the other respondents the judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.

184 Cal. 726

CURTIS v. HOLEE et al. (L. A. 6435.)

(Supreme Court of California. Jan. 26, 1921.)

1. Limitation of actions ⚷143(6)—Mortgagor's grantee could extend running of limitations by acknowledgment of debt without personally assuming it.

Mortgagor's grantee could extend the running of the period of limitations under Civ. Code, § 2911, and Code Civ. Proc. § 337, subd. 1, by entering into extension agreement, under section 360, requiring acknowledgment of debt to be in writing, "signed by the party to be charged thereby," in order to toll statute, though grantee did not assume payment of the mortgage debt, since the grantee, owning the land subject to the mortgage lien, was, to a limited extent, charged with the debt and interested in its payment.

2. Limitation of action ⚷148(1)—Acknowledgment of mortgage debt by mortgagor's grantee sufficient to toll statute.

The acknowledgment by mortgagor's grantee of the existence of the mortgage debt in writing with sufficient certainty is sufficient to take the debt out of the operation of the statute of limitations under Code Civ. Proc. § 360; an actual promise to pay not being necessary.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Limitation of actions 🔑145(1)—Acknowledgment of mortgage is an acknowledgment of the debt secured.

The acknowledgment of the mortgage is an acknowledgment of the debt secured by the mortgage, with regard to tolling the statute of limitations.

4. Limitation of actions 🔑145(1)—Acknowledgment of debt constitutes acknowledgment of the mortgage securing it.

Acknowledgment of the debt by the mortgagor's grantee with knowledge on his part of the existence of the mortgage constitutes an acknowledgment of the mortgage itself, and takes the mortgage out of the operation of the statute of limitations; for the mortgage is merely an incident of the debt evidenced by the note.

5. Limitation of actions 🔑145(1)—Extension agreement held to toll statute.

Extension agreement entered into by mortgagee and mortgagor's grantee written on back of mortgage note and expressly referring to note *held* sufficient acknowledgment of existence of mortgage to toll statute of limitations under Code Civ. Proc. § 360, though no mention was made of the mortgage itself, where the note expressly referred to specified that it was secured by mortgage.

Department 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Emma F. Curtis against A. D. Holee and others. Judgment for plaintiff, and defendants appeal. Affirmed.

L. C. Woods, of Los Angeles, and Simpson & Simpson, of Pasadena, for appellants.

Joseph H. Call and Asa V. Call, both of Los Angeles, for respondent.

LENNON, J. The pleaded facts of the plaintiff's case, briefly stated, are these: The defendant A. D. Holee on June 20, 1912, executed a note, secured by a mortgage on real property, in favor of one M. M. Arthurs, in the sum of $2,500. The mortgage note by its terms was due and payable "on or before three years after date," and the interest thereon, at the rate of 6 per cent. per annum, was to commence running from July 1, 1912. The mortgage was duly recorded in the county recorder's office of the county wherein the mortgaged property was located. The mortgagor, Holee, conveyed the mortgaged property to one Haymond on or about the 1st of July, 1915, when he was still the owner in fee simple, subject to the mortgage, of the mortgaged property. Haymond made and entered an agreement in writing with M. M. Arthurs, the original and then owner of the said note and mortgage. This agreement, which was written on the back of said note, provided that, in consideration of a raise in the rate of interest, provided for in and by said note, from 6 to 7 per cent. from the date of said agreement, namely, July 1, 1915, the time for the payment of the note was extended to June 20, 1916. At the time of the execution of said agreement of extension, namely, on July 1, 1915, the sum of $75 was paid on account of interest and $500 was paid on account of the principal of said note. Subsequent to the execution of said agreement of extension, on August 16, 1915, the said Haymond conveyed the mortgaged property by grant deed to F. E. Lindblom, which deed, after specifically describing the mortgaged property, expressly stated that it was conveyed "subject to a mortgage to secure a note for $2,500 * * * in favor of M. M. Arthurs, upon which note there has been paid the sum of $500 on the principal," and that "the note was extended for one year from July 1, 1915, and the interest rate raised to 7 per cent. in place of 6 per cent." This deed from Haymond to the Lindbloms was duly acknowledged and recorded in the recorder's office of the county wherein the mortgaged property and the property mentioned in the deed is situated. The Lindbloms thereafter conveyed said property by grant deed, also expressly subject to said mortgage and the extension heretofore mentioned, to one Werner. Werner subsequently conveyed said property by grant deed, also subject to said mortgage and extension, to the appealing defendant herein, Ruth Gold. On October 29, 1917, M. M. Arthurs, the original owner of the note and mortgage, sold and assigned the same to this plaintiff and respondent, which assignment was thereafter duly recorded in the county wherein the property is situated.

This action to foreclose the mortgage as extended was instituted and filed August 29, 1919. Pending the hearing and determination of defendant's demurrer to the plaintiff's complaint, the defendant A. D. Holee entered into a stipulation with the plaintiff that her default might be entered and a judgment might be taken by plaintiff against her upon condition that no deficiency judgment should be entered against her.

Answering the plaintiff's complaint, the defendant Ruth Gold admitted the truth of the allegation that Holee, the mortgagor, did, by grant deed, convey the mortgaged property to Haymond, but, while conceding that all the subsequent conveyances of the property were made subject to the mortgage, affirmatively alleged that it did not appear from the grant deed to Haymond that the conveyance to the latter was made subject to the said mortgage. For lack of information and belief, the answer denied that Haymond and Arthurs agreed in writing at any time or at all that the payment of said note and mortgage should be extended to June 20, 1916. Further answering, the defendant Ruth Gold interposed the defense of the statute of limitations, pleading that the plaintiff's cause of action was barred by the provisions of section 337, subd. 1, and section 360 of the Code of Civil

Procedure, and also by section 2911 of the Civil Code of the state of California. Upon the issues thus framed, a trial was had and judgment rendered for the plaintiff upon findings made in favor of and in substantial accord with the allegations of the plaintiff's complaint and against the defense of the statute of limitations. From the judgment of foreclosure and sale the defendant Ruth Gold has appealed.

As previously indicated, the question of the liability of the original mortgagor has been eliminated from the case, and the question of the liability of appellant for a deficiency judgment does not arise upon this appeal, for no deficiency judgment was rendered.

It is a stipulated fact in the case that Haymond, as the grantee of the defendant Holee, did not, when taking a conveyance of the mortgaged property, agree to pay the note in suit or assume the mortgage by which it was secured, and, because of this fact, it is insisted, upon behalf of appellant, that the agreement between Haymond and Arthurs, the owner of the mortgage, for an extension of the time within which the note would mature, is insufficient, under the provisions of section 360 of the Code of Civil Procedure, as evidence of a continuing contract which would take the case out of the operation of the statute of limitations. The insufficiency is claimed to result from the fact that Haymond was under no legal obligation in the first instance, or at all, to pay the note or assume the mortgage, and therefore the extension agreement, in so far as it related to him, was not signed by a party to be charged with the original indebtedness. In other words, it is the contention of the appellant that the grantee of a mortgagor who does not assume the mortgage is a stranger to the mortgage debt to whom the provisions of section 360 of the Code of Civil Procedure do not apply, and that therefore the legal life of a mortgage note cannot be continued by the written agreement of such a grantee of the mortgagor.

[1] As previously stated, it is admitted that Haymond did not agree to pay the note and mortgage and never became personally liable thereon, but, since the mortgage was on record at the time of the conveyance of the property to Haymond, the property itself continued subject to the lien of the mortgage after it was acquired by him. While, under such circumstances, the grantee is not personally liable for the debt, nevertheless, in view of the fact that our laws render the land primarily liable for the payment of a mortgage debt (Crisman v. Lanterman, 149 Cal. 647, 87 Pac. 89, 117 Am. St. Rep. 167), the grantee of land subject to a mortgage, as long as he is the owner of the thing which is the fundamental source of satisfaction of the debt, is, to a limited extent, charged with the debt and interested in its payment. For this reason the grantee of the mortgagor who takes subject to a mortgage is not such a stranger to the mortgage or the mortgage debt that he cannot, while he is the owner of the mortgaged property, extend and continue the same as against himself and his successors in interest. Fitzgerald v. Flanagan, 155 Iowa, 217, 135 N. W. 738, Ann. Cas. 1914C, 1104. Therefore it is not necessary, in order to take a mortgage out of the operation of the statute of limitations as against the grantee of the mortgagor and his successors, that the grantee who signs the acknowledgment thereof should have personally assumed the payment of the mortgage.

[2-5] We turn, then, to a consideration of the form of acknowledgment in the present case. If the grantee acknowledged the existence of the debt in writing with sufficient certainty, that will suffice to take the debt out of the operation of the statute. Chaffee v. Browne, 109 Cal. 211, 218, 41 Pac. 1028; State, etc., Co. v. Cochran, 130 Cal. 245, 251, 62 Pac. 466, 600; Concannon v. Smith, 134 Cal. 14, 66 Pac. 40. An actual promise to pay is not necessary. Foster v. Bowles, 138 Cal. 346, 71 Pac. 494, 649. When such an acknowledgment is made before the note becomes barred by the statute of limitations as applied to the date originally designated for the payment of the note, it constitutes a continuation of the life of the original obligation beyond the operation of the statute of limitations as applied to the original obligation. McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123; Rodgers v. Byers, 127 Cal. 528, 60 Pac. 42. The acknowledgment of the mortgage is an acknowledgment of the debt secured by the mortgage. Foster v. Bowles, supra; Girard, etc., Co. v. Dixon, 89 Neb. 557, 131 N. W. 912. And, conversely, it must be that an acknowledgment of the debt by the mortgagor's grantee, with knowledge on his part of the existence of the mortgage, as admittedly was done by the grantee of the mortgagor in the instant case, constitutes an acknowledgment of the mortgage itself and takes the same out of the operation of the statute of limitations, for the mortgage is merely an incident of the debt evidenced by the note. While the extension agreement in the instant case does not, in so many words, make mention of the mortgage, still that agreement was written upon the back of the mortgage note and made express reference thereto. The note, upon its face, bore the caption, "Note secured by mortgage," and therefore, considered and construed in connection with the note to which it referred, the agreement to extend the time for the payment of the note constituted an unqualified acknowledgment of the mortgage and the debt secured thereby, sufficiently direct and distinct to arrest the running of the statute of limitations.

It was not essential that the plaintiff's complaint should allege, nor the trial court should find, that the conveyance from Holee, the mortgagor, to Haymond, his grantee, was made subject to the mortgage in suit. The complaint alleged that the mortgage was recorded prior to the transfer to Haymond, and, moreover, the execution of the extension agreement, particularly when coupled with the payment of a part of the principal and some of the interest due upon the mortgage note, was a sufficient acknowledgment that the property conveyed was transferred subject to the mortgage. Fitzgerald v. Flanagan, supra; McLane v. Allison, 60 Kan. 441, 56 Pac. 747. It likewise operated to toll the statute of limitations as against the successors in interest of Haymond, all of whom took the mortgaged property expressly and affirmatively subject to the mortgage and to the agreement extending the legal life of the mortgage note.

What we have thus far said in effect adversely disposes of the remaining points presented in support of the appeal.

The judgment is affirmed.

We concur: WILBUR, J.; SLOANE, J.

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184 Cal. 714

RUNKLE v. SOUTHERN PAC. MILLING CO.

(L. A. 6350.)

(Supreme Court of California. Jan. 24, 1921.)

1. **Warehousemen 🔑34(7)—Evidence held to support finding of negligence.**

In action for destruction of plaintiff's goods in warehouse fire, evidence *held* to support finding that the loss was the result of warehouseman's negligence.

2. **Appeal and error 🔑995—Supreme Court will not weigh evidence.**

The Supreme Court will not weigh the evidence upon which the judgment rests.

3. **Negligence 🔑136(9)—Question for jury.**

Negligence is a question of law for the court instead of a question of fact for the jury only when the facts are not in any event or in any view of the case susceptible to the inference of negligence sought to be deduced therefrom.

4. **Warehousemen 🔑24(1)—Required to exercise same degree of care as a reasonably careful owner would exercise.**

Under Warehouse Receipts Act, § 21, a warehouseman was required to exercise such care in the safeguarding of property stored in warehouse as a reasonably careful owner of similar property would exercise.

5. **Warehousemen 🔑34(9)—Whether warehouseman failed to provide sufficient fire fighting appliances held for jury.**

In action against warehouseman for destruction of goods by fire, question of whether the fire fighting appliances provided by the warehouseman for the protection and preservation of the warehouse and its contents were ordinarily adequate and reasonably sufficient as a protection against loss and damage by fire under the circumstances *held* for the jury.

6. **Warehousemen 🔑24(6)—Owner's knowledge as to conduct of business did not affect liability for loss by fire.**

Warehouseman's liability for destruction of goods in fire was not lessened and owner was not estopped from asserting such liability merely because owner may have had knowledge as to the manner in which the warehouseman conducted its business at the time owner stored his goods in warehouse.

7. **Warehousemen 🔑24(3)—Liable for negligence of employee.**

Warehouseman is liable for destruction of goods in fire caused by his employee's negligence.

8. **Warehousemen 🔑34(10)—Instruction that ordinarily prudent employer would not retain "habitual drunkards" in its employ held warranted by evidence.**

In action against warehouseman for loss of goods in warehouse fire claimed to have been caused by an intoxicated employee of the warehouseman, evidence that employee frequently got drunk *held* to warrant instruction that an ordinarily prudent employer would not retain in its employ a man who was known or should have been known to be a habitual drunkard, a "habitual drunkard" being one addicted to the habit of drinking intoxicating liquors to excess and who is commonly or frequently intoxicated and becomes so as often as opportunity permits, it being unnecessary that he be intoxicated so often as to incapacitate him from attending to his business for a considerable portion of time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Habitual Drunkard.]

9. **Trial 🔑219—Failure to define "habitual drunkard" used in instruction not error.**

In action against warehouseman for destruction of goods in fire claimed to have been caused by intoxicated employee, instruction, that an ordinarily prudent employer would not retain in its employ a man who was known or who should have been known to be a habitual drunkard without a definition of the words "habitual drunkard," *held* not erroneous; such words needing no explanation as used in the instruction.

10. **Warehousemen 🔑34(9)—Whether employee in charge of warehouse was habitual drunkard held for jury.**

In action for loss of goods in warehouse fire, question of whether defendant's employee in charge of warehouse, and who was intoxicated at time of fire, was an habitual drunkard, *held* for the jury.

11. **Warehousemen 🔑24(2)—Warehouseman who knowingly employs habitual drunkard liable for damage resulting from employees' drunken negligence.**

Where an employer hires a habitual drunkard as a warehouseman knowing him to be a habitual drunkard, and where an ordinarily prudent person would not have hired such employee as a warehouseman, employer is liable for damage proximately caused by the employee's drunken negligence.

12. **Warehousemen ⚷34(5, 9)—Plaintiff suing for loss of goods in warehouse fire not required to prove what constitutes ordinary care.**

In action against warehouseman for loss of plaintiff's property in destruction of warehouse by fire, plaintiff is required to prove defendant's negligence, but in so doing is not required to show affirmatively what would constitute ordinary care on the part of the warehouseman in the operation and management of its warehouse, such question being a matter of defense, and, in the absence of a showing in relation thereto, it is within the province of the jury to determine from all the evidence whether the warehouseman conducted its business with the care and caution which would be required of a reasonably prudent person conducting such business.

Department 2.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Frank J. Runkle against the Southern Pacific Milling Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles F. Blackstock, of Oxnard, for appellant.

Robert M. Clarke, of Los Angeles, for respondent.

LENNON, J. The defendant appeals from a judgment entered upon the verdict of the jury in the sum of $5,652.17 as damages for the destruction by fire, resulting from the defendant's negligence, of a lot of beans which were stored in the warehouse of the defendant at Santa Susanna in Ventura county. Substantially stated, the pleaded facts of the plaintiff's case, in so far as material to the points presented on appeal, are these: The corporation defendant was doing a general storage business on and prior to the 25th day of December, 1918, and on that day the plaintiff had stored in the defendant's warehouse certain quantities of beans reasonably worth the sum of $5,675.67. On the date last mentioned and prior thereto, the defendant failed generally to exercise ordinary and reasonable care and diligence for the protection and preservation against destruction by fire of the plaintiff's beans, which had been deposited and stored in the warehouse of the defendant, and was particularly negligent in failing to provide a watchman or caretaker of its said warehouse other than one Roy Thomas, "who was at all times careless, negligent, reckless, and unfit to have charge of said public warehouse" and its contents, and on the said 25th day of December, 1918, said Thomas, then and there, being the servant of said defendant, entered the warehouse of the defendant in an intoxicated condition and negligently set fire thereto, causing the warehouse and its contents, including the plaintiff's beans, to be destroyed.

[1-6] The jury's finding of negligence, implied from the verdict, is sufficiently supported by evidence. It is idle to discuss upon appeal to this court the weight of the evidence upon which the judgment rests, and, of course, it is only when the facts of a given case are not in any event or in any view of the case susceptible to the inference of negligence sought to be deduced therefrom that the question of negligence becomes one of law for the sole consideration of the court rather than one of fact for the determination of the jury. It is conceded, as indeed it must be, that by reason of the relationship of the parties arising out of the contract of bailment for hire and the provisions of section 21 of the Warehouse Receipts Act (Stats. 1909, p. 437), that the duty devolved upon the defendant to exercise such care in the safeguarding of the plaintiff's property as a reasonably careful owner of similar goods would exercise, and, failing in this, the defendant must be held in damages for the resulting loss. The evidence in the instant case shows, in response to the issue of negligence, substantially as follows: The defendant's warehouse was a wooden structure, 200 feet long and 74 feet wide, in which, in addition to general merchandise, gasoline, and other inflammable and explosive substances were stored. Two barrels of water, without buckets at hand, were located at either end of the building, and these, with two small pyrene fire extinguishers and a three-quarter inch low-pressure water pipe leading from a neighbor's well and terminating with a faucet in a sink inside the warehouse, constituted the fire-fighting appliances provided by the defendant for the protection and preservation of the warehouse and its contents. Whether these fire-fighting appliances were ordinarily adequate and reasonably sufficient as a protection against loss and damage by fire under all of the circumstances, and considering particularly the situation of the warehouse, was clearly a question of fact for the jury to determine. The liability of the defendant as a bailee for hire was not lessened, and the plaintiff was not estopped from asserting such liability merely because the plaintiff may have had knowledge as to the manner in which the defendant conducted its business at the time plaintiff stored his beans with the defendant. Stevens v. Stewart-Warner Corporation, 223 Mass. 44, 111 N. E. 771.

Upon the question of the particular negligence of the defendant in employing an unfit man to have charge of its warehouse, the record shows some evidence to the effect that the defendant, prior to and at the time of the fire, employed as a warehouseman one Roy Thomas, a person who was addicted to the use of intoxicating liquor and who got drunk to the knowledge of the agents of the defendant. Upon the latter phase of the case there was evidence to the effect that the agents of the defendant knew the failing of this man when they employed him. There is further evidence to show not only that this man was especially employed as the warehouseman but had in fact acted in his capacity of warehouseman, and that he was at times in complete charge of the warehouse and at all times had the key to the warehouse, although there was another person over him who was known as the "agent for the warehouse" who was agent at Santa Susanna and Moorpark and who was generally in charge of those warehouses, but he resided at Moorpark, some ten miles from Santa Susanna and only occasionally visited the warehouse there. Another employee, a Mrs. Haigh, the bookkeeper, lived on a ranch about 1¼ miles from the warehouse. Thomas was the only person residing usually in Santa Susanna who was in authority in the warehouse, and when the warehouse was open for business Thomas "seemed to be boss there. He wasn't doing anything but standing around and giving orders."

[7] It is an undisputed fact in the case that Thomas was intoxicated to the point of irresponsibility on the night of the fire, and that, prior to the discovery of the fire, he was seen, still intoxicated, going towards the warehouse, and while it was not shown by any direct evidence that he was in the warehouse until after the fire started, nevertheless, within the evidence adduced upon the whole case, there are to be found circumstances which unerringly point to the conclusion and justified the jury in finding that he was not only in the office of the warehouse where the fire originated and at the time it originated, but that he, while in a drunken stupor, was the cause of the fire. That Thomas was acting within the scope of his employment on the day and the evening of the fire, notwithstanding the fact that the warehouse was not open for business at that time, is fairly inferable from the evidence as a whole and in particular from that evidence which tended to show that Thomas was employed as "a warehouseman * * * to take charge of the warehouse" and was given a key thereto which he had at all times in his possession. Under these circumstances, we are not prepared to say that the jury was not justified in finding that when Thomas entered the warehouse on the evening of the fire he was acting within the scope of his employment. Thomas was the only agent of the corporation at Santa Susanna who had control of its property at the time of the fire or who could be said to be in charge of the warehouse, and it may well have been found that the duties of Thomas as warehouseman in charge of the warehouse extended beyond the hours ordinarily occupied for the public use of the warehouse, and it was not necessary for the plaintiff to prove that at the time of the fire Thomas was engaged in executing any particular business or specific command of his principal. If Thomas at the time of the commission of the act which resulted in the fire was in the warehouse within the general scope of his employment and the injury and damage resulted from his negligence, that is all that need be shown in order to charge the defendant with liability for the damage. Mulvehill v. Bates, 31 Minn. 364, 17 N. W. 959, 47 Am. Rep. 796; Rahn v. Manf. Co. (C. C.) 26 Fed. 912; Riordan v. Gas Consumers' Ass'n, 4 Cal. App. 639, 88 Pac. 809; Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 123 Pac. 219. But, however that may be, the jury may well have found that the defendant was guilty of actionable negligence in the selection and employment of a man whose duties called for the constant possession of a key to the warehouse, with the consequent right of access thereto at all times, and who to the knowledge of defendant's agents drank intoxicating liquors to excess and who was in the habit of getting drunk. Cussen v. So. Cal. Sav. Bank, 133 Cal. 534, 65 Pac. 1099, 85 Am. St. Rep. 221. In short, the real question involved in the instant case is not so much one of the scope of Thomas' employment but rather a question of the negligence of the defendant in the selection of an employee whom it knew was not competent, by reason of his known drinking habits, to be placed in the care and charge of the defendant's warehouse and the property of the plaintiff therein.

[8-12] No fault can be fairly found with the instruction of the trial court to the effect that an ordinarily prudent employer would not retain in its employ a man who was known, or who should have been known, to be an habitual drunkard. While there is no evidence showing that Thomas was an habitual drunkard in the sense that he got drunk so often and to such an extent as to incapacitate him from attending to his business for a considerable portion of the time, nevertheless the evidence as a whole shows that Thomas frequently got drunk while employed at Santa Susanna, was drunk when he came there on or about November 20, was drunk on the occasion of the fire, and was observed to be drunk by the townspeople and under the influence of liquor oftentimes when on duty in and at the warehouse. The habitual drunkenness referred to in the instruction was not used in a technical or limited sense but in its general sense as distinguished from that habitual intemperance, for instance, which might be made the ground of an action in divorce. An "habitual drunkard" in the general sense and as commonly

understood is one who is addicted to the habit of drinking intoxicating liquors to excess and who is commonly or frequently intoxicated and becomes so as often as an opportunity permits. State v. Pratt, 34 Vt. 323. As used in the instruction complained of, the phrase "habitual drunkard" needed no explanation. The jury, presumably, was competent to understand what is meant by language in common use. And whether the habits and conduct of the man Thomas, as shown by the evidence, were insufficient to stamp him as an habitual drunkard was a question properly submitted to the jury under the allegations of the complaint to the effect that Thomas was incompetent and unfit to have charge of the defendant's warehouse and to care for the plaintiff's property deposited therein. 3 Labatt's Master and Servant, § 1087 (185), p. 2875; Probst v. Delamater, 100 N. Y. 266, 271, 3 N. E. 184. Fairly construed, the instruction in question did not purport to tell the jury that they might come to a conclusion based upon their own individual opinion, without regard to the evidence, as to what a prudent warehouseman would or would not have done under the circumstances. The most that the instruction can be said to have done was to tell the jury that if the evidence in the case warranted a finding that an ordinarily prudent person would not employ a known habitual drunkard as a warehouseman, and that if it were further found that the defendant knowingly and imprudently did that very thing, the defendant was guilty of negligence and must respond in damages for the injury and loss proximately resulting to plaintiff as the result of the warehouseman's drunken negligence. So construed, the instruction clearly stated the law. 3 Labatt, Master and Servant, § 1087, p. 2875; Huntingdon, etc., Co. v. Decker, 84 Pa. 419-424. While it was incumbent upon the plaintiff to sustain the burden of showing defendant's negligence, it was not necessary to the plaintiff's case to show affirmatively what would constitute ordinary care on the part of the defendant in the operation and management of its warehouse. That was a matter of defense, and in the absence of a showing in that behalf by the defendant it was within the province of the jury to determine from all of the evidence whether the defendant was negligent in the management of its business or conducted it with the care and caution which would, considering the character of the business, ordinarily be required of a reasonably prudent person.

The judgment is affirmed.

We concur: WILBUR, J.; SLOANE, J.

(184 Cal. 809)

PROUD v. SOUTHERN PAC. MILLING CO. PATTERSON RANCH CO. v. SAME. ÆTNA INS. CO. v. SAME. (L. A. 6394, 6426, 6625.)

(Supreme Court of California. Jan. 24, 1921.)

Department 2.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Consolidated actions by C. J. Proud, by the Patterson Ranch Company, and by the Ætna Insurance Company, against the Southern Pacific Milling Company. Judgments for plaintiffs, and defendant appeals. Affirmed.

Charles F. Blackstock, of Oxnard, for appellant.

Robert M. Clarke and Henry L. Knoop, both of Los Angeles, I. W. Stewart, of Oxnard, A. D. Shaw, of Hollister, and W. W. Hindman, of Los Angeles, for respondents.

PER CURIAM. Although they are three separate and independent suits, the three above-mentioned cases are identical in their facts with the facts of the case of Runkle v. Southern Pacific Milling Co., 195 Pac. 398, this day decided. The points urged for a reversal in these cases by appellant, Southern Pacific Milling Company, are the same as those which were presented in said case of Runkle v. Southern Pacific Milling Company, and therefore what we have said in the latter case sufficiently disposes of the points made.

Upon the authority of that case the judgments in these three cases are affirmed.

(184 Cal. 701)

Ex parte NOWAK. (Cr. 2324.)

(Supreme Court of California. Jan. 19, 1921.)

1. Municipal corporations 🔑58—Charter held limitation of power, and not a grant of power.

The Los Angeles Charter, in view of article 1, § 2, subd. 51, as amended in 1917, pursuant to Const. art. 11, § 6, as amended in 1914, authorizing city to exercise all powers in municipal affairs subject only to the limitations of the charter, *held* a limitation of powers instead of a grant of power.

2. Licenses 🔑6(1)—Charter, empowering city to "license and regulate," authorizes tax for revenue only.

Los Angeles City Charter, art. 1, § 2, subd. 21, empowering city to "license and regulate" any lawful business or calling, *held* to authorize the imposition of an occupational license tax for revenue only, in view of construction placed on quoted words by the Supreme Court prior to incorporation thereof in the charter.

3. Statutes 🔑212—Legislature presumed to use words according to construction previously given them by Supreme Court.

The Legislature will be presumed to have used words in the precise and technical sense previously placed on such words by the Supreme Court.

4. Statutes 🔑181(1)—Construed according to legislative intent.

Statutes will be construed according to the intention of the Legislature.

5. Licenses 🔑6(1)—Charter authorizing city to license held not to render charter subordinate to state-wide laws; "general"; "uniform"; "general and uniform laws."

Los Angeles City Charter, as amended in 1913, authorizing city to license and regulate, "under general and uniform laws," any lawful business or calling, *held* not to render the charter subordinate to state-wide laws on such subject, the quoted words referring not to state-wide laws, but to laws or ordinances by the legislative body of the city; the words "general" and "uniform" as applied to laws having a meaning antithetical to special or discriminatory laws.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General, General Law; Uniform.]

6. Municipal corporations 🔑592(1)—Occupational tax imposed on grocers for revenue held authorized by charter.

Los Angeles City Ordinance No. 39600 (New Series), imposing an occupational license tax upon grocers, *held* valid as against objection that it was contrary to the general laws of the state, prohibiting the imposition of license taxes for revenue purposes, since the charter of the city, in view of article 1, § 2, subd. 51, as amended in 1917, is a limitation on and not a grant of power, and does not prohibit the imposition of such a tax, but under article 1, § 2, subd. 21, empowering city to license and regulate any lawful business or calling, expressly authorizes the imposition of such taxes for purposes of raising revenue.

7. Constitutional law 🔑83(3)—Imprisonment for nonpayment of license tax held not unconstitutional.

Imprisonment of grocer for nonpayment of occupational tax imposed by Los Angeles City Ordinance No. 39600 (New Series), denouncing failure to pay such tax as a crime, *held* not in violation of the grocer's constitutional right not to be imprisoned for debt.

8. Licenses 🔑7(1)—Ordinance imposing license upon merchant, manufacturer, or otherwise not void for uncertainty.

Los Angeles City Ordinance No. 39600 (New Series) § 153, imposing a license tax on all persons conducting, managing, or carrying on any business, whether as a "merchant, manufacturer, or otherwise," *held* not void for uncertainty, being applicable only to merchants or manufacturers.

9. Constitutional law 🔑230(3)—Licenses 🔑7(3)—Occupational tax graded on gross receipts held not discriminatory.

Los Angeles City Ordinance No. 39600 (New Series), imposing license tax graded according to gross receipts, *held* valid as against contention that it is discriminatory in favor of one whose gross receipts are just within the maximum amount for a given class as against one whose gross receipts are just above the minimum amount for the given class.

10. Constitutional law 🔑42—Person not within class discriminated against cannot complain.

A person, not within the class whose constitutional rights are invaded by alleged discrimination, cannot complain.

In Bank.

Application by Frank Nowak for writ of habeas corpus against George K. Home, Chief of Police of the City of Los Angeles. Writ discharged.

Henry N. James, J. P. Chandler, Paul H. McPherrin, and Rex Hardy, all of Los Angeles, for petitioner.

Erwin W. Widney, City Prosecutor, J. D. Taggart, Deputy City Prosecutor, Charles S. Burnell, City Atty., Wm. P. Mealey, Asst. City Atty., and Julius V. Patrosso, Deputy City Atty., all of Los Angeles, for respondent.

LENNON, J. Petitioner was arrested for the commission of an alleged misdemeanor, namely, the violation of an ordinance of the city of Los Angeles, No. 39,600 (New Series). This ordinance is a rather complex piece of municipal legislation, the numerous sections or subdivisions of which attempt an elaborate classification of various businesses or callings as a basis for the imposition of an occupation tax, differing in amount in the case of different businesses. The precise offense charged against petitioner consisted in conducting, managing, and carrying on the business of a retail grocer in the city of Los Angeles without paying the tax upon said business prescribed by the ordinance. Retail grocers are not specifically mentioned in any provisions of the ordinance, and they are therefore governed by the provisions of section 153 of the ordinance. This section contains an omnibus provision, imposing upon "every person, firm or corporation, conducting, managing or carrying on any business, whether as a merchant, manufacturer or otherwise, not otherwise specifically licensed by other sections of this ordinance, the gross annual receipts of which business amount to less than six thousand dollars ($6,000.00)" a tax of $1.50 per quarter of a year, and thereafter sets forth a graduated scale, indicating the amount of license tax to be paid upon businesses whose gross annual receipts amount to sums falling within the classes therein specified. Petitioner's gross receipts during 1919 were $30,000. He failed to pay the license tax provided by the ordinance for the quarter commencing July 1, 1920, and terminating September 30, 1920, and has been arrested pursuant to a provision of the ordinance making the conduct of a business without paying the required license tax a misdemeanor. Petitioner claims that the ordinance in question, or at least so much of it as is applied against him, is null and void.

[1] It is contended, first, that inasmuch as the sole purpose of the ordinance is to raise revenue, its enactment is not authorized by the charter of the city of Los Angeles. In their argument the parties overlooked a certain provision of the charter of which mention should be made. By 1914 amendment to section 6 of article 11 of the Constitution of California a new scheme for city charters was adopted, in that it was provided that—

> "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters * * * so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

In 1917 the city of Los Angeles adopted an amendment to the city charter, subdivision 51 of section 2 of article 1, by which the city is authorized to exercise all powers in municipal affairs, subject only to the limitations of the charter, which was strictly in accordance with the language and the purpose of the constitutional amendment. The question of the effect of a similar amendment to the charter in 1913, prior to the constitutional amendment above mentioned, need not be considered in this case. The net result of this situation is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and, the imposition of the tax for revenue purposes being strictly a municipal affair, the city has the power to impose that tax unless the power was taken from it by the charter itself. Civic Center Ass'n v. R. R. Comn., 175 Cal. 441, 166 Pac. 351; Cole v. City of Los Angeles, 180 Cal. 617, 182 Pac. 436; Hayes v. Handley, 187 Pac. 952.

[2, 3] Section 2 of article 1 of the charter of the city of Los Angeles, relating to the enforcement of the ordinances of that city, reads as follows:

> "The city of Los Angeles, in addition to any other powers now held by and that may hereafter be granted to it under the Constitution, or laws of the state, shall have the right and power: * * * (21) To license and regulate under general and uniform laws, any lawful business or calling; to fix the amount of license tax thereon, and to prescribe the manner of enforcing the same."

Petitioner insists that the use of the term "license and regulate," in defining the power of the city over lawful businesses and occupations, restricts the municipality to the imposition of license taxes for purposes of regulation only, and we are indebted to counsel for a learned and comprehensive analysis of authorities from other jurisdictions in support of this proposition. However persuasive we might find the reasoning of the cases and texts thus called to our attention had the language in question never received interpretation in this state, we are now bound by previous decisions wherein a grant by the Legislature of authority to "license and regulate" has been held to include authority to impose a license tax for revenue only. Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642; San Jose v. San Jose R. R. Co., 53 Cal. 475; Ex parte Braun, 141 Cal. 204, 74 Pac. 780. Assuming, apparently, that these decisions have no effect other than as mere precedents, petitioner argues that they were based upon erroneous reasoning, and should now be overruled. We are unable to follow petitioner in this argument. The question is not whether or not, as a matter of logic and policy, the words "license and regulate" appearing in a grant of power to a municipality should, as an original proposition, be held to include authority to impose a license tax for revenue purposes only. The question is what, as a matter of fact, was the intent of the people and of the Legislature when, in amending the city charter in 1913, a time subsequent to the decisions above cited, they again incorporated in the charter the words "license and regulate" in defining the power of the city over lawful businesses and occupations. Whether correct or incorrect as to reasoning, the decisions of this court had given to the words "license and regulate," as used in this connection, a precise and technical meaning. When, therefore, at a subsequent time, the people and the Legislature undertook to use these exact words in this particular connection, the presumption is almost irresistible that they used them in the precise and technical sense which had been placed upon them by this court. Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600; Dalton v. Lelande, 22 Cal. App. 481, 135 Pac. 54; Robert v. Superior Court, 38 Cal. App. 199, 175 Pac. 800.

[4] The question being one of intent, this presumption is, of course, not irrebuttable, and it is possible to conceive of circumstances which would suffice to indicate that the words "license and regulate" were used in a sense other than that which has been accorded to them by this court. No such circumstances or combination of circumstances has been called to our attention by petitioner. It is, indeed, contended that the fact that the Legislature amended the general laws in 1901 so as to forbid municipalities not operating under freeholders' charters to impose license taxes for the purpose of revenue only indicates a change of policy which should be reflected in a change in the construction of the expression to "license and regulate." This argument obviously has no weight when applied to the interpretation of freeholders' charters, and, moreover, this court has reenunciated its former interpretation of the words in question in Ex parte Braun, supra, a case decided subsequent to the amendment of the general laws.

Petitioner makes several additional arguments based upon the provisions of the charter. In this behalf, our attention is directed to the fact that no limit is placed upon the amount of the license tax authorized. In the light of the legislative policy to jealously safeguard all exercise of the taxing power, a policy exemplified in the charter itself by a limitation upon the amount of the tax which may be levied and collected upon real and personal property, it is argued that this failure to place a limit upon the license tax authorized by the charter indicates that it was intended to restrict the power to impose the said license tax so as to prevent its use for revenue purposes. The very fact, however, that an inflexible limit is placed upon the amount of revenue which may be raised by real and personal property taxes lends force to respondent's suggestion that some other source of revenue must have been contemplated by the people. Moreover, the charter provides that the law imposing the license tax shall be general and uniform in its operation, and that no discrimination in the amount of the tax shall be made between persons engaged in the same business otherwise than in proportioning the tax to the amount of business done. In view of this safeguard, we cannot say that there is such danger of uncontrolled legislation upon the subject as to reasonably require a construction limiting the effect of this portion of the charter as contended by petitioner.

Petitioner next relies upon certain principles of statutory construction, namely, that the express inclusion of one thing is tantamount to the exclusion of another, and that the meaning of a word may be ascertained by reference to the meaning of words associated with it. It is insisted that the application of these maxims requires that subdivision 21 of section 2 of article 1 of the charter be interpreted as a restriction to the power to regulate, for the reason that the latter portion of the subdivision refers expressly to the regulation and suppression of certain occupations which are in themselves noisome or unhealthful. We do not think that these maxims are to be so applied. Indeed, the very fact that the opening provisions of the subdivision refer to all lawful businesses and callings and use words well recognized as expressing an authorization to tax for revenue purposes, while the closing provisions refer to businesses noisome or unhealthful in themselves and contain words apt to authorize control and prohibition, indicates clearly that the subdivision deals with two separate and distinct matters, namely, the taxation of all lawful businesses and the police control of all noisome or unhealthful businesses. Neither provision can be construed to exclude or absorb the other.

[5] Upon this phase of the case petitioner finally contends that by the charter amendment of 1913 the power of the city to impose license taxes was subjected to the general laws of the state, which, as we have already indicated, prohibit the imposition of license taxes for revenue purposes. As it stood prior to 1913, the charter authorized the city "to license and regulate the carrying on of any and all professions, trades, callings, and occupations. * * *" As amended in 1913, the charter authorizes the city "to license and regulate, *under general and uniform laws*, any lawful business or calling. * * *" (Italics ours.) Petitioner's contention in this behalf is that the words "general and uniform laws" as used in the charter amendment should be construed to read "general laws of the state of California." We cannot so construe them without doing plain and obvious violence to the charter. The only basis for petitioner's contention that there was an intent to render the charter subordinate to state-wide laws on the subject is the use of the adjective "general," which is often used to describe state-wide laws. The significance of this fact is very slight, indeed, when we consider that the obvious purpose of the charter was to safeguard the exercise of the taxing power by forbidding discriminatory laws, and that in this connection the words "general" and "uniform," as ap-

plied to laws, have a well-defined and generally accepted meaning as antithetical to "special" or discriminatory laws. That the word "general" was used in this sense is further indicated by the use of the correlated adjective "uniform." The words "general and uniform laws" as used in the charter as amended would certainly be interpreted by the average person as referring, not to statewide laws, but to the enactment of laws or ordinances by the legislative body of the city. We can see no good reason for adopting a different or more technical interpretation.

[6] Our conclusion is that, not only does the charter not prohibit, but it expressly authorizes the imposition of a tax upon petitioner's business for the purpose of raising revenue.

[7] Ordinance No. 39,600 (New Series) provides that this tax may be recovered in a civil action as a debt. It also provides that the act of doing business without the payment of the tax shall be a crime, and shall be punishable as such. For the commission of this crime petitioner has been imprisoned. This imprisonment does not violate his constitutional right not to be arrested for debt. Imprisonment for debt, as such imprisonment is defined in our constitutional guaranties, is necessarily imprisonment in a civil action for debt. As such imprisonment existed in the English common law, it was a provisional remedy strictly analogous to the present-day remedy of attachment of goods. It is against such attachments that the constitutional guaranties against imprisonment for debt are directed.. They have no application whatever to imprisonment for crime, and legislative bodies are free to provide for punishment by imprisonment of offenders who commit acts denominated by the said legislative bodies as offenses against the public, provided, of course, that other constitutional limitations are not violated Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922.

We proceed next to a consideration of petitioner's contention that the ordinance is unlawfully discriminatory in its operation and effect, and is in other respects unreasonable.

[8] We need only mention, in passing, the contention that the ordinance is uncertain in that section 153 imposes a license tax upon all persons conducting, managing, or carrying on any business, whether as a "merchant, manufacturer or otherwise," without defining more specifically the business included. Petitioner has answered this objection himself. He concedes in his reply brief that, had the section referred to merchants and manufacturers only, it would have been sufficiently certain, while he demonstrates in his opening brief that such, in fact, is the precise interpretation which is to be placed upon the section.

[9] It is also objected that the ordinance operates unequally by reason of the fact that it adopts a method of gradation based upon gross receipts such that the business whose gross receipts are just within the maximum amount for a given class enjoys an exemption practically equal to the difference between the maximum and minimum amounts, while no such exemption is enjoyed by the business whose gross receipts are just above the minimum amount for the given class. This objection is but the expression of the effect of classification by amount, and has been frequently made before and been considered by the courts. Their judgment has been uniformly adverse to the contention of petitioner herein. Sacramento v. Crocker, 16 Cal. 120; Clark v. Titusville, 184 U. S. 329, 22 Sup. Ct. 382, 46 L. Ed. 569; Magoun v. Sav. Bank, 170 U. S. 283; State v. Ins. Co., 40 La. Ann. 463, 4 South. 504. We do not think it necessary to review the cases or enter into the reasoning upon which they were based further than to say that, while it is conceivable that a legislative body might undertake to classify by amount in a manner so arbitrary and unreasonable as to be confiscatory, no such case has, so far as we are aware, been presented to the courts. Certainly such a case is not presented herein.

[10] The remaining objections to the ordinance, based upon alleged discriminations therein, will not be considered, for the reason that these claimed discriminations do not work any injustice upon petitioner or violate his rights. Admittedly, all persons engaged in the same business as that of petitioner, namely, that of retail grocer, are governed by the general provisions of section 153 of the ordinance, and the only distinction made by that section between such persons is to be found in the fact that the tax is proportioned to the amount of the business done. Petitioner is therefore confronted with the general rule that a person not within the class, whose constitutional rights are invaded by an alleged discrimination, cannot complain. Hatch v. Reardon, 204 U. S. 152, 160, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; Jeffery Mfg. Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364; Ex parte Quong Wo, 161 Cal. 222, 233, 118 Pac. 714; Brown v. Los Angeles, 192 Pac. 716. Inasmuch as it has not been pointed out that there is, in the present case, any circumstance giving rise to a reason why this general rule should not be applied (see Buchanan v. Warley, 245 U. S. 60, 38 Sup. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201, and Quong Ham Wah. v. Ind. Acc. Com. 192 Pac. 1021), petitioner's objection in this behalf must be held not maintainable.

Petitioner has, consequently, no ground for complaint on account of his imprisonment because of his violation of the ordinance in question, and the writ is accordingly discharged.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

184 Cal. 697

Ex parte GALUSHA. (Cr. 2314.)

(Supreme Court of California. Jan. 19, 1921.)

1. **Attorney and client 🔑14—Attorneys not officers of the state.**

Attorneys, though in one sense officers of the court, are in no sense officers of the state, and do not hold a public trust.

2. **Licenses 🔑6(3)—State may delegate to city power to impose occupational tax on lawyers.**

A state may impose an occupational tax upon persons engaged in the practice of law, and may delegate such power to a municipality; the imposition of such a tax not being an interference with state affairs or with state regulations.

3. **Municipal corporations 🔑58—Charter held a limitation upon and not a grant of powers.**

Los Angeles City Charter, in view of article 1, § 2, subd. 51, Const. art. 11, § 6, is a limitation upon power, rather than a grant of powers, so far as municipal affairs are concerned.

4. **Licenses 🔑6(1)—City held authorized to impose occupational tax for revenue only; "license and regulate."**

Los Angeles City Charter, empowering city to "license and regulate" any lawful business or calling, *held* to authorize city to impose an occupational tax for revenue purposes only.

5. **Licenses 🔑6(3) — Charter authorizing city to tax any "business" or "calling" held to authorize tax against lawyers.**

Los Angeles City Charter, empowering city to license and regulate "any lawful business or calling," *held* to authorize city to tax persons practicing law, since the words "business" and "calling" include persons following the professions, as well as those engaged at work of a more purely commercial nature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business; Calling.]

In Bank.

Application for writ of habeas corpus by Elon G. Galusha against George K. Home, Chief of Police of the City of Los Angeles. Writ discharged.

Eugene D. Williams, Benjamin E. Page, Arthur C. Hurt, Hugh M. Bode, and J. R. Scott, all of Los Angeles (Eugene Overton, of Los Angeles, of counsel), for petitioner.

Erwin W. Widney, City Prosecutor, Charles S. Burnell, City Atty., and Wm. P. Mealey, Asst. City Atty., all of Los Angeles, for respondent.

LENNON, J. Petitioner was arrested and held in custody under the charge of carrying on the profession of attorney at law in the city of Los Angeles without paying the license tax imposed upon persons engaged in that profession by section 152 of the ordinance of the said city of Los Angeles, designated as No. 39,600 (New Series). In the present proceeding petitioner questions the validity of the tax thus imposed. The only feature of the ordinance attacked is its application to the profession of attorney at law, and the single question presented to this court for determination in this case is whether or not the city of Los Angeles can legally impose a license tax upon the business or profession of attorney at law in so far as that business or profession may be carried on within the said city.

The salient argument advanced in support of the negative of this proposition is that, owing to their peculiar position as officers assisting the courts of the state in the administration of justice, and owing to the supervision which the state is already exercising over these officers, the control of the conditions upon which the profession of attorney at law may be carried on is solely a state affair, which cannot be delegated to a municipality. This argument is based upon a misconception of the status of the attorney at law and of the theory upon which the occupational tax is imposed.

[1] While attorneys are, in one sense, officers of the court, they are in no sense officers of the state, nor do they hold a "public" trust. Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62. The adequate protection of public interests, as well as inherent and inseparable peculiarities pertaining to the practice of law, require a more detailed supervision by the state over the conduct of this profession than in the case of almost any other profession or business. This circumstance, however, does not alter the fact that attorneys are not public officers, but are engaged in a private profession pursued primarily for pecuniary profit. "The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute." Ex parte Yale, supra. The weight of authority in this country is to the effect that there is nothing which particularly exempts the attorney from bearing a just share of necessary public bur-

dens, and that consequently an attorney can claim no peculiar exemption from an occupational tax imposed directly by the state for revenue purposes. Cousins v. State, 50 Ala. 113, 20 Am. Rep. 290; State v. King, 21 La. Ann. 201; Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131; Languille v. State, 4 Tex. App. 312. Apparently the only authority to the contrary is the so-called "Lawyers Cases" of Tennessee, 55 Tenn. (8 Heisk.) 565.

[2] As in the case of other professions or businesses which can be taxed by the state, the cases hold that the state can delegate to a municipality the power to impose a tax for the privilege of following the practice of the profession within the jurisdiction of the municipality. Goldthwaite v. Montgomery, 50 Ala. 486; St. Louis v. Sternberg, 69 Mo. 289, Id., 4 Mo. App. 453; Wilmington v. Macks, 86 N. C. 88, 41 Am. Rep. 443. The imposition of an occupational tax by a municipality upon those engaged in the practice of the legal profession is not an interference with state affairs. The mere compliance with certain prerequisities, in return for which a license to practice law is granted by the state, does not place a person beyond the range of additional regulation of the conditions upon which the license may be used. The municipality, in imposing an occupational tax upon attorneys, is not interfering with state regulations, for it is not attempting to prescribe qualifications for attorneys different from or additional to those prescribed by the state. It is merely providing for an increase in its revenue by imposing a tax upon those who, by pursuing their profession within its limits, are deriving benefits from the advantages especially afforded by the city. The tax is levied upon the business of practicing law, rather than upon a person because he is an attorney at law. Ex parte Johnson (App.) 190 Pac. 852. A license to practice does not carry with it exemption from taxation. The fact that the state has itself imposed no occupational tax upon attorneys is of no consequence. "The omission of the state to tax lawyers does not affect the express power of the city to impose a tax upon them. That power is not thereby abrogated. It is of frequent occurrence, that the state omits to impose taxes of this kind, or omits some particular subject of taxation, to which the power of taxation of municipal corporations extends, and no diminution of that power is intended." Ex parte Montgomery, 64 Ala. 463. We are constrained to conclude, both upon reason and authority, that the state may impose an occupational tax upon persons engaging in the practice of law, and may delegate this power to a municipality.

[3] Petitioner then raises the question as to whether or not such power has, in fact, been delegated to the city of Los Angeles. It must be borne in mind that, as stated in Matter of Nowak, 195 Pac. 402, this day decided, the city of Los Angeles is operating under a charter amended so as to render the charter a limitation upon powers rather than a grant of powers, so far as municipal affairs are concerned. Charter of City of Los Angeles, art. 1, § 2, subd. 51; Const. Cal. art. 11, § 6. The question, then, is not whether the charter grants the power to impose the tax, but whether it prohibits the tax, and no such prohibition is to be found in the charter. Even if it be conceded, however, that an express grant of power is necessary in the instant case for the reason that the taxation of attorneys is not a purely municipal affair, but one in which the state is directly concerned, that would not defeat the tax in question, for the charter does contain an express grant.

[4, 5] The charter of the city of Los Angeles confers upon it the power "to license and regulate under general and uniform laws, any lawful business or calling; to fix the amount of license tax thereon, and to prescribe the manner of enforcing the same. * * *" In the case of the city of Los Angeles the power "to license and regulate" includes the power to impose a tax for revenue purposes only. The reasons for this interpretation are fully stated in the recent decision of In the Matter of Nowak, supra, and need not be repeated here. The case of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674, wherein it was held that the city of Sonora had no power to impose upon attorneys a tax for revenue purposes only, is not in point, for the reason that the city which passed the ordinance in that case was not operating under a freeholders' charter, as is the city of Los Angeles. Ex parte Braun, 141 Cal. 204, 74 Pac. 780; In the Matter of Nowak, supra. The grant of a power to tax for revenue purposes "any lawful business or calling" is sufficiently definite to confer the power to tax those practicing the legal profession. The present phraseology of the charter was adopted in 1913. Prior to that time the terms used were "professions, trades, callings, occupations or other business." The amendment of 1913 did not constitute a restriction; it is equally as broad and comprehensive as the previous wording. The word "business" is defined in the New Standard Dictionary as:

> "1. A pursuit or occupation that employs or requires energy, time and thought; trade; profession; calling."

The same dictionary defines "calling" as:

> "Habitual occupation; regular work or duty to which one is called; a vocation in life; profession."

Clearly these terms include those following the professions as well as those engaged in work of a more purely commercial nature. It is true that some cases seem to hold that, in delegating the power to tax attorneys, a state must specifically mention them (St. Louis v. Laughlin, 49 Mo. 559); on the other hand, it has been held that where a city was authorized in general words to tax "all such callings, trades and employments as the public good may require," a tax might be imposed on the occupation of attorney at law. Abraham v. City of Roseburg, 55 Or. 359, 105 Pac. 401, Ann. Cas. 1912A, 597. In the absence of constitutional or statutory restrictions, there is no reason for making a particular exception of the legal profession, and where, as in the present case, the wording of the charter is sufficiently broad to include other professions in the delegation of the power to tax, it must also be held to embrace the legal profession.

The tax is valid and the writ is therefore discharged.

We concur: ANGELOTTI, C. J.; OLNEY, J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

184 Cal. 662

WALLIS et al. v. SOUTHERN PAC. CO.

(S. F. 9018.)

(Supreme Court of California. Jan. 17, 1921. Rehearing Denied Feb. 14, 1921.)

1. Negligence ⚷132(3)—Evidence of habit of caution admissible on issue of contributory negligence.

On the issue of contributory negligence of one killed by a train at a crossing, evidence of his habit of caution, stopping his team at crossings, and when necessary going ahead to ascertain if a train was approaching, was admissible, at least where there was a space within which he might have stopped to look and listen, as to which there was no eyewitness, though so far as he was seen he did not do so.

2. Appeal and error ⚷1066 — Unwarranted submission of last clear chance issue prejudicial.

Giving an instruction submitting the issue of last clear chance when there was not sufficient evidence to justify the submission is prejudicial error.

3. Negligence ⚷83—Last clear chance doctrine stated.

To make one liable under the last clear chance doctrine, not only must he have been aware of the danger in time to avert it, but he must have known or had reason to believe that the person injured was oblivious of the danger and in a position where he could not extricate himself from it.

4. Railroads ⚷350(33)—Evidence insufficient for submission of last clear chance doctrine.

Evidence of engineer having seasonably realized or had reason to realize that a person approaching crossing was oblivious of danger *held* insufficient for submission of last clear chance doctrine.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Elizabeth Wallis and others against the Southern Pacific Company. Judgment for plaintiffs, and defendant appeals. Reversed.

A. A. Moore, Stanley Moore, and Geo. K. Ford, all of San Francisco, for appellant.

Clarence A. Henning, of San Francisco, for respondents.

SLOANE, J. This is an appeal from a judgment in favor of the plaintiffs, heirs of Thomas Henry Wallis, in an action to recover damages for the latter's death, caused from his being run into by an engine of one of defendant's trains.

The accident occurred on the evening of October 16, 1909, at the intersection of Oak street and First street in the city of Oakland. The deceased was driving a lumber wagon, drawn by two horses, southerly on Oak street. The train was approaching from the east on the tracks of defendant company on First street. There was no load or bed on the wagon, and decedent was seated on what is termed the cinch, about midway between the front and rear wheels. Just as the wagon reached a point where the driver was midway between the rails of the railroad track it was struck by the engine and the driver was killed.

The case was tried before a jury, which returned a verdict for plaintiffs in the sum of $3,500.

Plaintiffs' case rests upon allegations of negligence of defendant in running its train at unlawful and excessive speed and in its failure to exercise due care in giving warning of its approach. Defendant, besides denying its own negligence, pleads contributory negligence of the deceased in failing to stop, look, and listen before attempting to cross the track.

That negligence of the defendant in exceeding the speed limit was shown by the evidence is not seriously disputed. On the defense of contributory negligence there was no direct testimony as to whether or not the decedent took any precautions to ascertain whether the track was clear before driving upon it, but there were circumstances given in evidence which might justify an inference that the decedent did not exercise such precaution.

[1] One of the grounds urged by defendant for a reversal, and the only one upheld by the District Court of Appeal, is alleged error of the trial court in admitting, over defendant's objection, testimony of plaintiffs' witnesses that the decedent on other occasions, not only at this crossing, but elsewhere, was in the habit of stopping his team, and, when

necessary, going ahead to the railroad track to ascertain if any train was approaching. The objection to this testimony was made generally on the grounds that it was incompetent, irrelevant, and immaterial, but the more specific contention of counsel for defendant was that such evidence of custom or habit to support a presumption of conduct in a given case was permissible, if at all, only when there was no eyewitness to the fact. The language of counsel in supplementing his general objection was:

> "If there is evidence of any eyewitness, then it is not admissible. I think unless there is evidence that there is no eyewitness it would be very doubtful."

After the court had overruled the objection, counsel for defendant stated:

> "I want the evidence to go in subject to my objection that it is incompetent, irrelevant, and immaterial and no sufficient foundation has been laid. * * * That is the only point. My theory is that it must first appear there was no eyewitness. * * * It is addressed to that only in this particular, that it has not been shown there was no eyewitness, and it is incompetent, irrelevant, and immaterial."

We think it sufficiently appears that defendant's objection to this evidence was thus limited to the condition that the evidence introduced was inadmissible if there was direct evidence of eyewitnesses to the fact. It was upon this assumption that the ruling of error was made by the District Court of Appeal. Accepting this theory of the law, we doubt if the foundation appears in the evidence here to exclude this testimony. No eyewitness testified directly on the subject or made reference to it. Only two witnesses saw the decedent as he approached the crossing. Neither of these saw him for more than a moment. Mrs. Borba, who lived on Oak street a block south of the crossing opened her door and looked out just as what was probably the crossing whistle of the train sounded at a point shown to be some 700 or 800 feet east of the crossing. At that time she saw the decedent driving on Oak street toward the crossing at some point between her house and First street. She re-entered the house, closed the door, and heard the continued whistle of the engine. J. F. Finn, the engineer of the locomotive, testified that just after he had finished blowing the crossing whistle he saw the heads of the horses coming into his line of vision at a point about 10 feet from the north rail of the track at the crossing, and that he thereupon began to sound the warning whistles; that the team continued toward the track until the collision happened. We do not agree with respondents' interpretation of the testimony of Mrs. Borba that she saw decedent just after he was past the intersection of Oak and First streets. She distinctly states that she saw him on Oak street between First and Second streets "right by the red building," which was between these streets. That would leave a considerable space where he was not seen by either witness. It is obvious that an interval elapsed between the moment when Mrs. Borba saw the decedent and when the moving team came into the engineer's line of vision. There is room for inference, however, that decedent did not stop to look and listen in that brief interim, and yet he might have done so, and there was no eyewitness to testify on that point. The time and place for so stopping would have been as he came into First street, where he could see up and down the railroad track. He might have just started his team after an instant's halt to glance up and down the track, when the engineer first saw the heads of the horses. If ever a cause was entitled to whatever presumption arises from habits of caution to overcome an inference from adverse circumstantial evidence of negligent conduct, it arises under the facts of this case.

We do not understand that the authorities which uphold the admissibility of this class of testimony only in the absence of direct evidence base the condition of its admission upon an entire absence of other evidence as to collateral facts that may uphold an inference as to what happened, but upon the absence of direct testimony of any eyewitness that the thing did or did not occur. In this case there was no such direct testimony.

The law governing this class of evidence is perplexingly inharmonious. The weight of authority, however, seems to uphold its use under the conditions stated, that there is an absence of satisfactory testimony of eyewitnesses as to the fact in controversy, while other decisions and authorities consider it legitimate evidence without such condition. This limitation upon the introduction of such testimony seems rather illogical. If the fact of the existence of habits of caution in a given particular has any legitimate evidentiary weight, the party benefited ought to have the advantage of it for whatever it is worth, even against adverse eyewitnesses; and if the testimony of the eyewitnesses is in his favor, it would be at least a harmless cumulation of evidence to permit testimony of his custom or habit.

The only authority in this state directly in point is that of Craven v. Central Pacific R. R. Co., 72 Cal. 345, 13 Pac. 878. In that case the plaintiff was suing for damages resulting from a fall from a train. The controversy was as to whether she was thrown off by the jolting movement of the car, or fell in an attempt to step off while the car was moving. Testimony was admitted as against testimony of eyewitnesses to the actual occurrence that she was in the habit of alighting from cars while they were still in motion. The court in this connection says:

> "A sensible man, called upon, out of court, to determine whether or not a certain person

had on a certain occasion carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give some weight to the fact that the person was in the habit of alighting from cars in that manner; and the consideration of such a fact in cases resembling the one at bar has frequently been sanctioned in court. The evidence, at least, had some legal tendency to show that plaintiff's conduct at the time of the injury was such as defendant ascribed to her."

If the evidence of habit is to be recognized at all, this unconditional rule would seem to be the logical ground for its admission. It is contended by appellant that later decisions of this state, though not directly calling in question the case above cited, are in substantial conflict with it, citing Towle v. Pac. Imp. Co., 98 Cal. 342, 33 Pac. 207; Cunningham v. Los Angeles Ry. Co., 115 Cal. 561, 47 Pac. 452; Langford v. San Diego Electric Ry. Co., 174 Cal. 729, 164 Pac. 398; Carr v. Stern, 17 Cal. App. 397, 120 Pac. 35.

These are all cases in which negligence was charged against defendant corporations through acts of their servants or employees. In each instance it was sought to prove or disprove negligence by the general character of the servant as to his skill or incompetence, prudence, or carelessness in the certain line of employment involved. Such evidence was excluded. This class of evidence is clearly distinguishable from that establishing a custom or habit of doing some particular thing in a particular way. Because one is a skillful workman in a given occupation does not tend to disprove negligence in some specific act, but, if the question in controversy is whether he did the thing at all or his manner of doing it, his custom or habit regarding that particular matter would be significant. Most of the text-writers seem to recognize the competency of such testimony. Ruling Case Law, vol. 10, p. 955, § 127, thus states the doctrine:

> "A habit of doing a thing is naturally of probative value as indicating that on a particular occasion the thing was done as usual, and, if already shown as a definite course of action, is constantly admitted in evidence"

—but recognizes the limitation upon such evidence by adding:

> "The weight of authority seems to be against admitting evidence of general conduct under proven circumstances, to show conduct of the same kind under similar circumstances on a particular occasion, when there were eyewitnesses of the occurrence."

In Thompson on Negligence, vol. 6, § 7140, it is said:

> "Where there are no witnesses to the accident, evidence of the habitual care of the deceased is often admitted on the question of his exercise of due care at the time of the accident."

Mr. Greenleaf says (1 Greenlf. on Ev. [16th Ed.] §§ 14j and 14k):

> "A habit of doing a thing is naturally of probative value as indicating that on a particular occasion the thing was done as usual, and, if clearly shown as a definite course of action, is constantly admitted in evidence."

In Elliott on Evidence, vol. 1, § 172, the author says that—

> "Evidence of personal habit is often of some probative value and is frequently admitted; but such evidence should not be admitted when to admit it would violate the character rule, and it cannot ordinarily be proved that a person did or did not do a certain thing at a particular time by showing that he acted in a certain way under similar circumstances at other times."

We find in Wigmore on Evidence, vol. 1, § 92, the following strong indorsement of habit evidence:

> "Of the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of the habit or custom there can be no doubt. Everyday experience and reasoning make it clear enough."

The author, however, very pertinently points out the distinction in the probative value of casual and infrequent acts along given lines of conduct and such a constant and repeated course of action, as would indicate a fixed habit. He adds:

> "It is easy to see why in a given instance something which may be loosely called habit or custom should be rejected because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance or in most instances. Whether or not such sufficient regularity exists must depend largely upon the circumstances of each case."

When we turn to the decided cases there is such a diversity of facts and confusion of rulings that it would be impracticable to analyze them or try to reconcile them other than in a general way.

In Parsons v. Syracuse, B. & N. Y. R. R., 133 App. Div. 461, 117 N. Y. Supp. 1058, it was held in a case similar to this that evidence was not admissible for the purpose of showing that a decedent who was killed while crossing a railroad track used care at the time of the accident, by introducing evidence of specific instances of care on other occasions, although no eyewitnesses were present. In the opinion, Mr. Justice Chester said:

> "A man may be careful on one occasion and may be careless on another. The circumstances at one time may be such as to induce prudence while they may not at another."

In that case, however, it was merely offered to show that the decedent had been seen on several isolated occasions to stop and look and listen at this crossing. There may have been many intervening occasions when he failed to observe that precaution.

In the case at bar the testimony of the witness Glass was that he had worked in connection with the decedent, not only in hauling lumber over this particular crossing (which had only been for a few days), but in teaming elsewhere when they hauled hay and grain across a railroad track. The witness was asked if he was familiar with the practice of decedent when he approached a railroad track, and if he knew decedent's habit in that respect. In making objection to the testimony counsel for defendant stated that he did not make the point that the witness had not had sufficient observation, but that his objection was to evidence of decedent's custom in the matter. In testifying the witness states as to decedent's habit "that he would get off and look to see if there was a train coming," and that for the few days they had been at work over this crossing "he always stopped, looked to see if the train was coming." So the evidence here was not to show the casual acts, but a consistent habit.

In Smith v. Boston & Maine R. R. Co., 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596, another case of a railroad crossing accident, evidence was upheld to the effect that the deceased "for many years always checked his horse and looked and listened for the train at such crossing." The Supreme Court in the opinion says:

> "Cate's uniform habit of slackening the speed of his horse to a walk at the Waukewan crossing, and looking and listening for the approach of a train before attempting to pass the crossing, tended to show that he did so on this fatal trip. It was substantial evidence of the exercise of care on that occasion"—citing a number of New Hampshire cases to the same effect.

This subject is quite fully discussed, with citation of numerous authorities, pro and con, by the Court of Appeals of New York in the case of Zucker v. Whitridge, 205 N. Y. 50, 98 N. E. 209, 41 L. R. A. (N. S.) 683, Ann. Cas. 1913D, 1250. In the trial of that case evidence had been introduced of the habitual exercise of caution on the part of the deceased killed by a street car at a crossing, as tending to prove freedom from contributory negligence at the time of the accident. The admission of the testimony was held prejudicial error, but the ruling was made on the ground that there were eyewitnesses of the occurrence and expressly withheld any opinion as to the admissibility of such testimony where there was no direct evidence on the subject.

The following cases are cited in the foregoing opinion as disapproving this class of evidence. Attention is called to this list of decisions as indicating how generally the question arose on testimony of casual and disconnected acts or upon evidence of general reputation of carelessness or incompetence not going to a specific act or circumstance:

> "In Wisconsin, to show that the person injured 'was an habitually careless man' (Propsom v. Leatham, 80 Wis. 608, 612, 50 N. W. 586, 587); in Pennsylvania, that the deceased 'had made a practice of jumping from the elevator while in motion' (Baker v. Irish, 172 Pa. 528, 531, 33 Atl. 558); in Connecticut, that the intestate 'was a careful and prudent driver' (Morris v. Easthaven, 41 Conn. 252); in Illinois, 'that the deceased was in the habit of jumping on trains' (Peoria & Pekin Co. v. Clayberg, 107 Ill. 644, 648); in Iowa, in a case where there was some evidence that the deceased was asleep in his buggy when he drove on the track, 'that he had been found asleep in his buggy on other occasions' (Dalton v. Chicago, R. I. & P. R. R. Co., 114 Iowa, 257, 259, 86 N. W. 272, 273); in Maine, 'that, in the opinion of those who knew the deceased well, he was a cautious and careful man,' no witness having seen the accident (Chase v. Maine Cent. R. R. Co., 77 Me. 62, 65, 52 Am. Rep. 744); in Massachusetts, specific instances of want of care in the engineer in his business of running trains within three months of the injury, before or after (Robinson v. Fitchburg & Worcester R. R. Co., 7 Gray, 92, 95); also 'previous specific acts of negligence on the part of defendant's engineer known to its superintendent' (Conners v. Morton, 160 Mass. 333, 335, 35 N. E. 860)."

We do not find enough in these authorities, or in the rule laid down in Towle v. Pacific Imp. Co., Cunningham v. L. A. Ry. Co., and Langford v. San Diego Elec. Ry. Co., cited in this opinion, to discredit the ruling in the Craven Case, supra, so far as it applied to the evidence tending to show a consistent uniformity of action along given lines indicating a fixed habit, and applied to the question as to whether some specific act involving the same trait was done or was not done in a certain manner.

The probative force of evidence of habit, though not passed upon as a rule of evidence (that question being expressly withheld), is recognized by Mr. Justice Shaw in the case of Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059. In that case the plaintiff was injured while riding as a passenger in a carriage which was run into by a street car. Evidence of the driver's habitual carelessness in crossing in front of moving cars, and of plaintiff's knowledge of his customary want of care, was held admissible as tending to show contributory negligence on the part of plaintiff in failing to keep a lookout or to warn the driver to watchfulness. This, of course, could only be upon the theory that plaintiff, having knowledge that the driver was careless in this particular matter, was bound in common prudence to anticipate the probability of a repetition of his careless conduct on this occasion. The rule admitting evidence of habit to rebut or support conflicting testimony of eyewitnesses, as adopted in this state in Craven v. Cent. Pac. R. R. Co., supra, is cited and approved by the Appellate Court of Indiana under a similar state of facts, in Pittsburg, etc., Ry. Co. v. McNeil (Ind. App.) 66 N. E. 777. To the same effect is Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848. The Supreme Court of New Hampshire, in the case of Parkinson v. N. & L. R. R. Co., 61 N. H. 416, says:

> "Although it is quite generally held elsewhere * * * that evidence of other specific instance of negligence on the part of either party is not competent, because raising a collateral issue, yet in this state a different rule prevails, and has become established in cases where the evidence is conflicting; and it is held to be competent to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question, on the ground that a person is more likely to do a thing in a particular way, as he is in the habit of doing * * * it."

Gillett's Indirect and Collateral Evidence, § 68, states:

> "The weight of authority favors the view that, where the direct evidence shows that an act was done or omitted, it is competent to prove that a custom existed prior to the time to do or not to do such an act, as such evidence legitimately tends to uphold the theory of one of the contending parties."

Other decisions upholding this character of evidence upon one ground or another are: State v. R. R., 52 N. H. 528; International & G. N. R. R. Co. v. Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; Shaber v. St. P., M. & M. Ry. Co., 28 Minn. 103, 9 N. W. 575; Saffer v. Dry Dock, etc., R. R. Co., 5 N. Y. Supp. 700;[1] Bower v. Chicago, etc., R. R. Co., 61 Wis. 457, 21 N. W. 536; Cleveland, etc., R. R. Co. v. Moss, 89 Ill. App. 1; Cox v. Chicago & N. W. Ry. Co., 92 Ill. App. 15; Mayer v. Milwaukee St. Ry. Co., 90 Wis. 522, 63 N. W. 1048; Meier v. Shrunk, 79 Iowa, 17, 44 N. W. 209.

Most of these cases involve habits of negligence, but, of course, habits of caution and prudence are of equal, if not greater, evidentiary weight. Prof. Wigmore, in his work on Evidence (volume 1, § 97), even questions if acts of negligence can be anything more than casual or occasional. Experience, however, will not support that theory. It may be said, however, that prudence and caution in matters involving exposure to danger may more readily become habitual from the incentive always present to follow the path of safety.

The main argument which seems to prevail with the authorities excluding habit evidence is the fact that it introduces into the trial collateral issues of fact of which the opposing party has had no notice. This condition, however, arises in numerous instances in nearly every trial on the introduction of probative facts, collateral in their nature, and of which the ultimate facts pleaded give no inkling.

We think the evidence excepted to in this case was properly admitted. The weight of this class of evidence, of course, depends upon the nature of the act and the fixity of the habit, but that is a question which can properly be left to the jury under proper instructions.

Men are accustomed to weighing, and acting upon, such evidence of conduct in their everyday affairs. Recognition of its force is seen in the adoption by the law of many presumptions based on common experience, such as the presumption that a letter properly deposited in the mails has reached its destination in due time, the presumption that the regular customs of business have been followed, and the express declaration of our Code of a presumption "that things have happened * * * according to the ordinary habits of life." Code Civ. Proc. § 1963, subd. 28.

It may be doubted if the jury in this case was seriously influenced in its verdict by evidence of decedent's habit of caution, but we have felt justified in devoting so much attention to the question because of the general uncertainty of the law in other jurisdictions and the apparent confusion as to the rule in California arising out of the suggested conflict between the Craven Case and other later decisions of this court herein cited to that point.

[2-4] There are only two grounds of error presented. The first, which we have already ruled upon, is the admissibility of the evidence as to decedent's habits of caution. The other is alleged error of the trial court in giving to the jury an instruction submitting an issue on the last clear chance.

Without passing upon the objection, raised for the first time on motion for a hearing in this court, to the sufficiency in form of the instruction given, to fully present the doctrine of the last clear chance, we are compelled to the conclusion that there was not sufficient evidence to justify submitting this instruction to the jury, and for this reason the judgment must be reversed.

This instruction may have governed the jury in arriving at a verdict for the plaintiff, and, in the absence of evidence to support it, must be held fatally prejudicial.

The jury may, under the evidence, have found the decedent guilty of contributory negligence. A verdict for plaintiff after a finding of such negligence could not be supported, excepting under the doctrine of the last clear chance. The rule is well settled in this state that in order to make the defendant liable, notwithstanding contributory negligence of the plaintiff, the defendant must not only be aware of the danger in time to avert it, but must also know or have reason to believe that the plaintiff is oblivious of the danger and is in a position where he cannot extricate himself from it. Arnold v. S. F. O. T. Rys., 175 Cal. 1, 164 Pac. 798; Basham v. So. Pac. Co., 176 Cal. 320, 168 Pac. 359; Young v. So. Pac. Co., 190 Pac. 36. The only evidence on this point is that of the engineer himself. He testifies that when he rounded the curve some 400 or 500 feet from the crossing he saw the heads of decedent's horses some 10 feet from the track. He immediately sounded the crossing whistle. He doubtless believed, and had a right to believe, that the driver would at once stop his team and not attempt to cross the track. As soon as he saw that the team was still approaching and the driver not looking toward him, but in an opposite direction, he put on the emergency brakes with full force, and used every means shown by the evidence to be available to stop his train. He was justified in assuming that at the distance from which he sounded the warning, and with the headlight and noise of the approaching train, the driver would be warned of his danger. The team was moving at a walk, and, under ordinary circumstances and so far as appeared here, could have been pulled up within a space of 2 or 3 feet. Even though the train had been running at a lawful rate of speed, it would have been a new act of contributory negligence for the driver to attempt to cross ahead of it after the warning was sounded.

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[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 53 Hun, 629.

The remarks of Mr. Justice Shaw in his opinion in Basham v. So. Pac. Co., supra, apply aptly to the case before us. Commenting on the last clear chance doctrine and the fact that the train whistle was sounding, the bell ringing, and the noise of the moving train considerable, he says:

> "The horses were in a slow walk. The lines were in Coffey's hands. The horses were under his control. He could have come to a standstill in a second. Under all these circumstances it would be extremely unreasonable for any one to suppose that he was unaware of the approaching train, and did not intend to stop before reaching the track, as he could easily have done, and as is the frequent custom. When the fireman did, nevertheless, begin to entertain a fear that Coffey was inattentive, he at once gave the urgent order to the engineer to stop. It cannot be said either that he did realize the danger sooner, or that, in reason, with his knowledge, he had cause to realize it sooner. Hence the last clear chance doctrine never came into operation."

Such was the situation in this case.

The judgment is reversed.

We concur: ANGELOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SHAW, J.

(184 Cal. 674)

In re MILLER'S ESTATE. (S. F. 9477.)

(Supreme Court of California. Jan. 18, 1921.)

1. Taxation 🔑895(7)—Inheritance tax based on net clear value of beneficial interest transferred.

The only provision for deductions in the Inheritance Tax Act is for debts, but the plain purpose of the act was that the clear market value of the beneficial interest transferred should be its net clear value, so that the expenses of the administration should be deducted.

2. Taxation 🔑895(7)—Federal tax on estate should be deducted before assessing inheritance tax.

The California inheritance tax is a succession tax on a beneficial interest of each heir, computed on the net clear value, and chargeable against it, while the federal tax under Revenue Act, tit. 2 (U. S. Comp. St. §§ 6336½a–6336½m), is not a succession tax, but a tax upon the estate left by decedent, so that the federal tax should be deducted before determining the state tax.

3. Taxation 🔑895(7)—Inheritance tax on corporate stock by state of corporation's domicile, deducted before assessing an assessment in California.

The Inheritance Tax Law of Nevada provides a succession tax on what the transferee receives, and where stock in a Nevada corporation is inherited by one in this state, the Nevada tax should be deducted from the amount of the inheritance before computing our succession tax.

4. Taxation 🔑895(7) — Federal and other state acts held enforceable though passed after gift inter vivos.

In view of Inheritance Tax Act, § 5, providing for appraisal immediately after death of decedent and according to market value in the manner provided by section 15, where a gift was made inter vivos in contemplation of death prior to the going into effect of the federal and Nevada inheritance tax laws, but the grantor died after their going into effect, taxes under them must be deducted to determine the succession taxable here.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Henry Miller, deceased. From an order and judgment determining and fixing inheritance taxes, the State of California and the State Controller appeal. Affirmed.

See, also, 175 Pac. 641.

U. S. Webb and Matthew Brady, both of San Francisco, Robert A. Waring, of Sacramento, and H. C. Lucas and Hartley F. Peart, both of San Francisco, for appellants.

Edward F. Treadwell and Forrest A. Cobb, both of San Francisco, for respondent.

OLNEY, J. This is an appeal by the state and the state controller, in whose charge is the matter of collecting inheritance taxes, from a portion of a common order and judgment entered in three different proceedings determining and fixing the inheritance taxes payable upon the death of one Henry Miller. Miller was a resident of California, and died, testate, October 14, 1916. On April 17, 1913, he had executed a deed of trust to Nellie Miller Nickel and J. Leroy Nickel, assigning to them as trustees approximately 120,000 shares of the capital stock of Miller and Lux Company, a Nevada corporation. It is conceded that the transfer was made in contemplation of death and is subject to tax under our Inheritance Tax Law in effect at the time of transfer. The controversy is solely as to the amount of the tax.

Immediately prior to the transfer, but not going into effect until afterwards, the state of Nevada adopted an Inheritance Tax Law (Statutes of Nevada for 1913, p. 411), and thereafter, and prior to Miller's death, the United States adopted the existing federal tax act. Revenue Act of 1916, tit. 2, 39 U. S. Statutes at Large, pp. 777–780 (U. S. Comp. St. §§ 6336½a–6336½m). Under these laws, the United States makes claim for taxes in the amount of nearly $4,000,000 on the transfer mentioned, and the state of Nevada makes claim for some $48,000. The validity of both these claims is in contest and as yet undetermined. Such being the situation, the trustees named, when it came to fixing the inheritance taxes on the transfer under the California law, claimed that in case the claims of the United States and Nevada should be finally upheld, the amount of those claims as established should be deducted from the value of the stock transferred in order to obtain the value upon which the California tax should be computed. The claim of the state and the state controller, on the other hand, was that no such deduction should be made. The lower court sustained the contention of the trustees, and the order or judgment appealed from provides, among other things, for such deduction to the extent that the validity of the claims of the United States and Nevada may be finally established. It is from this portion of the order and judgment that the appeal is taken.

We are, of course, not concerned here with the validity of the claims of the United States and Nevada. We are concerned only with the result upon the amount of tax due the state of California in case those claims are valid and finally so established. For the purposes of discussion, then, we may assume their validity. It will also simplify somewhat the discussion of the primary question involved if we assume that it is not material that the transfer was made prior to Miller's death and prior to the going into effect of both the Nevada and the United States tax acts. Our discussion will therefore for the time being be on the basis of a transfer by inheritance or will occurring upon Miller's death. It should also be noted that shortly after Miller's death the California law was amended so as to provide expressly that no deduction should be made because of the federal tax. This amendment, however, very plainly cannot affect the question as to what was the law before its adoption, and that question must be determined as if the amendment had not been made.

[1] The California act (St. 1911, p. 713) contains no provision as to how the principal upon which the tax is to be computed is to be ascertained other than that it is designated as the "clear market value" of the "beneficial interest" transferred, and that there are provisions which plainly imply that the decedent's debts and the commissions of executors are to be deducted to ascertain this "clear market value." In this connection it should be noted that this designation of the principal upon which the tax is to be computed is one common to the inheritance tax acts of many other states, and in particular is the designation in the acts under consideration, in most of the decisions from other states which we subsequently cite. But while this is the designation in our act, and the only provisions for deductions are for the deduction of debts and executors' commissions, the plain purpose of the act was that the clear market value of the beneficial interest transferred should be its net clear value. This has been the construction given it in actual administration and by the courts (Estate of Kennedy, 157 Cal. 517, 108 Pac. 280, 29 L. R. A. (N. S.) 428; Estate of Hite, 159 Cal. 392, 113 Pac. 1072, 32 L. R. A. (N. S.) 1167, Ann. Cas. 1912C, 1014), and the deduction of expenses of administration, sums allowed by way of family allowance, and the value of property set aside as a family homestead, as well as of debts, has been sanctioned and has been commonly made. The primary question, or, rather, questions, in the present case are therefore: (1) In determining the net clear value of the beneficial interest transferred, should the federal estate tax be deducted? and (2) for the same purpose should the Nevada inheritance tax on the stock of a Nevada corporation owned by a resident of this state at the time of his death be also deducted? These two questions are not the same, and we shall consider first that concerning the federal tax.

[2] The solution is found in the different natures of the two taxes, the California tax and the federal tax. The California tax is a succession tax, a tax on the beneficial interest of each beneficiary or heir. If there be more than one beneficiary or heir there is a separate tax on the interest of each, computed on its net clear value, and chargeable against it. The provisions of the law are substantially the same as those of the previous inheritance tax act of 1905 (Stats. of 1905, p. 341), which was under consideration in Estate of

Kennedy, previously referred to. The question there presented was whether a homestead set apart for the widow of the testator out of his estate in the course of probate should be deducted in order to determine the amount upon which she, as residuary legatee, should pay the inheritance tax. It was held that it should be deducted because of the nature of the tax, the court saying at page 526 of 157 Cal., at page 283 of 108 Pac. (29 L. R. A. [N. S.] 428):

> "The provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir. It would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent, where the very property to which he is so held to succeed is lawfully diverted by the probate court to other purposes, and never can be distributed to him."

The federal tax under the act of 1916, on the other hand, is not a succession tax, but an estate tax, not a tax on what comes to the beneficiaries or heirs, but upon what is left by the decedent. In this respect it differs from the legacy tax imposed by the United States War Revenue Act of 1898 (30 Stat. 448). The act of 1916 entitles the tax an "estate tax," and in terms imposes it upon the net estate of the decedent as a unit. It is not apportioned among the various transferees, and bears no relation to the separate amounts which they are to receive. The distinction between a succession tax and an estate tax is a recognized distinction, and, so far as we are aware, it has been held without exception that the federal tax under the act of 1916 is of the latter character. It is not possible, in our judgment, to take any other reasonable view of it.

The nature of the federal tax is discussed in Re Roebling's Estate, 89 N. J. Eq. 163, and it is said at page 166 (104 Atl. 295, 296):

> "To be more precise, it is imposed upon the estate, transferred by death, and not upon the succession resulting from death. The distinction is well defined and recognized in countries where both kinds of tax exist. The federal tax resembles the probate duty of the act of 1862, chapter 119 (12 U. S. Stat. p. 483), which was payable by the executor out of the estate, while the legacy duty therein provided for (at page 485) was payable by the beneficiaries. The tax occupies the same field of death duty as does the 'Estate Tax' in England. By the Finance Act of 1894 an estate duty is levied upon the principal value of all property, real or personal, which passes on the death of a person and is imposed upon the estate and is payable by the executor as an administration expense. In addition to this tax, there is also a legacy tax, and a succession duty upon the realty, payable by the recipients. Speaking of the death duty, Mr. Hanson in his opening chapter (Hans. D. D. [6th Ed.]) says: 'The new duty imposed by the Finance Act 1894, and called estate duty, supersedes probate duty; but the key to the construction of the Finance Act 1894 and the amending act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the property in respect of which an interest ceased by reason of the death. Unless this principle is clearly kept in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty, which have no real connection with the subject.'"

See, also, to the same effect, Corbin v. Townshend, 92 Conn. 501, 103 Atl. 647; Knight's Estate, 261 Pa. 537, 104 Atl. 765; People v. Pasfield, 284 Ill. 450, 120 N. E. 286; State v. Probate Court, 139 Minn. 210, 166 N. W. 125; People v. Bemis (Colo.) 189 Pac. 32; State v. First Calumet, etc., Co. (Ind. App.) 125 N. E. 200, and Northern Trust Co. v. Lederer (D. C.) 257 Fed. 812, affirmed in Lederer v. Northern Trust Co. (C. C. A.) 262 Fed. 52.

The state tax, then, being a succession tax, a tax upon what the transferee receives, and the federal tax being an estate tax, a tax upon what the decedent leaves, there would seem to be no escape from the conclusion that the federal tax must be deducted in order to determine the amount upon which the state tax should be levied, since it is plain that what the transferee receives is only the portion of what the decedent left which remains after the federal tax is taken. We might apply here the language from Estate of Kennedy already quoted that—

> "It would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent, where the very property to which he is so held to succeed is lawfully diverted by the probate court [in this case by operation of law] to other purposes and never can be distributed to him."

We might also say in the language of People v. Pasfield, supra, 284 Ill. 454, 120 N. E. 288:

> "The legatees and distributees cannot in any sense be held to have 'received' any part of the duty that is paid to the government by the executor or trustee or administrator as such estate tax, and there is no language in the act that will permit a construction that the duty is levied upon each share of the legatees or distributees of the decedent, as was given the federal act of 1898 by the court in Knowlton v. Moore, supra. The federal Estate Tax Act of September 8, 1916, necessarily operated to lessen, by the amount of such tax, the clear value of the beneficial interest which passed to the heirs and legatees in the instant case, and prevented their receiving any part of that tax, and the ruling of the county court that

the same should be deducted before computing the state tax was correct."

The identical question presented here as to whether the federal tax should or should not be deducted in computing a succession tax has been presented in a number of other jurisdictions, and the overwhelming weight of authority is that it should be deducted. It was so held in all of the cases we have cited above as to the nature of the federal tax. The discussion of the question by many of them is full and convincing, and makes unnecessary here anything more than the rather brief discussion we have given to it.

We are cited to but three authorities as holding to the contrary. While one of them is not in point, the other two are, and it may not be amiss as to the latter to point out wherein we think they are in error. The case to which we have referred as not in point is In re Sanford's Estate (Iowa) 175 N. W. 506. It is not in point, for the reason that the Iowa statute, unlike ours, particularly specifies what should be deducted before computing the tax, and that nothing else should be deducted and the federal tax did not come within any of the deductions authorized. It is upon this peculiarity of the statute that the decision goes.

The two cases referred to which are in point are Estate of Sherman, 179 App. Div. 497, 166 N. Y. Supp. 19, affirmed 222 N. Y. 540, 118 N. E. 1078, and Estate of Bierstadt, 178 App. Div. 836, 166 N. Y. Supp. 168, which may be considered as one, and In re Week's Estate, 169 Wis. 316, 172 N. W. 732. The New York case or cases go apparently upon the ground that the federal tax is unconstitutional, and upon the authority of Estate of Gihon, 169 N. Y. 443, 62 N. E. 561. The question as to the constitutionality of the federal tax is not presented here, and, as we have said, its validity must be assumed. As to the authority of the Estate of Gihon, the two later New York decisions under discussion fail to recognize the difference between the federal legacy tax under the law of 1898, which was involved in the Estate of Gihon, and the federal estate tax under the law of 1916, which was involved in them. The legacy tax of 1898 was a succession tax, as its name would indicate, and it is upon this fact that the decision in Estate of Gihon is rested. It is said:

> "In our judgment the vital error of this argument [the argument for the deduction of the federal legacy tax] lies in the assumption that the 'taxes are primarily payable out of the estate.' The federal tax is of exactly the same nature as the state tax; a tax not on property, but on succession; that is to say, a tax on the legatee for the privilege of succeeding to the property."

The decision, therefore, cannot be considered as authority for not deducting an estate tax, and affords no justification for the later cases in so holding. On the contrary, the implication from it is that such a tax should be deducted.

As to the Wisconsin case, it proceeds solely upon the proposition that the statute makes no express provision for any deduction whatever. It recognizes the fact that this ground would forbid a deduction of any sort from the gross value of the estate left by the decedent, even a deduction of expenses of administration, and yet it also recognizes that it was the established practice in Wisconsin to make a deduction for expenses of administration, and by expressly refusing to disturb that practice, confirms it. We cannot follow it to such inconsistent and irreconcilable results. It is the settled law of this state that the inheritance tax is imposed upon the net clear market value of what the transferee receives, and that to ascertain this the value of what he does not receive, in contemplation of law, must be deducted from the value of what the decedent left. The application of this principle plainly requires the deduction of the federal estate tax.

[3] As to the deduction of the Nevada tax, the question is quite different, and its correct answer by no means so certain. Very little attention is paid to it by counsel on either side, undoubtedly because of the small amount of tax claimed as compared with the amount of tax claimed by the United States. But the Nevada tax, like our own, is a succession tax, a tax on what the transferee receives, and it is quite permissible to have two taxes on the same thing, and ordinarily where such taxes are levied neither is to be deducted in computing the other.

In support of their position, counsel for the trustees advance the reasoning and authority of Corbin v. Townshend, 92 Conn. 501, 103 Atl. 647, and Van Beil's Estate, 257 Pa. 155, 101 Atl. 316. That reasoning is that the tax of the foreign state "must be paid before the executor or administrator can reduce the [foreign] bonds or stock to possession. These cannot be transferred until the [foreign] state tax is paid, and the value of the security so transferred is reduced by the amount of the tax which the executor or administrator has had to pay." Corbin v. Townshend, supra. This reasoning is hardly sufficient. The stocks and bonds cannot, of course, be transferred until the tax is paid and the administrator or executor must pay it. But this is true of the tax by the state of the decedent's domicile as well. The point is that, while each tax must be paid and paid by the administrator or executor, both are a tax on the same thing, the interest of the transferee, and both are chargeable against it and finally paid out of it. If the two taxes were levied under concurrent or equal authority, we would have little hesitation in holding that, without express provision to the contrary in the statute, neither should be deducted in computing the other. Such was the situation and ruling in Estate of Gihon, supra, where the two taxes involved were the federal legacy tax under the law of 1898 and the state succession tax. It is manifest that in such a case both the federal government and the state have equal and concurrent authority, and no reason appears why the tax of one should be deducted in computing the tax of the other. Hooper v. Shaw, 176 Mass. 190, 57 N. E. 361, holds to the contrary, but we fail to appreciate the reasons it advances for so doing.

But there is, we believe, a difference between two succession taxes, one federal and one state, and two succession taxes, both state, one imposed by the state having actual control over the subject-matter of the transfer, and the other imposed by the state of the domicile of the decedent. The two states do not have equal and concurrent authority in such a case. The authority of the state having actual control of the subject-matter, either because it is personal property within its limits or because, as in this case, it is the stock of one of its corporations, is, of necessity, the superior. The state of the decedent's domicile can deal with the property only after the requirements of the state of its actual situs are satisfied. Putting it another way and concretely, the stock of Henry Miller in the Nevada corporation comes into his California estate, there to be administered upon and taxed, only after the requirements of Nevada are complied with, and the only thing over which California secures authority is what remains after Nevada has taken its tax. It would seem reasonable to say, under such circumstances, that so far as California is concerned, the value of the interest transferred by death or in contemplation of death is the value of the corporate stock after the Nevada tax had been paid. This, we believe, is the justification of Corbin v. Townshend and Van Beil's Estate, which hold that the foreign tax should be deducted. It is a reason hinted at in both, and may in fact be the thought which underlies them, too briefly expressed to be entirely clear to us. The Matter of Penfold, 216 N. Y. 171, 110 N. E. 499, is a decision to the contrary, but it proceeds solely on the authority of Estate of Gihon, which, because of the distinction stated, we do not think in point. At any rate, for the reasons given we are ready to follow the authority of Corbin v. Townshend and Van Beil's Estate, and to hold in this case that the Nevada tax should be deducted.

[4] There remains only the question as to whether or not the conclusion so reached as to both the federal and the Nevada tax is affected by the circumstances that the particular transfer under consideration was not made by death, but inter vivos and in contemplation of death only, and that when the transfer was made neither the federal nor the Nevada act was in force. It is the settled law in this state, as well as in other jurisdictions, that when a transfer is made inter vivos its liability for tax is determined by the law then in effect, even though the tax be not payable until the death of the transferor. Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961; Estate of Felton, 176 Cal. 663, 169 Pac. 392; Nickel v. State, 179 Cal. 126, 175 Pac. 641.

With this proposition as a premise, counsel for the state argue that upon the making of the transfer here involved there vested in the state the right to the tax imposed by the statute then in force, and that this right cannot be divested by a subsequent statute of another jurisdiction. This we may concede; but, conceding it, the question still remains as to the method of computing the amount of the tax, the right to which so vested. This is the real question in the case. It is evident that, if the tax is by our statute to be computed on the value of the property as of the date of transfer, then to permit this value to be reduced by the amount of taxes imposed subsequently by other sovereignties would be to reduce the tax from what our statute provides shall be collected. On the other hand, if our statute provides that the valuation is to be made as of the date of death of the transferor, then the valuation which our own statute calls for is one that must take into account valid burdens then existing upon the beneficial interests transferred, and which have the effect of taking from the beneficiaries a portion of those interests, and it is wholly immaterial that such burdens were or were not imposed at or prior to the time of transfer. They exist at the time of death, when the valuation is to be made, and reduce the value as of that time, and it is this value which our statute calls for. The question, therefore, presents itself as to whether under our own statute the tax in this case is to be computed upon the value of the beneficial interests transferred as of the date of transfer, or as of the date of the death of Miller, the transferor.

When the dates of transfer and death are the same—that is, in the usual case where the transfer is by death—the question does not arise, and the statute plainly contemplates a valuation as of the joint date of transfer and death. There is no declaration in the statute as to what shall be the rule when the dates are not the same; i. e., when a taxable transfer is made prior to the death of the transferor. The statute, however, does contain a provision which closely approaches a declaration that the valuation of future, contingent, or limited estates, created by the transfer, shall be as of the date of death. Such estates were created by the transfer here involved. The beneficial interests under the trust were a life estate in Miller, with remainder over to his daughter and her husband for their lives, and to the survivor of them for his or her life, with remainder over in fee. The provision of the statute referred to is the portion of section 5 reading (the italics being ours):

> "When any *grant, gift*, legacy, devise or succession upon which a tax is imposed by section one of this act shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised *immediately after the death of the decedent*, and the market value thereof determined, in the manner provided in section fifteen of this act. * * *" St. 1911, p. 713.

This provision is plainly one for the valuation of future, contingent, or limited estates. It appropriately requires an appraisal, both of the property as a whole out of which such estates are carved, and of the particular estates into which it is carved. Grammatically, the "market value thereof," as those words are used, would refer to the market value of the property as a whole, but a consideration of the purpose of the provision and of the character of the estates with which it is dealing makes it evident that it is the market values of the particular estates which are to be determined in the manner provided by section 15. It is these values upon which the tax must be computed, and the method of their ascertainment is what the section is seeking to provide for. Section 15 in turn appropriately provides that the value of future, contingent, or limited estates is to be determined in accordance with the mortality tables.

The provision of section 5, particularly significant upon the point under discussion, is that the appraisal in such cases, whether the taxable transfer be by death or inter vivos, be made "immediately after the death of the decedent." This, of course, is literally a provision as to the time of actually making the appraisal, not as to the time as of which it shall be made. It is also true that it is possible, when a transfer has been made preceding the death of the transferor, to appraise estates dependent upon his death as of the date of transfer and not as of the date of actual death although that death has already taken place. For example, in this case it would be possible to appraise the life estate of Miller's daughter and her husband, and of the subsequent remainder in fee, by going back to the date of transfer, disregarding the actual date of Miller's death, and taking in place of it the date of his probable death, according to the mortality tables, and upon this basis computing the value of the life estate which he provided for himself, and of the life estates and the remainder which were to follow. But such method would not be a natural or reasonable one. At the time when the statute requires the appraisal to be made, the death upon which the estates to be valued depend has actually occurred, and the natural and reasonable method of computing their value would be to take the actual date of death, rather than one determined by mortality tables, which might be very different, and the use of which would produce a correspondingly different result from the existing and known actuality. We think it fairly certain, therefore, that when the statute provides that in such cases as the present the appraisal is to be made immediately after the death of the transferor, it contemplates and requires that the appraisal be on the basis of the actual date of his death, and therefore, of necessity, as of that date.

We should, perhaps, say that the conclusion so reached, based, as it is, on the particular provisions of section 5 as to the appraisal of future, contingent, or limited estates, does not involve a determination of the question as to whether it is the date of transfer or the date of death of the transferor as of which the appraisement should be made in cases of taxable transfers inter vivos which do not create estates of that particular character. That question is not involved here, and should not be determined. It is worthy of note, however, that in a case recently argued before us, where the question is involved, the position of the state, contrary to that which it must necessarily take here, was that the property was to be valued as of the date of death of the transferor, and also that it was conceded on behalf of the transferee, who was contending that the valuation there should be as of the date of transfer, that if the estates created had been future, limited, or contingent estates, section 5 would require their appraisal as of the date of the death of the transferor.

Since, then, the appraisal in this case must be made under our statute as of the date of Miller's death, and at that time the federal and Nevada statutes had gone into effect, and the net clear value of the beneficial interests transferred had been reduced by the amounts of any valid taxes under those statutes, it is this reduced value which our statute prescribes shall be taken as the basis of computation. It follows that it is not material that the transfer was made before the going into effect of the Federal and Nevada statutes, and that the conclusion reached upon a discussion of the case as one of a transfer by death remains unaffected.

Judgment and order affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

(184 Cal. 764)

PARSONS et al. v. EASTON. (S. F. 8831.)

(Supreme Court of California. Jan. 27, 1921. Rehearing Denied Feb. 26, 1921.)

1. Carriers 🔑320(23)—Whether elevator was operated with door open held for jury.

In action for death of elevator passenger, question of whether elevator was operated with door opening into elevator shaft open *held* for the jury.

2. Evidence 🔑587—Direct testimony may be contradicted by circumstantial evidence.

Direct testimony may be contradicted by circumstantial evidence, and the contradiction may be so strong that it will justify a disbelief of the testimony.

3. Carriers 🔑295(2) Operation of elevator with door open negligence.

The operation of an elevator with the doors opening into it open while passing a floor is negligence.

4. Appeal and error 🔑1002—Verdict on conflicting evidence not disturbed.

Verdict on conflicting evidence cannot be disturbed.

5. Appeal and error 🔑837(11)—Incompetent evidence admitted without objection considered on appeal.

Technically incompetent evidence admitted without objection will be given as much weight by appellate court passing on the sufficiency of the evidence as if it were competent.

6. Death 🔑82—Damages for suffering of deceased child not recoverable.

In parents' action for death of son under Code Civ. Proc. § 377, only such damages as have been suffered by the parent can be recovered; no damages being allowed for the pain or anguish inflicted on the child.

7. Death 🔑86(1)—Expectancy of life considered in fixing damages to parents.

In parents' action for the death of a son under Code Civ. Proc. § 377, their shorter expectancy of life is taken into consideration in awarding damages for the loss of benefits which might accrue during their lives.

8. Death 🔑58(2) — Son's benefit to parents presumed to continue during mother's survivorship of father.

In parents' action for son's death, where the mother will survive the father according to her expectancy, it will be presumed, in the absence of anything to the contrary, that the benefit to the parents from the son would have continued during her survivorship the same as during the lives of both of them.

9. Death 🔑88—Damages recoverable for loss of society having pecuniary value.

In parents' action for son's death under Code Civ. Proc. § 377, damages are recoverable for deprivation of the society, comfort, and protection of the deceased son only where the circumstances show a reasonable probability that such society, comfort, and protection had a pecuniary value.

10. Death 🔑99(5)—$6,000 damages for death of mentally defective adult son held excessive.

$6,000 verdict to 69 year old father and 60 year old mother for death of 27 year old son mentally defective and earning only $360 a year *held* excessive.

In Bank.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by B. W. Parsons and another against Ansell M. Easton. Judgment for plaintiffs, and defendant appeals. Reversed.

Watt, Miller, Thornton & Watt, of San Francisco, for appellant.

Theodore A. Bell, of San Francisco, for respondents.

SHAW, J. This is an appeal by the defendant from a judgment in favor of the plaintiffs for the sum of $6,000.

The action was instituted by the plaintiffs, as father and mother and heirs at law of one Jay Parsons, to recover damages from the defendant on account of the death of said Jay Parsons, which, it is alleged, was the result of defendant's negligence. The defendant assigns error in denying his motion for a nonsuit, and he also claims that the evidence is insufficient to sustain the allegation that the death of Jay Parsons was caused by the defendant's negligence, and that the damages allowed by the jury were excessive. The question presented on the motion for nonsuit is not substantially different from that presented by the assignment of the insufficiency of the evidence, and the two propositions may be considered together.

The defendant was the owner of an office building in Oakland and maintained and operated therein a passenger elevator. The death of the deceased was caused by injuries received by him while a passenger in the elevator.

The floor of the elevator cage on the inside was 5 feet and 6 inches in length and 4 feet and 9½ inches in width. The cage had no door, but for ingress and egress an opening was provided at the front on the left-hand side going out. This opening was 3 feet wide and about 7 feet high. The cage ran up and down in a shaft composed of vertical iron bars five-sixteenths of an inch square, set 2½ inches apart. On each floor of the building there was a sliding door in the front of the shaft, opening opposite to the corresponding opening in the cage. This door was 2 feet 7½ inches wide and 7 feet 5 inches high. It was moved on wheels running upon an iron rail set on edge, 2 inches wide and three-eighths of an inch thick, extending entirely across the shaft. The distance between this rail and the cage as it passed was only 2 inches. Seven inches above this carriage rail was another rail or bar extending across the shaft, the distance from which to the passing cage was 2½ inches. Immediately above this bar there was a small steel air cylinder 18 inches long, parallel to the bar. It was used to open and close the door by air pressure. Above the air cylinder, for a distance of 3 feet, the space between the vertical bars of the shaft and the passing cage was 5½ inches. The air cylinder projected so far into the shaft that it left only one inch between it and the cage as it passed. The operator in running the elevator stood at the right-hand front part of the cage next to the end thereof. The full speed of the elevator was 550 feet per minute.

On the occasion of the accident Parsons and one other person entered the elevator. The other person got out at the second floor. Parsons was bound for the sixth floor, and was standing with his back against the end of the cage and about 2 feet from the front thereof until the third floor was reached. At that instant, according to the testimony of the operator, the only eyewitness, Parsons fell over to his left toward the front of the cage, turning his face to the front as he fell, bringing his right arm immediately under the projecting air cylinder so that it was caught there by the floor of the rapidly ascending cage. Upon seeing him fall, the operator immediately moved the lever to stop the cage, and it was stopped 3 feet above the door and just as the floor of the cage reached the bottom of the fourth floor. No negligence is charged on account of there not being a quicker stop. The operator immediately called the engineer of the building and with his assistance extricated Parsons. His body was wedged at or immediately above the hips between the floor of the cage, the floor above, and the iron bars of the shaft. His head, arms, and trunk were hanging down in the elevator shaft below the cage floor with the face toward the rear wall of the shaft. His legs and feet were inside the cage lying over on the floor. The pressure of the cage against the bars of the shaft or some of the irons connected therewith had ruptured the ascending colon and severely bruised the body immediately above the hips, from which injuries Parsons died a few hours later. The operator testified that the third floor door into the shaft was closed as he passed it. The engineer testified that it was closed when he arrived on the scene. There was no other direct evidence on that point, and there is no evidence tending to show that the motion of the cage or anything done in its operation caused Parsons to fall.

Relying on the testimony that the door into the elevator shaft was closed at the time, the defendant contends, in accordance with the testimony of the operator, that by reason of the fall of Parsons toward the front of the cage his head, shoulders, and body were drawn into the 5½-inch space between the cage floor and shaft bars above the door after the cage floor had reached that space and while the cage was traveling the remaining 3 feet before it was stopped, and that the body was crushed immediately above the hips, as above described, by the pressure. As the fall, if such it was, was not brought about by the operation of the elevator, the result, upon this theory, would be that the negligence of the defendant was not proven to be the cause of the injury.

[1] The attendant circumstances appearing in the evidence are somewhat inconsistent with this theory, and they tend to show that the elevator door was open at that floor, and that that fact caused the injury. If the head and upper part of the body did not enter the space between the cage floor and the sides of the shaft until the cage floor reached the 5½-inch space above the cross rails at the top of the door, it is extremely improbable that there would be no injury of any consequence to the head or any part of the body except at and just above the hips and no crushing or rupture of the internal organs except the ascending colon, and no abrasions or contusions of the skin or flesh at any other part of the body. Yet these facts were shown by the evidence. The injuries at and immediately above the hips were very great. There must have been much greater pressure at that point than upon any part of the body above them. Yet, upon the theory of the defendant, the head and upper parts of the body must have passed first into the narrow space between the shaft and the cage floor, and the part of the body which received the injuries was drawn in afterwards. As the shoulders and chest of a normal man would have been practically as large as the portion at the small of the back and immediately above the hips, it is reasonable to believe that the pressure on the upper parts would have been enough to make perceptible lacerations of the skin, bruises, and contusions upon the shoulders and chest. If the door of the shaft opening on to the third floor was open at the time, the condition of the body is more easily explained. If Parsons, seeing it open, had impulsively thrown himself forward to get out, under the impression that it was his floor, or had fallen from some other cause toward the front of the cage at that point, it is entirely reasonable to suppose that the upper part of his body might have passed through the opening just far enough to have been caught at the hips by the top of the door, where there is a space of only 2 inches between the floor of the cage and the iron carriage rail which there extended across the shaft. This would have produced great pressure at that point and would have caused the rupture and bruises described as appearing at that part of the body. This pressure would have been relieved as soon as the floor of the cage had passed this rail and the other cross rail 7 inches above it so that the

upper parts of the body coming, as they would in that event, into the wider space immediately above these cross rails, would hang free in the shaft below and would sustain comparatively little injury. It is true that there is evidence indicating that the injury may have been caused, just as the elevator was stopped, by the jamming of the body against the projecting lower edge of the fourth floor. But it was for the jury to determine between the two theories, since both were reasonable deductions from the circumstances.

[2-4] Direct testimony may be contradicted by circumstantial evidence, and the contradiction may be so strong that it will justify a disbelief of the testimony. We think that in the present case the circumstances contradictory of the testimony as to the door being closed and as to the manner of the accident are sufficient to justify the jury in rejecting that testimony and adopting the theory indicated by the circumstances above stated. The operation of an elevator with the doors opening into it open while passing a floor is clearly negligence. Consequently we cannot overturn the verdict on the ground that the evidence does not show that the injury was caused by the negligence of the defendant.

[5] The plaintiffs testified that shortly before his death the son, in telling his mother how the accident happened, said that he "thought he was there before he got there" and started to get off. This is corroborative of the theory that the door may have been open. Although this evidence was technically incompetent, it was admitted without objection. It must therefore be given as much weight in this court, in reviewing the question of the sufficiency of the evidence, as if it were competent. Janson v. Brooks, 29 Cal. 223; Curiac v. Packard, 29 Cal. 197; McCloud v. O'Neall, 16 Cal. 397; Williams v. Hawley, 144 Cal. 102, 77 Pac. 762. The plea of contributory negligence did not aver the attempt to get off the elevator at the wrong floor as a part of such negligence, but limited it to the act of falling toward the front of the cage.

[6] The next question is in respect of the claim that the damages are excessive. Section 377 of the Code of Civil Procedure provides that, in an action by heirs for damages arising from the death of a person not a minor, "such damages may be given as under all the circumstances of the case may be just." The present action is brought under this section. The rules upon the subject of the measure of damages in such cases are as follows:

> "In actions by a parent, either for the death or the injury of a child, the damages to be allowed are those, and those only, which have been, or may be, suffered by the parent. No damages can be given in such an action for pain or anguish inflicted on the child, or for any pecuniary injury personal to such child. * * * The damages are limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given from the death or injury of the victim." Bond v. United Railroads, 159 Cal. 277, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50.
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> "This pecuniary loss may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances of the particular case, it could be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have been a moral obligation only." Sneed v. Marysville Gas, etc., Co., 149 Cal. 710, 87 Pac. 379.

In 17 Corpus Juris, 1331, the rule is set forth more in detail as follows:

> "When the action is by a parent for the death of an adult son, substantial damages are recoverable only by showing that the deceased had been of actual pecuniary benefit to his parent, or that such benefit might be reasonably expected by the continuance of his life, the reasonable character of such expectation to appear from the facts in evidence, such as for instance the age of deceased, his wages, habits as to economy, and amount of help given by deceased to his parent."

[7] It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents. Id.; Redfield v. Oakland, etc., Co., 110 Cal. 287, 42 Pac. 822, 1063.

The facts relating to this subject are as follows: Jay Parsons, the deceased, was about 27½ years of age at the time of his death. When about 17 years old he became insane, and on September 6, 1907, he was committed to the Napa State Hospital for the Insane. Thereafter he was confined in said hospital for the following periods: From September 6, 1907, to March 1, 1908; from November 13, 1909, to February 6, 1912; from April 23, 1912, to June 12, 1912; from August 5, 1912, to April 1, 1913; from September 22, 1915, to June 21, 1917, less than 3 months prior to his death. During his absence after April 1, 1913, he was discharged from the hospital, on July 21, 1915, but not as cured, and he was recommitted thereto on September 22, 1915. He was not discharged on June 21, 1917, but was allowed to go on leave of absence. Shortly afterward he obtained work as messenger for the Postal Telegraph Company and remained in its service until his death, September 17, 1917, earning about $30 a month thereby. During this period he lived with his parents and occasionally contributed small sums of money to the support of the family. His mother testified that she was "lenient with him"; that "whatever he gave" to her was satisfactory; that "he gave me just what I wanted"; that there was no regular sum paid; and that the money he gave was not asked for by her, but was offered by him. There was no evidence as to the amount of any payment nor as to the total amount, nor of any previous contributions by him to his parents. He had only $10 in his possession at the time of his death. When about 5 years old his left leg became diseased in some manner, and he was kept in a hospital for 5 or 6 months for treatment thereof. The leg shrunk in size and it never recovered. The physician at the Napa Hospital who examined him on his recommitment thereto in September, 1915, testified that at that time the circumference of the left thigh in the upper third was 9 inches, while of the right thigh at the same point was 16 inches, and that of the left calf 6 inches while that of the right calf was 11 inches, and that the left leg was 2½ inches shorter than the right. He was, however, able to walk without difficulty and did not limp so as to be especially noticeable. Upon that examination he was not found to be insane, but was found to be mentally defective or "inferior." He was of a kind and affectionate disposition and well disposed toward his parents. His father testified that when he was out of the hospital he would take trips to New Orleans, St. Louis, Denver, Oregon, and different parts of the country and would sometimes be away for 2 years at a time. As will be noted from the hospital record, he was never out of the hospital as long as 2 years except between the dates of April 1, 1913, and September 22, 1915. The father also testified that when the son was away from home he would write to his mother for money and she would send it to him. He was a person of ordinary intelligence in some respects and was usually in good health. His own statement made to the physician at the Napa Hospital on October 6, 1915, a month after his recommitment, was that when he was out of the hospital on previous occasions he had sometimes helped his father in the father's business of distributing newspapers; that he also took care of the yard at home; that he had worked at odd jobs for meals in Los Angeles, Omaha, Oregon, and Oakland, and that 7 days was the longest time he had ever worked at one place; that he went away and traveled just to see the country, working his way for his board at times and riding in box cars.

[8] The son being 27 years old at the time of his death, his expectancy of life, according to accepted mortality tables, was 37 years. His father's age was 69½ years, with an expectancy of life of nearly 7 years. The mother's age was a little under 60 years, and her expectancy of life was a little over 14 years. This, of course, assumes ordinary good health. In the absence of anything to the contrary, the presumption would be that the benefit of the parents from the son, if any, would have continued during her survivorship the same as during the lives of both of them. Hence it is proper to consider the value in money of the benefits which, from all the circumstances of the case, the parents might be reasonably expected to derive from the son during their expectancy of joint life and for the remainder of the mother's life expectancy, assuming that the son's life would have continued for that period.

He was earning at the time of his death at the rate of $360 a year. Assuming that of this amount $180 yearly might have been devoted to the benefit of his parents, this benefit if continued during the life of the mother, would be the equivalent of an annuity of $180 for 14 years. Since the damage is to be paid in cash, the award on this account should not have exceeded the present worth of the annual contributions for the future period. Allowing 7 per cent. as the rate of interest and discount, at compound interest, the present worth of such an annuity would be $1,574. At a 6 per cent. rate the present worth would be $1,673. The evidence shows that up to the time of his death, instead of being of any pecuniary or other benefit to his parents, he had always been a burden and a cause of solicitude and care to them, except during the last 3 months, when he contributed small unascertained sums to his mother. There is nothing in the proof as to his character and capacity to indicate any reasonable probability that he would ever contribute materially to their comfort or support, or would ever be able to earn more than would be necessary for his own support. Any reasonable estimate of his probable earnings and contributions therefrom for the benefit of his parents must fall far short of the $6,000 awarded by the verdict. Considering his physical malformation and mental inferiority and the restless habits of previous years, even the sum above stated could not reasonably be expected by them from him.

[9, 10] It is also held that, in addition to the pecuniary loss arising from deprivation of direct financial assistance or services, while nothing can be allowed for grief, sorrow, and mental suffering of the heirs of a person whose death is caused by negligence, additional damages may be given where the "circumstances" referred to in section 377 indicate that there may be a pecuniary loss to a parent from the death of a child or to a wife from the death of her husband arising from the deprivation of the "society, comfort and protection" of such child or husband. Beeson v. Green Mountain G. M. Co., 57 Cal. 38; Munro v. Pacific Coast, etc., Co., 84 Cal. 525, 24 Pac. 303, 18 Am. St. Rep. 248. But this is not a universal right existing in every case. It is allowable only where the "circumstances" show a reasonable probabil-

ity that the "society, comfort, and protection" afforded to the surviving parent or wife was of such a character that it would be of pecuniary advantage to the parent or wife, and that a deprivation thereof would entail a pecuniary loss to them. Thus in the Beeson Case the court said:

> "The loss of a kind husband might be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy."

Manifestly no allowance can be made because of a possible loss arising from circumstances which do not appear from the evidence and which rest upon conjecture or imagination. The evidence in this case does not show circumstances indicating that the society, comfort, and protection of the son had been of any appreciable pecuniary advantage to the plaintiffs, or any reasonable probability that it would be so in the future. It may be that they dearly loved him and that they loved him the more because of his infirmities and helplessness. But it is pecuniary loss only, and not the loss of an object of love and affection, that the law recognizes as ground for allowing damages to the heirs of one whose death has been caused by the negligence of a third person. No great sum could reasonably be given as damages in this case on account of the deprivation by the plaintiff of the society, comfort, and protection of the deceased. A verdict of $6,000 is clearly greater than the evidence warrants.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

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184 Cal. 737

LAW v. RAILROAD COMMISSION OF CALIFORNIA. (S. F. 9543.)

(Supreme Court of California. Jan. 27, 1921.)

1. Constitutional law ⚷135, 298(1) — Public service commissions ⚷2—Change of utility rates as fixed by contract is within the police powers, and not interferences with contract obligation or denial of due process.

The change of rates to be charged for public service by a public utility corporation from those fixed by private contract is within the police power of the state, and is not an interference with the obligation of the contract, or a taking of property without due process of law, even though the contract was made before the enactment of the statute authorizing the change.

2. Public service commissions ⚷19(1)—Reference to other proceeding does not invalidate complete order.

Where an order of the Railroad Commission was complete in itself, finding that the rates therein fixed were just and reasonable charges for the service and prescribing them for all consumers, a reference in the order to findings made in another proceeding is superfluous and cannot vitiate the order in view of Civ. Code, § 3537.

3. Public service commissions ⚷15—Need not consider evidence as to value of privileges given by consumer.

In view of Public Utilities Act, § 17(b), prohibiting a public utility from receiving a greater or less, or different compensation than the rates fixed by the commission, privileges given by the consumer to the utility in part payment for service are different compensation prohibited by the act, so that, in proceedings to fix the reasonable rates, the commission need not receive evidence of the value of such privileges.

4. Steam ⚷5—Order changing rates fixed by contract authorizes rescission of privileges.

A contract whereby a consumer was entitled to heat from a public service company at rates therein specified in addition to privileges given the utility by the consumer can be rescinded by the consumer when the Railroad Commission fixes rates for such public service in excess of those fixed by the contract, and the utility can thereafter exercise those privileges only by paying an agreed compensation to the consumer.

In Bank.

Petition by Hartland Law for certiorari to review an order of the Railroad Commission of California fixing rates for steam power in excess of those fixed by private contract. Order to show cause dismissed.

Alexander McCulloch, of San Francisco, for petitioner.

Hugh Gordon, of Los Angeles, for respondent.

LENNON, J. The questions in this case are before this court as the result of an order to show cause in response to a petition for a writ directing a review of an order of the Railroad Commission alleged to be violative of certain constitutional rights of petitioner.

In May, 1910, the petitioner and one Frederick G. Cartwright entered into a written contract, for a period of 20 years, whereby said Cartwright agreed to furnish steam and electricity for purposes of heating, power, and illumination in a building in the city of San Francisco owned by petitioner. The commodities furnished were to be paid for by petitioner at certain rates set forth in the contract, and, in addition, Cartwright was granted the right to use free of charge parts of said building and premises belonging to petitioner. The right thus granted included the privilege of using certain wells, a smokestack, a steam and water circuit extending from said building under the streets of the city to another building, and the right of constructing and maintaining tanks on the roof of the building and of installing and maintaining motors, pumps, and pipes in the basement of the building. Cartwright assigned this contract to the Great Western Power Company. Subsequent to the assignment the present Railroad Commission of the state of California was created, the Public Utilities Act of 1915 was passed, and the Great Western Power Company, considered as a corporation furnishing heat, became a public utility under said act. In May, 1920, the Railroad Commission made an order wherein it directed that all steam heating consumers should be charged upon a uniform basis for heating service, approved certain schedules of rates for steam heating service, and, in effect, prohibited deviations from said schedule under existing contracts providing different rates. Petitioner complains of this order in so far as it affects his rights under his contract.

[1] There is no longer any question as to the power of a state to fix rates for a public utility service which will supersede rates for such service previously fixed by private contract between the consumer and the company. It has been conclusively settled that the interference with private contracts by the state regulation of rates is but a legitimate effect of a valid exercise of the police power which neither impairs the obligation of a contract nor deprives of property without due process of law. Atlantic Coast Line Ry. Co. v. Goldsboro, 232 U. S. 548, 558, 34 Sup. Ct. 364, 58 L. Ed. 721; Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420; S. P. Co. v. Spring Valley Water Co., 173 Cal. 291, 159 Pac. 865, L. R. A. 1917E, 680; Limoneira Co. v. R. R. Comm., 174 Cal. 232, 162 Pac. 1033. It is immaterial that petitioner's contract was entered into prior to the enactment of the present Public Utilities Act and the amendment thereto by which steam heating service was included as a utility to be regulated. If the service contracted for was devoted to public use (Allen v. R. R. Comm., 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249), the contract for the service was subject to the exercise of the police power, and, the state having elected to confer upon the Commission the power to prescribe uniform rates for the service, petitioner cannot complain if the exercise of this power results in the practical annulment of his private contract fixing compensation for a public service (Producers' Transportation Co. v. R. R. Comm., 251 U. S. 228, 40 Sup. Ct. 131, 64 L. Ed. 239).

[2] Petitioner raises the objection that the opinion and order of the Commission refer to findings made in another proceeding. The proceeding referred to was one in which an order was made prescribing rates for the Pacific Gas & Electric Company and prohibiting departures therefrom under private contract. This reference was made only by way of amplification for the purpose of indicating the attitude of the Commission in a previous parallel case. Nothing appears to suggest that the present proceeding was not independent and complete in itself or that the conclusion of the Commission was not based solely upon the facts presented therein. The substance of the opinion and order in the present case is that certain rates are found and declared to be just, fair, and reasonable charges for steam heating service by the Great Western Power Company, and such rates are accordingly prescribed for all consumers. The reference complained of does not affect the substance of the order, and, being superfluous, it cannot vitiate the order. Civ. Code, § 3537.

[3] It is pointed out that there was no evidence before the Commission as to whether the rates provided by petitioner's contract, when considered with the grant of privileges in the use of petitioner's property, were in fact discriminatory. Under section 17 (b) of the Public Utilities Act (Stats. 1919, pp. 488, 496), it is provided that no public utility shall receive "a greater or less or different compensation," than the rates fixed by the Commission. The same section provides that the Commission may establish such exceptions from the operation of this prohibition as it may consider just and reasonable. It appears from the face of petitioner's contract that the compensation provided therein is "different" from that fixed by the Commission. It was therefore unnecessary for the Commission to receive evidence as to the value of the privileges granted by petitioner in order to determine the amount of the rate fixed by the contract. It is not essential that a rate be greater or less in amount in order to be discriminatory; a difference in character of payment, such as the granting of privileges or concessions, may in itself give just such advantages as the act is designated to prevent. The contract did, in fact, fix a "different" compensation than that prescribed by the Commission. It therefore came within the general prohibition of the Public Utilities Act, and the Commission was not obliged to receive further evidence in order to determine whether or not an exception should be made.

[4] Having disposed of this point, for we deem it unnecessary to say more in regard thereto, there remains the claim of petitioner that, if the Great Western Power Company is to retain its right given by the contract to use agencies and appliances belonging to him, the order will operate to deprive plaintiff of the use of his property without compensation, and, by compelling him, in effect, to pay a higher rate than other consumers, create the discrimination it purports to abolish. If the order attempted to change the rate paid by petitioner and at the same time

give the power company the right to continue to use the agencies and appliances of petitioner under the contract, then it would, indeed, exceed the jurisdiction of the Commission by depriving petitioner of his property without compensation and due process of law. This, however, is not the effect of the order, which simply does what the law permits, namely, fixes the rates to be paid by the consumer, and therefore nullifies the compensation fixed by the contract. It follows, of course, in view of the change effected by the order in such an important part of the contract, that petitioner will have the right under the law to rescind the contract, and prevent further use of his property by the former company, except for compensation properly determined. See Newport v. Temescal, etc., Water Co., 149 Cal. 538, 87 Pac. 372, 6 L. R. A. (N. S.) 1098; Miller & Lux v. Enterprise, etc., Co., 169 Cal. 415, 426, 147 Pac. 567.

The order to show cause is dismissed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; SLOANE, J.; OLNEY, J.; WILBUR, J.

184 Cal. 775

FIGARI v. OLCESE et al. (S. F. 9219.)

(Supreme Court of California. Jan. 28, 1921. Rehearing Denied Feb. 26, 1921.)

1. Bills and notes 🔑48—Signer qualifying signature by word "witness" held not liable as maker.

If a person subscribed his name to a note as maker without qualification and without notice or knowledge on the part of the payee that he was only intending to witness the signature of the other maker, he would be bound as maker, but where he wrote the word "witness" before his name, and where the payee knew that he was receiving no consideration, and that he had been asked to sign the note merely as a witness, he was not liable as the maker.

2. Evidence 🔑423(6)—Party who signed as maker may show that with payee's knowledge he signed in other capacity.

Under Civ. Code, § 2832, one who has signed note apparently as maker may show by parol evidence as against the payee that he has signed with the knowledge of the payee in a different capacity and with a different liability, where such facts are pleaded.

3. Appeal and error 🔑994(3)—Credibility of witness for trial court.

The credibility of witnesses is exclusively within the province of the trial court.

4. Evidence 🔑591—Defendant's testimony when called as witness by plaintiff to be given proper weight, although not conclusive on plaintiff.

Testimony of defendant called as plaintiff's witnesses under Code Civ. Proc. § 2055, as added by St. 1917, p. 58, is to be given its proper weight, notwithstanding that under such statute plaintiff is not bound by such testimony; such provision of the statute meaning merely that such testimony is to be treated as though given on cross-examination, and that plaintiff is not concluded from rebutting the testimony or from impeaching the witnesses.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Andrea Figari against G. B. Olcese and Emilio Olcese. From a judgment for the last-named defendant, plaintiff appeals. Affirmed.

Frank Schilling, of San Francisco, for appellant.

William A. Kelly and H. C. Faulkner, both of San Francisco, for respondent.

PER CURIAM. Plaintiff brought this action to recover on a promissory note purporting to have been executed by the defendants.

The question here presented is whether the respondent, Emilio Olcese, signed the note as a maker, or merely as a witness to the signature of his codefendant, G. B. Olcese.

The trial court found that respondent signed the instrument only as a witness.

The appeal is from the judgment in respondent's favor, and is based upon the contention that the above finding is not supported by the evidence.

The instrument, as reproduced in the record shows the names of both defendants in the usual place of signature by the makers of a promissory note. The name of respondent, Emilio Olcese, is directly under that of his codefendant, an admitted maker of the note. The only distinguishing feature is that the word "Witness" appears immediately in front of respondent's signature.

The undisputed facts are that the plaintiff, Figari, loaned $1,300 to the defendant G. B. Olcese, and received this note as evidence of the indebtedness. The defendant Emilio Olcese is the son of the other defendant, and at the time of this transaction was 26 years old and was in the employment of his father in the latter's grocery store, and had no personal interest in and received no part of the borrowed money.

Figari was about 56 years of age and an Italian. Both he and the elder Olcese had an imperfect knowledge of English. The plaintiff was unable to read or write the English language.

Although the testimony is conflicting on the point at issue, plaintiff's testimony is that he had been given to understand by the elder Olcese that the note was to be signed by both the father and son, and that he accepted the note in the belief that both had signed it as makers, and did not know that Emilio Olcese had written the word "Witness" before his name until many months after the note was executed. The two principals, Figari and Olcese, went to a notary and had the note drawn up. It does not appear clearly whether the elder Olcese signed it at the notary's office or later. At any rate, the deal was not closed there, but the parties met the next morning at the office of Olcese over his store, at which time and place Figari produced his money to complete the loan. It is at this point that the matter in controversy arises as to Emilio Olcese's relation to the transaction. Figari says that he went the next morning to get the note. He testifies:

> "Emilio, the son, gave me the note." "I say, 'I want to see you put your name.' He say, 'I put it all ready.' I say, 'I like to see it. Some time I can't read. I like to see you put your name.' He told his father, 'He wants me to put my name again,' and the father say, 'Yes; put it again.'"

He further testified in this connection that the son then took the pen and retraced his name and handed him the note. There was other testimony of Figari indicating that it was agreed between him and the elder Olcese that the son, and perhaps the wife, was to join in signing the note. At any rate, it is enough to say, from plaintiff's standpoint, that Figari's testimony, standing uncontradicted, would sufficiently establish Emilio's liability as a maker of the note, and had the trial court found accordingly such finding might well be held conclusive.

Both the father and the son, however, dispute this version of the transaction. On this controverted point the testimony of the elder Olcese, in substance, is as follows:

> "My son was present when the money was delivered. He was outside of the store, and I told my son, Mr. Figari told me, 'I would like to see your son and I give you the money;' so I called Emilio to come up, and Emilio came up, and Mr. Figari looked at the money, and he told me, 'Now, you got the money here,' and he say, 'Your son can sign.' He says, 'You have your son sign this note to see I give you the money.'" "Well, my son was there and I told him myself to sign the note." Q. But you have just stated that Mr. Figari said to you in your son's presence to have your son sign as a witness. A. Mr. Figari told me, and he said he was telling me. He told me first, my son was not present, and I called him up and I told him to come up to the office. * * * Mr. Figari came to my office and counted the money and put it on the desk, and after he got the money counted and before I took the money he asked me, 'We are here alone and I give you the money.' He would like to have somebody see that I give you the money, and he says, 'Is your son downstairs,' and I said, 'Yes,' and called my son up, and I says, 'I got some money here, and I would like to have you come up,' and I told him—he don't know Figari—I told my son, 'I got some money, and I show it and he loan some money, and I want you to come up and see the man lend the money. Mr. Figari was present. Q. Did you hear your son testify here a little while ago that Mr. Figari was not present; that he was on the outside? Mr. Kelly: That is not the testimony. The testimony of both witnesses is to the effect that Mr. Olcese went outside and called Emilio and brought him into the room where the money was and had Emilio sign the paper in the presence of both of them. The Court: That is the testimony. Q. At what particular place did you ask your son Emilio to come and sign the note? A. Right there in front of the money, in my office. * * * In the presence of Mr. Figari I asked my son to sign the note to witness, so Figari says, so Figari could see him loan me the money, and my son sign as a witness, and Mr. Figari turned around, and he didn't see my son do the writing, and he said to my son, 'I like to see you sign; I like to see you sign your name next,' and my son says, 'Yes; I have signed that.' Mr. Figari never say nothing about a witness; he never mentioned anything about seeing the money turned over and like to see him sign like a witness, and he never say anything else. My son don't have anything to do with the business."

This testimony is confusing and perhaps contradictory, but there is nothing in it to indicate that Emilio Olcese had any intimation from either his father or the plaintiff that he was signing other than as a witness. It would appear from the testimony of this witness that Figari had no conversation with Emilio as to the capacity in which he was to sign the note, that his communication in that regard was entirely with the father, but that the statement was made to the son in Figari's presence that he was asked to sign as a witness.

The respondent's own testimony on this point is more explicit. His testimony in substance is as follows:

> "The first time I saw Mr. Figari to know him was when I signed the note. I knew nothing about the negotiation of the note. I saw the money delivered to G. B. Olcese."
>
> "Mr. G. B. Olcese came outside and I saw him; he was borrowing some money from Mr. Figari. Mr. Figari was upstairs in the office, and he wanted me to sign the note as a witness. Mr. G. B. Olcese asked me to sign the note as a witness that he took the money. I was outside handling potatoes and stuff, and Mr. Olcese asked me to sign the note as a witness. I believe the note was signed by my father when I signed it. I signed right under his name. I saw him sign it. He signed first and I signed afterwards. Mr. Figari was there, right between me and my father. He told me to go over it again, and I went over it. He says, 'Let me see you sign it,' and I went over it again and signed the note. I don't know whether he saw me sign it the first time; he was there. He never asked me to go over it again. I ran my pen over my name a second time. Mr. Olcese asked me to sign the note.

Figari never asked me to sign the note. I never signed the note for Figari. I went over it when he asked me to go over it. I will show you just how it was done. Mr. G. B. Olcese came out and asked me if I would sign the note as a witness, and I told him 'Yes.' I come upstairs, took the pen, and signed that note. Mr. Figari was there, and he says 'Let me see you sign the note; go over it.' Q. Mr. Figari did not ask you to sign the note as a witness? A. Not at all; he asked me to go over it. I never had any experience with a promissory note. That was the first note seen. I had never had any experience with promissory notes at that time. I did not know anything about whether a promissory note needed to be witnessed. The first time I knew anything at all about the fact of a loan was when I was asked to go up where the note was signed."

It seems to be conceded that the respondent wrote the word "Witness" before his name when he signed the note. The only reference in the evidence to this point is the following questions by plaintiff's attorneys and respondent's answers thereto:

"Q. And you signed the word 'Witness' in front of your name? A. I know what I signed, and he had the note there and I signed. Q. So when you put your name to the note and put in front of it 'Witness' you are not positive whether or not you had seen your father sign the note? A. Oh, yes; G. B. Olcese's name was on the note before I signed it."

It also appears from other evidence that the word "Witness" was written before respondent retraced his signature at plaintiff's request.

It is argued in behalf of appellant that when the respondent, at Figari's statement that he wanted to see him sign, retraced his signature without retracing the word "Witness," it was a new and unqualified signing of the note. No such inference can be drawn from this circumstance. Respondent had been told, according to the testimony, in the presence of Figari, that he was to sign as a witness. If he signed as a witness under these circumstances, he had a right, when told by Figari that he wanted to see him sign, to assume that he was retracing his signature for the same purpose and in the same capacity that he originally wrote it.

Of course, it seems improbable that Figari should have been so insistent upon seeing the signature made if it was only to witness the making of the note by the elder Olcese. But that is not the point. The controlling circumstance is that Emilio Olcese was acting with the understanding that he was only signing in the capacity of a witness, and there was nothing in the fact of this request to rewrite his name calculated to change the situation.

[1, 2] There is no doubt under the law that, if he had subscribed his name without qualification and without notice or knowledge on the part of Figari that he was only intending to witness his father's execution of the note, he would be bound as a maker, but such is not the situation here. He was not in any way a party in interest. If the trial court believed the testimony of the defendants, as it apparently did, Emilio Olcese went into his father's office where the note was being executed with no other idea in his mind than that he was being asked to put his name to the paper merely as a witness, and that both parties so understood. He was told by his father in Figari's presence that the latter wanted him to see the money delivered and to sign as a witness. He made his own understanding of the matter plain by writing the word "Witness" immediately preceding his signature. It is true that Figari testified that he could not read or write the English language, but the court finds that this fact was not known to respondent. The only evidence tending to show such knowledge was the remark testified to by Figari that in asking respondent to again sign his name he gave as a reason the statement, "Some time I can't read." Respondent had a right to assume, not only from what his father had told him in Figari's presence, but from what he had signified on the note itself, that it was understood by Figari that he was signing as a witness. Under these circumstances the request that he sign again, or that he retrace his signature, so that Figari could see it written, would not carry any different significance as to what was expected of him than attended the original signature. Even where one has joined apparently as a maker of a note, he may show by parol evidence, as against the payee, that he has signed with the knowledge of the payee in a different capacity and with a different liability where, as here, such facts are pleaded. Civ. Code, § 2832; 3 R. C. L. p. 1138; Kelly v. Gillespie, 12 Iowa, 55, 79 Am. Dec. 516; Spencer v. Alki Point Transportation Co., 53 Wash. 77, 101 Pac. 509, 132 Am. St. Rep. 1058; Gillett v. Taylor, 14 Utah, 190, 46 Pac. 1099, 60 Am. St. Rep. 890; Windhorst v. Bergendahl, 21 S. D. 218, 111 N. W. 544, 130 Am. St. Rep. 715; Farmers' N. G. Bank v. Slover, 60 Cal. 387; Casey v. Gibbons, 136 Cal. 368, 68 Pac. 1032. This is true for the purpose of showing that an apparent principal is only bound as a surety notwithstanding the appending of the word "Surety" after the signature does not in itself change the liability of the party so signing. Aud v. Magruder, 10 Cal. 282; So. Cal., etc., Bank v. Wyatt, 87 Cal. 616, 25 Pac. 918. It surely follows that where the signer, with the knowledge and assent of the payee, has signed only as a witness and has qualified his signature on the note itself by so significant a designation as the word "Witness," he may be permitted to show that his name was written and accepted in that capacity alone.

It may be admitted that it is an unnecessary and unusual precaution to have the execution of a promissory note witnessed, but it appears that all of the parties to this transaction were unfamiliar with business customs and requirements, and the respondent testified that this was his first experience with a promissory note.

If it is assumed, as the trial judge had a right to assume, from the evidence, that the respondent was acting in good faith, and that the testimony of both defendants was to be accepted as true, there is no justification for setting aside the findings and judgment of the trial court, as affirmed by the District Court of Appeal.

[3] It is wholly a matter of the credibility of the witnesses, which is a consideration exclusively within the province of the trial court.

There could be no question about the matter were it not for the unusual circumstance of having a witness to such an instrument, the apparent inexperience and ignorance of the appellant, and the further fact that by the time the payment of this note was due the elder Olcese had gone through bankruptcy, and the son had succeeded to the position of financial responsibility. But even in this particular the respondent's explanation is plausible, and he testifies that it was not until after his father's financial failure and until long after the note was due that appellant made any claim upon respondent as a maker of the note. It is something, too, of a testimonial to the good faith of the elder Olcese that about $250 was paid by him on this note since his discharge in bankruptcy.

[4] There is no merit in appellant's objection that no testimony was taken in behalf of defendants, because of the fact that the defendants were called only as plaintiff's witnesses. Section 2055 of the Code of Civil Procedure as added by St. 1917, p. 58, provides that a party calling and examining as a witness an adverse party "shall not be bound by his testimony," and that the testimony of such adverse witness "may be rebutted by the party calling him." This provision does not mean that such testimony may not be given its proper weight, but merely as it declares, that the party calling such witness shall not be concluded from rebutting his testimony, or from impeaching the witness. Dravo v. Fabel, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421. In other words, such testimony is to be treated as though given on cross-examination.

The findings of the court sufficiently cover all the material issues raised by the pleadings.

The judgment is affirmed.

ANGELLOTTI, C. J., and SLOANE, OLNEY, SHAW, WILBUR, LENNON, and LAWLOR, JJ., concur.

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50 Cal. App. 356

HINDLE v. WARDEN et al. (Civ. 3227.)

(District Court of Appeal, Second District, Division 2, California. Dec. 11, 1920. Hearing Denied by Supreme Court Feb. 7, 1921.)

1. Quieting title 🔑44(4) — Proof of possession held prima facie proof of title when not controverted.

In a suit to set aside a deed on a sale under a municipal assessment and to quiet plaintiff's title, where plaintiff introduced a deed to himself and proved his possession subsequent to the date of delivery of the deed, such possession was prima facie evidence of ownership, and, though disputable, was sufficient evidence to support a decree quieting his title unless successfully controverted.

2. Municipal corporations 🔑581—Affidavit of service of notice before obtaining deed held not to show posting on property.

An affidavit on behalf of one purchasing property at a sale for a delinquent municipal assessment under St. 1909, p. 1066, as amended by St. 1911 (Ex. Sess.) p. 17, stating that the affiant attached a copy of the notice to redeem to "front part of building in a conspicuous place near the front line of the property," did not show that the notice was posted on the property as required by section 24 of such statute.

3. Municipal corporations 🔑581—Affidavit of service of notice to redeem from sale for assessment must allege facts showing diligence to find owner.

An affidavit of service of notice to redeem from a sale for a municipal assessment under St. 1909, p. 1066, as amended by St. 1911 (Ex. Sess.) p. 17, must set forth evidentiary facts justifying the conclusion that due diligence was used to find the owner, and an affidavit merely stating ultimate facts or conclusions in the language of the statute is not sufficient.

4. Municipal corporations 🔑581—Affidavit of service of notice to redeem from sale for assessment held not to show owner could not be found.

An affidavit of service of notice to redeem from a sale for a delinquent assessment under St. 1909, p. 1066, as amended by St. 1911 (Ex. Sess.) p. 17, alleging that the affiant inquired of an unnamed person and was given the name of the owner and verified such ownership by referring to the records of the county and searched the county records for a certificate of residence, and that none was on file, and that he searched the latest city and telephone directories, and the name was not therein, was insufficient to show due diligence in locating the owner as required by section 24, where blanks were left for the names of the persons of and concerning whom inquiry and search was made.

5. Municipal corporations 🔑582 — Deed for land sold for delinquent assessment void when affidavit of service of notice insufficient.

A deed for land sold for a delinquent assessment under St. 1909, p. 1066, as amended by St. 1911 (Ex. Sess.) p. 17, was void where the affidavit of service of the notice to redeem did not show posting on the property or due diligence to find the owner of the lot.

6. Abatement and revival 🔑15—Dismissal of prior action while second action is pending removes ground of abatement.

It is a good answer to a plea in abatement alleging the pendency of a prior action that the prior action has been dismissed by a judgment entered after a trial of the second action has commenced, but before its conclusion.

7. Estoppel 🔑91(1) — Plaintiff held estopped to question dismissal of prior action pleaded in abatement.

Where the attorneys of record for plaintiff in a prior action gave his attorneys of record in a subsequent action written authority to move to dismiss the earlier action, and plaintiff was in court when the motion was made, he was estopped to question the authority of the attorneys, and defendant, pleading the prior action in abatement, could not successfully contend that the motion was unauthorized.

8. Abatement and revival 🔑8(1) — Record must show identity of causes of action and issues.

To sustain the plea of another action pending, it must appear not only that there is another action pending between substantially the same parties, but also that the causes of action and issues involved are substantially the same, and, when there is nothing in the record to show the subject-matter of the former action or the relief sought, the plea is not sustained.

9. Abatement and revival 🔑7 — Dismissal of prior action pleaded in abatement cannot be collaterally attacked.

Assuming that under Land Titles Law, § 20, authorizing an applicant for the registration of land to withdraw the application, such right is subject to Code Civ. Proc. § 581, prohibiting dismissals when a counterclaim has been set up or affirmative relief sought, the judgment of the court in which the proceeding is pending dismissing such proceeding, though wrongfully entered and subject to reversal on appeal, is not open to collateral attack in another action in which the pendency of such proceeding has been pleaded in abatement.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Norman W. Hindle against Julia P. Warden and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellants.

Edgar F. Hughes and Goudge, Robinson & Hughes, all of Los Angeles, for respondent.

FINLAYSON, P. J. Plaintiff, averring that he is the owner of a certain lot in the city of Los Angeles, alleged that the defendant Julia P. Warden claims title under a deed executed to her by the board of public works of that city on July 11, 1916, after a sale of the lot following a delinquent assessment to pay the expenses of acquiring land for a public library under the act of April 22, 1909 (Stats. 1909, p. 1066), as amended by the act of December 23, 1911 (Stats. 1911, Extra Sessions, p. 17). Plaintiff does not question the validity of the proceedings leading up to and including the sale of the land by the board of public works, but does contend that the deed to appellant was invalid upon the ground, among others, that the affidavit of posting the redemption notice does not show that the notice was posted on the property or that due diligence had been used to find the owner. The complaint alleges, and the proof shows, that plaintiff, prior to commencing the action, tendered to the defendant Julia P. Warden, the purchaser at the assessment sale, the full amount necessary to redeem the property from the sale, namely, $2.45; that Mrs. Warden refused the tender; and that plaintiff deposited the sum with the clerk of the court and consented that it be paid to Mrs. Warden in redemption of the property.

The answer denied plaintiff's alleged ownership, alleged that the defendant Julia P. Warden acquired title under the deed to her from the board of public works, and, by way of a plea in abatement, further alleged that there is pending another action between the same parties for the same cause. The pleadings and files in this other action, though marked for identification, were not put in evidence. The record here is barren of any facts showing the nature of that other action, save a few incidental references thereto by court and counsel in the course of remarks made during the progress of the trial, and a finding by the court as follows:

> "* * * Prior to the commencement of this action and on November 3, 1916, the plaintiff filed in the superior court of the state of California, in and for the county of Los Angeles, an application to bring the said real property under the operation of the 'Land Titles Act,' the same being L. R. No. 110; that Julia P. Warden was joined as a party in said action and did file an answer and cross-complaint, in which she claimed title to said property by reason of the deed herein referred to; that said application L. R. No. 110 was dismissed during the trial of this action and is not pending."

By its decree the court adjudged and declared the deed from the board of public works to the defendant Julia P. Warden to be null and void; that plaintiff had redeemed the property from the lien of the assessment and from the sale; and that the purchaser, Julia P. Warden, is entitled to receive the $2.45 deposited by plaintiff in court for the redemption of the property from the assessment sale. The decree also quiets plaintiff's title to the land. From this judgment Julia P. Warden appeals.

Appellant's principal contentions are: (1) That plaintiff did not prove title in himself; (2) that the deed to appellant from the board of public works, execution whereof was admitted by the pleadings, is prima facie evidence of title in appellant; and (3) that the plea in abatement should have been sustained. There is no merit in any of these contentions.

[1] Plaintiff made out a prima facie case of ownership. He put in evidence a deed to himself from John A. Rennebeck and wife, dated August 5, 1913. He offered no proof of title in his grantors, and therefore did not present any direct evidence of paper title from the paramount source of title. He did, however, testify that he has been in actual possession of the property at all times since he received the deed thereto on August 5, 1913. Such possession was prima facie evidence of his ownership of the lot and of his right to a decree quieting his title. It is the settled law of this state that possession is prima facie evidence of ownership. And while such presumption is disputable and may be controverted by other evidence, it affords full and sufficient evidence of ownership of land, unless it be successfully controverted. Davis v. Crump, 162 Cal. 518, 123 Pac. 294.

The deed to appellant from the board of public works conveyed to her no title whatever. According to section 24 of the act under which the deed was executed by the board of public works (Stats. 1909, p. 1072), the purchaser at the delinquent assessment sale, at least 30 days before he applies for a deed, must serve upon the owner of the property, and the occupant thereof, if it be occupied, a written notice setting forth various matters, among others "the time when such purchaser * * * will apply * * * for a deed." If the owner "cannot be found, after due diligence," the notice must be posted upon the property. "The person applying for a deed must file with the street superintendent an affidavit or affidavits showing that notice of such application has been given, as herein required, and if the notice is not served on the owner of the property personally, that due diligence was used to find said owner." Plaintiff, the owner of the property at the time when it is claimed that the notice was posted, was not personally served with the notice. The affidavit stated that he could not be found. Respondent's claim that the affidavit is fatally defective in that it fails to show that the notice was posted on the property or that due diligence was used to ascertain the owner's whereabouts is supported by the record and must be sustained.

There was no proof of service of the notice other than that afforded by the affidavit of C. D. Warden, to which was attached a copy of the redemption notice. The only statement in the affidavit respecting the posting of the notice is this:

> "That he [C. D. Warden] is agent of the owner of the certificate of sale referred to in the attached notice to redeem; that he did, as such agent, serve a notice to redeem on the 17th day of May, 1916, in the city of Los Angeles, county of Los Angeles, state of California, by attaching a true copy of the attached notice to redeem to front part of building in a conspicuous place near the front line of the property."

The only statements in the affidavit as to the use of due diligence in locating the owner are the following:

> "That affiant used due diligence in trying to find the residence, whereabouts, name, and address of the owner of said property, as follows, to wit: That he inquired of the ——, of Los Angeles, California; that the said company gave him the name of the fee title owners as ——; that he verified said ownership by referring to records of Los Angeles county in Book ——, page ——, of deeds; that he searched the county records of Los Angeles county for a certificate of residence of ——, per section 1163, Civil Code State of California; that none was on file; that he searched the latest city directory (1915) of the city of Los Angeles and the latest telephone directory of Los Angeles, Cal.; that the name of * * * was not therein; that after such above search was unable to learn the whereabouts of the said owner."

[2] By finding in favor of respondent the lower court ruled that the affidavit was insufficient. We cannot overturn this conclusion. Indeed, no other conclusion seems possible. The affidavit does not "show" that the notice was posted in a conspicuous or any place upon the property. Its language is that the affiant served the notice by attaching a true copy thereof "to front part of building in a conspicuous place near the front line of the property." Nowhere in the affidavit is there anything to show what property the affiant intended by his words "the property." The affidavit does not identify any property whatever. If we assume that by the words "the property" affiant meant the property that had been sold to appellant at the delinquent assessment sale, still there is nothing to show that the building, on the front part of which the notice was posted, was located on that property. If by the expression "near the front line of the property" affiant meant that he posted the notice itself near the front line of the property that was sold, there is nothing to show that the notice, though near the front line of the property was actually on the property. If by the phrase "near the front line of the property" affiant meant that the building on which he posted the notice was near the front line of the property, then there is nothing to show that the building was actually located on the property. For these reasons the affidavit is wholly insufficient to show that the notice was "posted in a conspicuous place upon said property," as required by the statute.

[3, 4] Nor does the affidavit show that the owner could not be found after due diligence. In Hennessy v. Hall, 14 Cal. App. 759, 762, 113 Pac. 350, 352, the court said that—

"To warrant the execution of a deed to the purchaser and foreclose the owner's right of redemption upon such constructive service, an affidavit must be filed showing, not merely stating, that due diligence was used to find the owner."

In other words, the affidavit must set forth evidentiary facts which justify the conclusion that due diligence was used. An affidavit which merely states the ultimate facts, conclusions in the language of the statute, is not sufficient.

The affidavit of C. D. Warden does not state of whom affiant made the inquiries. It is equally cryptic as to the identity of the person concerning whom the alleged inquiries were made. It does not state whether it was the owner of the lot, the plaintiff here, Norman W. Hindle, of whose whereabouts the inquiries were made, or whether it was some one else. It does not state whose name it was that was searched for in the directory and city records. In fine, there is a total absence of any showing of evidentiary facts tending to establish due diligence in locating the owner of the lot.

[5] For these reasons we agree with respondent that the affidavit fails to establish facts the existence of which is a necessary prerequisite to authority in the board of public works to execute the deed under which appellant claims. We conclude, therefore that the deed to appellant from the board of public works, her sole claim to title, is null and void, and that its introduction failed to overcome respondent's prima facie proof of title.

[6] There was no error in deciding against defendants' plea in abatement. It appears from the trial court's findings that the prior action, brought by plaintiff under the Torrens Land Law (St. 1897, p. 138), was dismissed by the court during the trial of the present action. It is the established rule in this state that a judgment of dismissal of the prior action, entered after the trial of the second action has commenced, but before its conclusion, is a good answer to the plea in abatement. Moore v. Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248. Seeking to avoid this effect of the dismissal of the prior action, appellant contends: (1) That the motion to dismiss was not made by the attorneys of record in the prior action; and (2) that the dismissal was made over appellant's objection and notwithstanding she had filed a cross-complaint in the prior action whereby she had asked that she be decreed to be the owner of the land under the deed that had been executed to her by the board of public works.

[7] The attorneys of record in the prior action which, it is claimed, plaintiff had commenced under the Torrens Land Law, gave to the attorneys of record in the present action written authority to move the court to dismiss the former action. This was sufficient authority for the presentation of the motion to dismiss. Moreover, plaintiff, who was in court when the motion was made, is estopped to question the authority of his attorneys to dismiss the former action. Appellant, therefore, is not in a position successfully to contend that the motion to dismiss the former action was unauthorized.

[8] There is no merit in the contention that the judgment of dismissal in the former action was a nullity because entered over the objection of the cross-complainant therein, the appellant here. In the first place, none of the pleadings or files in the former action was introduced in evidence in this action. Nor does any of them appear in the record on this appeal. There is no way, therefore, whereby we may know whether the subject-matter of the former action and the relief sought therein are the same as in this. To sustain the plea of another action pending, it is essential that it shall appear, not only that there is another action pending between substantially the same parties, but also that the cause or causes of action and the issues involved are substantially the same in the two suits. There is nothing in the record before us that tends to establish this prime essential and indispensable requisite of a successful plea of another action pending.

[9] Moreover, even if we accept appellant's assumption that plaintiff had filed an application for the registration of his title under the Land Titles Law and that appellant had filed a cross-complaint therein, still the judgment dismissing such former action is not subject to appellant's collateral attack in this action. By section 20 of the Land Titles Law, an applicant for the registration of land may, on payment of all fees due, "withdraw his application at any time prior to the hearing thereof." Deering's General Laws 1915, p. 388. Assuming, for the purpose of this decision only, that an applicant for registration of land under the Land Titles Law has no right thus to withdraw his application if any defendant shall have filed a pleading asking for affirmative relief, that is, assuming, for the present purposes only, that a motion to withdraw an application for registration of title under the Land Titles Law is subject to that provision of section 581 of the Code of Civil Procedure which declares that the plaintiff in an action may dismiss his action "provided a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant," nevertheless the judgment of dismissal was the court's final judgment in the case, and is not subject to attack here. The court had jurisdiction of the subject-matter and of the parties. The question of the applicant's right to a dismissal was properly before it for decision. Under such circumstances, a judgment of dismissal, though wrongfully entered and subject to reversal on appeal, would not be wholly ineffective. Until reversed on appeal or set aside in a direct proceeding

brought for that purpose, it is binding upon the parties to the former action. The judgment of dismissal, therefore, even if erroneously entered, as contended by appellant, is not subject to her collateral attack in this action. 18 C. J. 1172; County v. Geisinger, 1 Lehigh Val. Law Rep. (Pa.) 113; Moore, etc., Co. v. Marion, etc., Co., 52 Ind. App. 548, 101 N. E. 15.

Judgment affirmed.

We concur: WELLER, J.; THOMAS, J.

(50 Cal. App. 471)

MURRILL v. VAN VLEET. (Civ. 3606.)

(District Court of Appeal, First District, Division 1, California. Dec. 20, 1920.)

Account ⚷3—Contract for pasturage held not to have resulted in a mutual account.

Evidence showing an oral contract providing that defendant pasture stock on plaintiff's land, pay taxes on the land, and credit plaintiff with the balance of pasturage bill upon the price of the land which was purchased by plaintiff from defendant, *held* to show that only credit to be extended was of such balance, which was insufficient to establish a mutual account, and plaintiff could not recover such balance.

Appeal from the Superior Court, Fresno County; M. F. McCormick, Judge.

Action by E. M. Murrill against E. J. Van Vleet. Judgment for plaintiff, and from an order granting a new trial unless plaintiff remit a part of the judgment, he appeals. Order affirmed.

Irvine P. Aten, Gallaher & Simpson, Ray W. Hays, and M. G. Gallaher, all of Fresno, for appellant.

Strother P. Walton, of Fresno, for respondent.

WOOD, Presiding Justice pro tem. This is an action to recover an alleged balance of $5,190.55 upon a mutual, open and current account for pasturage furnished by plaintiff between October 1, 1915, and April 1, 1918. The credit allowed to defendant is $200.45 for moneys paid by him for taxes upon land, which was in the possession of plaintiff under a contract to purchase the same from defendant.

There was a verdict for plaintiff for $2,716.92. Upon a motion for a new trial, the court made a conditional order granting it, unless within 10 days plaintiff should remit all of the judgment in excess of $300. He declined to accept the reduction, and has appealed from the order.

The principal point raised here and argued by the parties is as to the sufficiency of the evidence to establish a mutual account. It is contended by appellant that if there is any evidence to uphold the findings of the jury, then the order must be reversed, because, as he claims, for certain reasons not necessary here to mention, the order cannot be construed under section 657 of the Code of Civil Procedure as amended in 1919 (St. 1919, p. 141) as having been granted upon any other ground than that of a legal insufficiency of the evidence to show a mutual account. The appellant relies upon no evidence other than his own to support the verdict, which is as follows:

> "Q. Now tell what, if anything, was said about pasturing cattle. A. Well, I says, I am not able to pay my taxes, and I have to pay you one-half of the money out of everything I make on the place, and I am not able to pay the taxes, I said, 'Will you help me to pay the taxes?' He says, 'Yes; we can arrange it.' I says, 'How?' He says, 'I have a lot of stock, and I take in a lot of stock from the neighbors I will put in the pasture at $2.50 a head a month, and,' he says, 'I will pasture it.' And I says, 'You will pay my taxes, and take your $75 or the $100 out of it, and then you credit me with the remainder?' He says, 'Yes; I will do that.' He says, 'Well, we will take Benge there for witness.' Benge was standing there at the gate. And I says, 'All right.' Benge and his wife both were standing there. And he says, 'That is all right,' and we went on, and that was about all the pasture matter at that time."

Benge was called as a witness for plaintiff Murrill, and his version of the conversation is as follows:

> "Why, Mr. Murrill, he says to Van, he says, 'What about the taxes?' he says, 'I am not able to pay them.' And Mr. Van Vleet says, 'Well, you needn't worry about that, Mr. Murrill' he says, 'I have plenty of stock, horses, and cattle,' and he says, 'I will pay the taxes on the place for the use of the pasture.' Then Mr. Murrill replies to him, he says, 'Mr. Van, how much is the taxes?' Van Vleet says 'They are $75 or $100,' and Mr. Murrill says, 'All right Van.' He says, 'Now all over $75 or $100, whatever the taxes are,' he says, 'you give me credit on the contract of the place,' and Mr. Van Vleet says, 'All right,' he says, 'Benge is present; he is a witness.'"

The defendant, Van Vleet, testified:

> "Why, he said if it didn't interfere with his crops, he would tell me when I could pasture; if he wanted to plow the ground, I had to take my stock away. If it didn't interfere with his crops and farming, I could have the pasture, after he took his crops off and before he put the crop in in the spring, if I would pay the taxes."

Appellant quotes and places much reliance upon the following excerpts from the opinion of this court in Copriviza v. Rilovich, 4 Cal. App. 26, 87 Pac. 398:

"Where different conclusions may be reasonably drawn by different minds from the same evidence as to whether an account is a mutual account, the question is one for the jury. * * * Under the evidence in this case it was for the jury to determine what was intended by the parties—whether the moneys paid to third parties for clothing for plaintiff's sister were intended to be payments to plaintiff, or were matters of set-off to be charged to plaintiff and credited to defendants pending the final settlement of the account." It appears from the record in that case that Copriviza was the bookkeeper for Rilovich Bros., and that he had entered on their books to his credit, his monthly salary, certain moneys he had loaned to the defendants and various amounts that he had paid out and advanced for them. He charged himself with the cash they paid to him. In order to establish the fact that there was mutual account Copriviza relied upon certain charges that he had made against himself for clothing, dressmaking, and a hat for his sister, which had been paid for by Rilovich Bros., at his request. He told them "to buy all the clothes his sister needed, and whenever they spent anything to tell him, and he would put it down and *charge it to his account.*" (Italics ours.)

In the decision in that case it was said that there was a difference between the payment of money by a debtor to a creditor and the payment of money by a debtor to a third party at the request of the creditor; that in the first case it is presumed to be a payment on the debt, while in the second it may be a payment on the debt if the parties so agree, or it may be a matter of set-off for which an action would lie. In that case the money disbursed for Copriviza's sister was entered in the books of Rilovich Bros., as cash payments, but Copriviza kept a private personal account of all his transactions with the firm in all respects similar to such account, except in his private account there were entries of the various articles of clothing and the price paid for each. Under this situation and the circumstances surrounding the case, this court held that a different conclusion might be drawn by reasonable men as to whether the parties intended that moneys paid out for the sister were intended to be cash payments or were matters of set-off upon which a demand arose in favor of Rilovich Bros.

In Carter v. Canty, 186 Pac. 346, it is said that the conclusion reached in that case goes to the border line. In the case last mentioned, the claim that there was a mutual account existing between Carter and Canty was disposed of by the Supreme Court in this language:

> "To our minds no inference may reasonably be drawn from this situation other than that this transaction was mutually intended to operate as payment pro tanto of the indebtedness of Canty to Carter, leaving Canty without any demand or right of action for the money. If this be so it could not have the effect, in view of our own decisions and the overwhelming weight of authority elsewhere, to give to the account the character of a 'mutual' account, one where there are reciprocal demands between the parties."

The above-quoted language is applicable to the facts in the instant case, which are unlike those in Copriviza v. Rilovich, where the debtor advanced money for the benefit of a *third* party at the request of the creditor with the understanding that it was to be *charged to the creditor's account.* Viewing the evidence in the most favorable light for appellant, the amount paid by respondent for taxes constituted a mere payment pro tanto of the indebtedness for pasturage, which left respondent without any demand or right of action for the money.

The only theory upon which appellant could have gone to the jury upon his claim that it was a mutual account was that he was a vendee in possession under a contract to purchase; that he informed the vendor that he was unable to perform his obligation to pay the taxes on the land; that the latter in return for the privilege of pasturing his stock thereon at the price of $2.50 per head per month agreed to pay the taxes and allow the vendee credit on his contract for the *balance.*

This constituted a distinct understanding to apply the moneys paid on account of taxes toward the satisfaction of the pasturage bill, an unequivocal agreement to credit such moneys as payments on account of pasturage, and the jury was not warranted in finding, as it did, that it was agreed by the parties that the payments of the taxes were matters of set-off to be charged to Murrill and credited to Van Vleet pending the final settlement of the account. The only credit to be extended to Van Vleet was the *remainder, after taking out the taxes.* There is no evidence from which any other credit may be inferred.

The order of the court granting a new trial is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

50 Cal. App. 466

SMITH v. UNITED CRUDE OIL CO.

(Civ. 3441.)

(District Court of Appeal, Second District, Division 1, California. Dec. 20, 1920. Hearing Denied by Supreme Court Feb. 17, 1921.)

1. Landlord and tenant 🔑134(6)—Damages to lessor from unpermitted use is actual injury to property.

A lessor's damages, under Civ. Code, § 1930, where the property was used for purposes other than contemplated by the lease, would only be those which the lessor would suffer by reason of his property being injured by a depreciation in value or other injury naturally occurring; the mere value of the use not measuring the amount of damages.

2. Pleading 🔑365(1)—Motion to strike amended complaint too late after answer.

Defendant's motion to strike out the amended and supplemental complaint after it had made answer thereto was properly denied as coming too late.

3. Limitation of actions 🔑127(13) — Where amended complaint declared on different cause of action, application of statute is determined from date of filing.

If a lessor suing the lessee stated a cause of action under Civ. Code, § 1930, to declare forfeiture of the lease, and not for the alternative remedy of damages permitted by the statute to be recovered, by filing amended and supplemental complaint eliminating all claim to any right to have the lease forfeited, and adopting the other alternative given by the statute, of suing for damages, plaintiff lessor declared on a different cause of action than set out in the original complaint, and the application of the statutes of limitation will be considered with reference to the date of filing the amended complaint rather than the original date of commencement of the action.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Mark B. Smith against the United Crude Oil Company. From judgment for plaintiff, defendant appeals. Reversed.

See, also, 179 Cal. 570, 178 Pac. 141.

Geo. E. Whitaker, of Bakersfield, for appellant.

Anderson & Anderson and Kaye & Siemon, of Bakersfield, for respondent.

JAMES, J. Plaintiff had judgment against the defendant for a large sum of money claimed as damages. Defendant has appealed, and presents the judgment roll and a bill of exceptions. The cause went to trial upon an amended and supplemental complaint and the answer made thereto. Issue was raised as to matters hereinafter discussed. The answer further pleaded in defense laches on the part of plaintiff and the interposition of statutes of limitation.

Predecessors of the assignors of defendant were the lessees named in a certain lease affecting land which at the time of the commencement of this action was owned by the plaintiff. The defendant succeeded to the rights of the original lessees. The lease mentioned was one made for the purpose of oil development under which, as we construe the instrument, the lessees were entitled to the exclusive possession of the property for the purpose of prosecuting the business designed to be accomplished. The lessees did so have the property, and this defendant, while in possession of the same, made a sublease on the 25th day of May, 1910, to cover a period of time up to the 25th day of May, 1915, and wherein the right to occupy certain portions of the land and to erect thereon buildings for the purposes of an oil-well supply business, was granted to a third party. In April, 1913, the plaintiff gave notice to the defendant, calling for an account of rents and royalties on oil production, and further stating an objection to the sublease, terming it an incumbrance against the conditions of the lease, and requiring the sublease to be vacated. This demand having been apparently disregarded, a written notice was given on the 8th day of April, 1913, declaring the lease of the defendant terminated and void. This action followed. In the complaint plaintiff alleged the failure of the defendant to make account for rent and oil royalties; alleged that the sublessee had been allowed to "occupy and use large portions of the surface of the said land for a long period of years for purposes not contemplated by or within the provisions of said lease, * * * that the said defendant has been collecting of and from said Associated Supply Company the sum of about $100 per month from and after the 6th day of May, 1910, to the date of the commencement of this action and applying all of said sums to its own use, and that the said defendant has failed, refused, and neglected to pay the same, or any part thereof, to the plaintiff, and has failed, refused, and neglected to clear said land of said incumbrances." The prayer of the original complaint was that the lease be terminated, that an account be had, and "for such other and further relief as to the court may seem meet and proper." The cause was tried upon the original complaint and judgment was rendered for the plaintiff, allowing recovery for the rents collected from the sublessee, amounting to $5,843.20. The cause was taken on appeal to the Supreme Court and decision made therein, which is found in 179 Cal. at page 570, 178 Pac. 141. The court there held that no term of the lease of the defendant prohibited the subleasing, and that therefore there had been no violation of any such covenant or agreement. The court did, however, declare that, as the lease held by the defendant was made for a particular purpose, the plaintiff might make his claim under section 1930 of the Civil Code, which provides:

> "When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, he is liable to the letter for all damages resulting from such use, or the letter may treat the contract as thereby rescinded."

The court further remarked that the complaint did not aver any damage, and that no proof was shown to have been offered of any damage to plaintiff by reason of any such use. The decision shows that at the former trial the collection of $100 per month rental by the defendant from its subtenant was not questioned. The judgment was reversed. Upon the cause being remanded to the lower court, plaintiff filed an amended and supplemental complaint in which he alleged only the material facts as to the tenancy of the defendant and the subleasing of a portion of the property, and alleged that the use made by the subtenant was of the value of $100 per month, which it was alleged was the damage suffered by the plaintiff because his property had been used "for purposes not contemplated by the lease." A number of questions are argued on this appeal, all of which it will not be necessary to particularly examine.

[1] The decision of the Supreme Court seems to settle the matter of plaintiff's right to damages as being a right to be predicated wholly upon the provisions of section 1930, Civil Code. That section provides, as has already been noted, that where property is let for a particular purpose and the hirer uses it for other purposes, he is liable "for all the damages resulting from such use." We have announced preliminarily, and we reaffirm the statement, that under the terms of the lease here exhibited and under which the defendant held the property of the plaintiff, the plaintiff reserved no right to use the ground, or any part thereof, during the time that the defendant held possession under its lease. What, then, would be the plaintiff's damages under section 1930, where the property was held for purposes other than those contemplated by the lease? In this case it seems quite plain that the damages would only be those which plaintiff would have suffered by reason of his property being injured by a depreciation in value being produced, or by some other injury which would naturally occur because of the nonpermitted use. The mere value of the use, where the plaintiff himself was not entitled to that use, would not measure the amount of damage, because to allow a recovery on that account would be to allow recovery for something to which the plaintiff was not entitled, considering his contract obligations to his lessee. The Supreme Court no doubt had that condition in mind when it declared that the original complaint did not aver any damage, "nor was proof offered of any damage by reason of such mentioned use." This statement was made in full view of the fact that in the opinion it had already been stated that the defendant did not deny that it had collected $100 per month rental from the subtenant. Let us illustrate the situation in a way which will point more readily to the conclusion already announced: Suppose that the defendant had leased to the plaintiff land for the purpose of occupying it with warehouse buildings only; suppose that this lease gave the right of possession to the lessee and reserved no right to such possession in the lessor; suppose that the lessee, instead of using the property for warehouse purposes, used it for the purpose of conducting a retail store thereon: It seems very clear that in such a case the lessor, seeking to recover damages, would necessarily have to prove some special injury to the property produced by reason of the use being changed from that contemplated by the contract. The keeping of a store instead of a warehouse might be a great deal more profitable to the lessee, and yet it could not be claimed that the lessor, under the provisions of section 1930, Civil Code, would be entitled to recover the increased profits which might accrue to his lessee. In order to permit a recovery at all of damages in this case, we think that the complaint should allege some special damage, if any there was, by which the plaintiff's property was injured through the nonpermitted use. The complaint as presented, taken in connection with the lease which is made a part thereof, in our opinion, fails to state facts warranting any judgment for damages.

[2, 3] Among other questions argued, which in view of our conclusion upon the proposition just discussed will not need elaboration, are: First, that the amended and supplemental complaint should not have been permitted to be filed; second, that a new cause of action was stated in this amended complaint different from the cause of action set up in the original complaint; third, that the alleged cause of action set up in the amended complaint was barred by certain provisions of the Code of Civil Procedure. We are satisfied that a motion made by the defendant to strike out the amended and supplemental complaint, after it had made answer thereto, was properly denied, as the motion came too late. We are convinced, nevertheless, that the amended complaint did declare upon a different cause of action than that set out in the original complaint. If we assume that a cause of action under section 1930, Civil Code, was stated, though imperfectly included in the allegations of the original complaint, it is clear that the cause of action was to declare a forfeiture of the lease, and not for the alternative remedy of damages which section 1930 permits to be recovered. By filing the amended and supplemental com-

plaint the plaintiff eliminated all claim to any right to have the lease forfeited, and adopted the other alternative given by the section of suing for damages. In such a case, of course, the application of the statutes of limitation will be considered with reference to the date of the filing of the amended complaint, rather than to the original date of the commencement of the action.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

50 Cal. App. 424

PEOPLE v. GAVIN. (Cr. 896.)

(District Court of Appeal, First District. Division 2, California. Dec. 16, 1920. Hearing Denied by Supreme Court Feb. 14, 1921.)

1. Infants 🔑20—Information charging acts encouraging minor to lead immoral life held sufficient.

Information charging that defendant induced, persuaded, and encouraged a 9 year old boy to submit to a lewd and immoral act, which tended to and did encourage, cause, and contribute to such boy becoming and remaining a person under the age of 21 years leading an idle, dissolute, lewd, and immoral life, within Juvenile Court Law, § 1, subd. 11, *held* sufficient, on general demurrer, as alleging that he is leading an idle, dissolute, or immoral life, or is in danger of doing so.

2. Indictment and information 🔑154—Uncertainty and indefiniteness waived by failure to interpose special demurrer.

Objections to information on ground of uncertainty and indefiniteness *held* waived by failure to interpose special demurrer.

3. Criminal law 🔑1186(4)—Technical defects in information not misleading defendant not ground for reversal.

Technical defects in the form of the information by which defendant was not misled are not ground for reversal, under Const. art. 6, § 4½.

4. Criminal law 🔑1144(18) — Assumed that motion in arrest of judgment, if made, was denied.

Where record does not contain motion for arrest of judgment, but contains recital that defendant's attorney stated that she decided to appeal in making motion for the arrest of judgment, and that the court thereupon immediately pronounced judgment, it will be assumed by the court on appeal that the motion for arrest of judgment, if made, was denied.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

John Gavin was convicted of violating the juvenile court law, and he appeals. Affirmed.

See, also, 193 Pac. 174.

Mrs. E. C. Harrington, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

NOURSE, J. Appellant was tried before a jury and convicted of a misdemeanor upon an information charging him with the violation of section 21 of the juvenile court law (St. 1915, p. 1225), in that on a certain day, in the city and county of San Francisco, he did willfully and unlawfully—

> "commit an act which did then and there tend to cause and encourage one ——, a male person under the age of 21 years, to wit, of the age of 9 years, to come within the provisions of subdivision 11 of section 1 of said juvenile court law, as follows: Said John Gavin did then and there willfully and unlawfully induce, persuade, and encourage the said —— to submit to a lewd and immoral act, * * * all of which * * * did thereby then and there manifestly tend to, and did, encourage, cause, and contribute to the said —— becoming and remaining such a person as is described in section 1, subdivision 11, of the juvenile court law of the state of California, to wit, a person under the age of 21 years, who is leading or from any cause is in danger of leading, an idle, dissolute, lewd, and immoral life."

[1-3] Appellant urges that the information does not state facts sufficient to constitute a crime or public offense because it fails to allege that the minor named in the charge is leading an idle, dissolute, or immoral life, or that he is in danger of doing so. It is alleged that the acts complained of tended to encourage the minor to become such person as is described by section 1, subdivision 11, of the juvenile court law, and the inferences which must necessarily be drawn from the facts alleged are sufficient to sustain the information as against a general demurrer. It may be that the acts complained of were not set forth in the information with sufficient certainty and definiteness to support it as against a special demurrer, but no attack was made upon that ground, and the objection must therefore be deemed to have been waived. People v. Eddards, 25 Cal. App. 660, 664, 145 Pac. 173. Other similar technical objections to the information are made, but it is apparent from an examination of the entire record that appellant was not misled by any of the alleged defects in the form of the information and that no miscarriage of justice has resulted therefrom. Accordingly, under the well-known rule of decision laid down by the Constitution in section 4½ of article 6 thereof, the judgment cannot be reversed upon any of these grounds.

It is also urged that the evidence is insufficient to prove that any crime was committed. A careful examination of the entire record shows that this contention is without merit. The evidence is clear, explicit, and without substantial conflict, and it would be difficult to conceive of any jury reaching a verdict other than one of guilty.

Objection is made to the instructions given to the jury. But reading them all as a whole, it is apparent that, if any error occurred therein, it did not result in a miscarriage of justice, because, taken as a whole, the instructions of the court completely and fairly presented the law of the case to the jury.

[4] It is also urged that the trial court erred in not deciding appellant's motion in arrest of judgment and in failing to arraign appellant for judgment. The record does not contain a motion for the arrest of judgment, but in the reporter's transcript of proceedings it appears that after appellant's motion for a new trial was denied his counsel stated that she desired to appeal and make a motion for the arrest of judgment. The court thereupon immediately pronounced judgment, and from this it may be assumed that the motion for arrest of judgment, if one be made, was denied. The record clearly shows that defendant was duly arraigned before sentence was pronounced.

In support of his motion for a new trial appellant filed affidavits for the purpose of showing that new evidence had been discovered. The affidavits were clearly insufficient and the denial of the motion for a new trial was proper.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(50 Cal. App. 339)

FONG LIN et al. v. PROBERT. (Civ. 3605.)

(District Court of Appeal, First District, Division 1, California. Dec. 9, 1920. Hearing Denied by Supreme Court Feb. 7, 1921.)

1. Municipal corporations 🔑706(6) — Negligence of automobilist held for jury.

In an action for death of a pedestrian killed by defendant's automobile, whether defendant was negligent *held* for the jury.

2. Municipal corporations 🔑705(10)—Pedestrian has right to stand in street to await train.

One intending to take a train has the right to stand in the street where the train is accustomed to stop.

3. Evidence 🔑117—Connecting evidence held unnecessary in view of admissions.

In an action for death of a pedestrian killed by defendant's automobile on a city street, where evidence of scars on the asphalt caused by the friction of rubber was received upon the condition that it be connected up with defendant's automobile, such connecting evidence was unnecessary where defendant himself admitted that he had examined the tracks and that his car had made them.

4. Municipal corporations 🔑706(5) — Evidence sufficient to support finding of negligence of automobilist.

In an action for death of a pedestrian killed by defendant's automobile while waiting for a train in the street, evidence *held* sufficient to support a finding of negligence of defendant.

5. Marriage 🔑50(2)—Of deceased sufficiently shown.

In an action for death where it was testified that deceased was married and that he left surviving him a wife and two children and no objection was made to such mode of proof, nor any evidence offered to disprove the fact, the marriage was sufficiently shown.

6. Appeal and error 🔑204(1) — Admissibility of evidence not to be raised first on appeal.

Admissibility of evidence cannot be questioned for the first time on appeal, where it was received without objection.

7. Death 🔑18(3)—Action lies regardless of dependency.

Under Code Civ. Proc. § 377, an action for wrongful death lies for the benefit of the "heirs" for any pecuniary loss they may suffer, regardless of the condition of such heirs as to dependency.

8. Death 🔑32—Action lies for benefit of nonresident surviving wife and children.

In an action under Code Civ. Proc. § 377, to recover damages for wrongful death, it was not necessary to show that deceased contributed to the support of his wife and children, and it was immaterial that the wife and children were nonresidents; deprivation of the support that deceased was morally and legally bound to furnish his wife and children being the pecuniary loss suffered.

9. Death 🔑99(4)—$5,400 not excessive allowance to surviving wife and children.

A judgment for $5,400 was not excessive to the wife and children of a Chinaman negligently killed, who was of the age of 37 years, in sound physical health, and employed as a cook at a salary of $45 a month in addition to his board and lodging; the wife and children having a life expectancy of more than 32 years.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Fong Lin and others, as special administrators of the estate of Fong Ben Yuen, deceased, against Frank H. Probert. Judgment for plaintiffs and the defendant appeals. Affirmed.

Chas. S. Perry, of San Francisco, for appellant.

Miller, Thornton, Miller & Watt, of San Francisco, for respondents.

KERRIGAN, J. Plaintiffs, suing as special administrators of the estate of Fong Ben Yuen, deceased, brought this action, alleging negligence on the part of defendant in the operation of an automobile owned by him resulting in injuries causing Yuen's death.

The complaint charged that deceased, at the time of the accident, was married and that he left surviving him a wife and two minor children, who are his heirs at law and in whose behalf this action is brought. Damages are hereby sought under the provisions of section 377 of the Code of Civil Procedure.

The case was tried before the court without a jury, and damages were awarded to plaintiff in the full amount prayed for, which was the sum of $5,400. A motion for a new trial was made and denied.

The findings in the case described generally the manner in which the accident occurred, and they are in substance as follows: On the 22d day of September, 1917, at or about the hour of 7:30 p. m., deceased was lawfully upon Claremont avenue, a public highway, at a place commonly known as the North Gate station of the San Francisco-Oakland Terminal Railways, in the city of Berkeley, county of Alameda. About this time defendant was driving his automobile in a westerly direction along Claremont avenue at a high rate of speed, and ran into, knocked down, and crushed and maimed deceased, inflicting injuries from which he died the same evening. Deceased at the time of his death was about the age of 37 years, was in sound physical health, and employed as a cook at a salary of $45 a month in addition to his board and lodging. That he left surviving him as his heirs at law Quong Shee, his wife, of the age of about 32 years; Fong Wing Jake, a minor son of about the age of 11 years; and Fong Kune, a minor daughter of about 7 years—all of whom reside in China, and were dependent upon deceased for support.

Appellant presents and argues several grounds upon which he relies for a reversal of the judgment. It is his claim that the evidence fails to show any negligence on his part, and further that there is no proof that deceased was married or that he ever contributed to the support of the heirs above named. Complaint is also made that the judgment is excessive.

We do not consider that there is any merit in any of the points urged.

Upon the question of negligence the evidence shows that on the evening of the day when the accident happened defendant, accompanied by his son, left his home in his automobile and proceeded along Claremont avenue in Berkeley toward the North Gate station of the railroad mentioned, commonly known as the "Key Route." According to the testimony of the defendant and his son they were traveling at the rate of from 10 to 12 miles an hour. At the intersection of two certain streets they reached the railroad track, looked for a train going to San Francisco, and, none being in sight, they crossed over the track to the northerly side of Claremont avenue, continuing to drive at the same rate of speed mentioned. At a point about 85 feet from the place where the accident happened defendant saw two people step off the sidewalk and into the street, whereupon he tooted his horn, applied the foot brake, and, to avoid striking them, swerved sharply to the left. As the machine passed these persons defendant noticed deceased standing in the street about 15 feet ahead of him. Confronted with this situation defendant immediately applied his emergency brake and attempted to turn his car so as to avoid hitting deceased, but in this effort he was unsuccessful, for the left headlight of the car struck deceased, dragged him some 18 or 20 feet, and inflicted the injuries which resulted in his death.

It is the claim of appellant that the uncontradicted evidence shows these facts, from which it is argued that a case is thus presented of two persons unexpectedly placing themselves in a position of danger, to avoid injuring one of whom defendant swerved, and in so doing struck the other, for which act it is claimed no negligence can be imputed to him.

[1] Other evidence, however, presents a different situation. Upon the question of the rate of speed the automobile was traveling there is a conflict in the testimony. The only other witness who saw the accident besides defendant and his son testified that the machine was traveling at about 20 miles an hour at the time of the accident. In addition to this direct testimony, it is also in evidence that a police officer, immediately after the accident, in company with defendant, drove the car at the rate of from 10 to 12 miles an hour for the purpose of ascertaining whether or not the brakes were properly working, and that, traveling at such rate of speed, he had stopped the machine in a space of some 9 feet. Expert testimony was also introduced to show within what distance at the place where the accident occurred a machine of the weight and character of defendant's car, and traveling at the speed testified to by the defendant, could be stopped. The witness upon this question placed the distance at about 10 feet, and further testified that it would have been impossible for the machine to have traveled as far as the evidence shows it did with the brakes applied as testified to by appellant. In this regard all the evidence shows that after defendant had traveled a distance of 85 feet or more, as above recited, with his foot brake on, he then applied his emergency brake, and notwithstanding this fact, with both brakes set he traveled an additional 35 feet. This evidence would indicate that defendant was traveling at a much

greater speed at the time of the accident than he and his son testified to. Moreover, there was in evidence the character of the injuries that deceased suffered. His face and scalp were extensively lacerated, so much so that his employer could not recognize him shortly after the accident. His skull and leg were fractured. This, too, would tend to show that the machine was driven at great speed. Aside from the question of speed it further appeared that defendant was driving with sidelights only. His front lights were brilliant but had not been dimmed, as required by the city ordinance, and for this reason he was not using them. The degree of illumination and the speed of a car are somewhat inter-related. The evidence showed that the night was dark, the city lights not having been lit, and save from that produced by two lanterns on a gate and the illumination from lights in a store, there was no artificial light except that furnished by the automobile. There was also evidence to show that it would not be safe to drive with sidelights under these circumstances at a greater speed than from 10 to 12 miles an hour. These were questions of fact to be considered by the trial court in determining whether or not the defendant was guilty of negligence.

[2] Appellant claims that deceased should not have been standing where he was. There was no regular station or safety zone where the train was accustomed to stop, but the place where deceased was standing awaiting its arrival was the usual place for persons intending to board trains to stand. Deceased had a right, therefore, to be where he was.

[3] Appellant complains of the admission of testimony of the existence of scars in the asphalt that appeared on the roadway the morning after the accident. These markings are caused from the friction of rubber. This testimony was introduced for the purpose of showing at what point defendant had applied his brakes. The witnesses who testified upon this subject had visited the scene at that time, and defendant contends that this evidence was inadmissible, for the reason it was too remote, there being no preliminary proof that the tracks were caused by defendant's automobile, and it being claimed that the street was a much traveled one. This evidence was received upon the condition that it be connected up. Plaintiff failed to do so, for the reason that defendant himself admitted that he had examined the tracks the same morning and that his car had made the scars testified to. Under these circumstances no connecting evidence was required of plaintiff.

[4] We deem the review of the evidence we have given sufficient to show that it is ample to support the finding of negligence.

[5, 6] Upon the question of the proof of marriage little need be said. A brother testified that deceased was married, and that he left surviving him the wife and two children hereinbefore mentioned. No objection was made to this mode of proof, nor was any evidence offered to disprove the fact. The evidence having been received without objection, its admissibility cannot be questioned for the first time on appeal. Lucy v. Davis, 163 Cal. 611, 616, 126 Pac. 490; McComish v. Kaufman, 185 Pac. 476.

[7, 8] The same applies to the claim that the record fails to show that deceased contributed to the support of his wife and children, or that they were dependent upon him. This question is not one of first impression in this state. The relief given by section 377 of the Code of Civil Procedure is one for the benefit of the "heirs" for any pecuniary loss they may suffer, and lies regardless of the condition of such heirs as to dependency. Taylor v. Albion Lumber Co., 176 Cal. 347, 168 Pac. 348, L. R. A. 1918B, 185. Deprivation of the support that deceased was morally and legally bound to furnish his wife and children is the pecuniary loss here suffered, and the fact that they are nonresidents does not in any manner affect their rights. Id.

[9] And finally, we are called upon to declare the judgment excessive. This we cannot do. Mortality tables were introduced in evidence to show that the expectancy of life of the decedent was 32 years; his wife and children a longer period. He was earning $45 a month together with his board and lodging, and was to receive more. The judgment is not excessive as a matter of law. Nor does it suggest at first blush passion or prejudice; and there is nothing in the case to show that the trial judge did not justly meet his duty of fixing the proper amount of damages to be awarded. Parsons v. Easton, 28 Cal. App. Dec. 1151.[1]

For the reasons given the judgment is affirmed.

We concur: WOOD, Presiding Justice pro tem.; RICHARDS, J.

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[1] Superseded by opinion of Supreme Court on hearing granted. See 195 Pac. 419.

(50 Cal. App. 462)

LEAKE v. CITY OF VENICE et al. ALLES v. SAME. BRAUN, BRYANT & AUSTIN v. SAME. (Civ. 3108.)

(District Court of Appeal, Second District, Division 1, California. Dec. 20, 1920.)

1. **Joint adventures ⟹8 — Evidence held to show that defendants promoted road races incurring debts to plaintiffs.**

Evidence *held* to show that the defendants associated in a joint venture promoting and holding road races over city highways and incurred debts to the plaintiffs.

2. **Joint adventures ⟹7 — Parties engaging in joint enterprise held liable.**

Parties banding themselves together to conduct road races and defray the expense from moneys raised by subscriptions, entrance fees, and gate charges, whether forming a partnership in the generally accepted sense or not, were engaged in a joint venture, in which each was personally liable for the debts incurred by certain members who purported to act as officers of the association.

Appeals from Superior Court, Los Angeles County; Russ Avery, Judge.

Actions by E. O. Leake, Fred L. Alles, etc., and Braun, Bryant & Austin against the City of Venice and others. Judgments in each case for plaintiffs, from which defendants, other than the City of Venice, appeal. Affirmed.

See, also, 185 Pac. 424.

C. E. McDowell and E. B. Coil, both of Los Angeles, for appellants.

E. O. Leake and Goudge, Robinson & Hughes, all of Los Angeles, for respondents.

SHAW, J. In each of these cases the complaint alleged that Thomas W. Prior, Thornton Kinney, Chauncey Pettis, J. R. Fones, F. A. Church, W. A. Rennie, Byron Palmer, and Charles W. Shaw did associate themselves under the fictitious name of Venice Road Race Association, for the purpose of promoting and conducting an automobile road race over the highways in the city of Venice; and that in preparing the highways and roads for said race and in the conduct of the same, plaintiffs and their assignors, at the special instance and request of defendants, with whom the city of Venice was joined as defendant, did certain described work and labor and, in connection with and for the use of said defendants, furnished certain materials.

In each case judgment went for the plaintiff, from which said defendants, other than the city of Venice, have appealed.

There appears to be no controversy as to the amounts for which the judgments were rendered; the sole contention of appellants in each case, as we understand their counsel, being that the evidence was insufficient to justify the finding of the court to the effect that said defendants above named did form a voluntary association under the fictitious name of Venice Road Race Association for the purpose of promoting and conducting automobile and motorcycle road races in the city of Venice.

The evidence, as to be expected in such cases, is voluminous, and no purpose could be served in an extended reference thereto. Suffice it to say that it clearly tends to establish the following facts: A meeting was held by a number of citizens, at which it was proposed to hold the races, and a committee, of which said defendants were members, was appointed to consider steps to be taken in furtherance thereof. Thereafter a conference was held by members of this committee with Mr. Shettler, who was a member of the American Automobile Association. This was followed by a meeting at which it was determined to hold the races and over what streets and highways the races were to be run, and at which H. B. Eakins, the city superintendent of streets, was requested to take charge of the work necessary to put the course in shape, and with whom they discussed the work necessary therefor. Later he received a letter signed "Thos. W. Prior, Venice Road Race Association, Chairman," asking him to give an approximate estimate as to the cost of the necessary labor in putting the streets in condition, to which he replied that his acceptance of the responsibility for superintending the work was subject to the city board of trustees consenting that he do so, and at a meeting, at which several of the defendants were present and defendant Prior speaking for the committee, they were told by the board that Eakins could act in the matter, provided they were assured the money for the labor would be forthcoming every Saturday night, which assurance was given; Mr. Prior stating they would see that the money was sent out. Eakins, assuming that the committee would attend to the financial arrangements, just as they would attend to the other arrangements for the race, proceeded with the work and labor, and, to the extent that he was given money, paid therefor at the end of each week. A part of the money was delivered to him in cash and part by checks signed "Thos. W. Prior, Custodian." The members of the committee met when necessary to discuss the questions arising in connection with the enterprise, and assumed to and did exercise control over Mr. Eakins in directing him as to the performance of the work as it progressed. Stationery and printed matter were gotten out by the committee, which was given general circulation, the heading of which was "Venice Road Race Association," and whereon, under the title "General Committee," appeared the names of defendants as members thereof, and appeared likewise upon letter heads as a chamber of commerce committee in charge of the venture. It was apparently expected that the cost of doing the work and the incidental expenses of holding the races would be met by subscriptions, gate fees from spectators, and entrance fees paid by those who participated in the races and with whom defendants, acting through one of their number as chairman made contracts.

[1] The foregoing and other facts established tend strongly to show that defendants, with the consent of the city authorities, undertook to and did promote and hold the automobile and motorcycle road races over the highways of the city, having, as their agent, the superintendent of streets, with the consent of the board of trustees, superintend the doing of the necessary work in preparing the streets therefor, which consent was obtained upon their agreeing to furnish the money and defray the expenses of said work; that a large part of the funds, raised by subscription, was paid, but that the amount so raised, together with the moneys derived from entrance fees and gate charges was inadequate to liquidate all of the claims for labor performed and materials furnished in connection with the enterprise so undertaken by defendants.

[2] The evidence is not only sufficient to justify the finding of which appellants complain, but clearly brings them within the rule correctly announced in 4 Cyc. p. 311, that—

> "Each member of an association is liable for the debts thereof incurred during his period of membership, and which have been necessarily contracted for the purpose of carrying out the objects for which the association was formed."

And in Winona Lumber Co. v. Church et al., 6 S. D. 498, 62 N. W. 107, it is said (quoting from the syllabus):

> "Where parties unite in a voluntary unincorporated association, and for convenience contract under an associate name, the acts of the association, it not being a legally responsible body, are the acts of its members who instigate and sanction the same."

Other cases to the same effect are: Willcox et al. v. Arnold et al., 162 Mass. 577, 39 N. E. 414; Vader et al. v. Ballou, 151 Wis. 577, 139 N. W. 413, 7 A. L. R. 216; Crawley v. American Society, etc., 153 Wis. 13, 139 N. W. 734, and Richardson v. Keely, 58 Colo. 47, 142 Pac. 167, in which last case it is said:

> "Where a business is conducted in the name of an unincorporated association, all the parties thereto are regarded as partners."

Conceding the association did not, as to the members thereof, constitute a partnership in the full and generally accepted sense, nevertheless it appears that defendants were engaged in a joint venture in the nature of a partnership, to which the same rules for enforcing liability for debts incurred apply. Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818. They were not only members of the association, but held themselves out to the public as such members and as constituting a committee in charge of the work. In the employing of plaintiffs to perform labor and purchasing materials required in holding the races, they acted by persons designated as officers of the association, and the fact that the transaction out of which the indebtedness arose were had between plaintiffs and such purported officers selected and appointed by defendants makes them none the less liable.

The judgments are affirmed.

We concur: CONREY, P. J.; JAMES, J.

50 Cal. App. 483

NORTON v. NORTON et al. (Civ. 3565.)

(District Court of Appeal, First District, Division 1, California. Dec. 21. 1920. Hearing Denied by Supreme Court Feb. 17, 1921.)

Trusts ⚷30½(2)—Payment of money to one agreeing to care for owner and make certain payments held to create trust.

Where plaintiff's intestate paid $1,000 to his brother's wife under the agreement that she was to care for him as long as he lived, pay his funeral expenses, and pay specified amount to a minister, and have any balance for her own, there was a valid trust of personal property, which, having been fully performed, entitled the brother's wife to such balance remaining after making the specified payments.

Appeal from Superior Court, Santa Clara County; P. F. Crosby, Judge.

Action by Florence Norton, administratrix of Reuben D. Norton, deceased, against Ellen Norton and husband. Judgment for defendants, and from an order denying a motion to vacate and set aside the judgment, plaintiff appeals. Affirmed.

J. C. Black, of San Jose, for appellant.

S. G. Tompkins, of San Jose, for respondents.

KERRIGAN, J. The plaintiff, as administratrix, brought this action to recover from the defendants, who are husband and wife, the sum of $1,000, claimed to be the property of the estate of Reuben D. Norton, deceased. The defendants alleged, and the court found, that the defendant Ellen Norton took said sum pursuant to the terms of a trust to care for Reuben D. Norton until his death, make certain expenditures in his behalf, and retain the remainder to her own use and benefit. Judgment was accordingly entered for the defendants. The plaintiff thereupon made a motion to vacate and set aside the judgment,

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and for judgment for the plaintiff, which was denied. This appeal is from the order denying the motion.

We see no merit in the appeal. On or about July 12, 1917, Reuben Norton, then being in feeble health, entered into an agreement with his brother William Norton that, if William would take care of him while he lived, Reuben would turn over to him the sum of $1,000; it being agreed that William should pay to Mr. Meyer, a minister, the sum of $100, and should pay such expenses as might be incurred in the care of Reuben, and upon his death should discharge his funeral bill, and that William should keep for himself for his trouble any balance that might remain at Reuben's death. The money was then actually paid over to William, who looked after Reuben for a short time. As William lived in Placer county and Reuben in San Jose, it seemed that a better arrangement could be made. Accordingly Reuben, William and Mrs. Ellen Norton, one of the defendants and wife of J. A. Norton, the other defendant and a brother of Reuben, talked the matter over, and it was agreed that Mrs. Norton should look after Reuben and take William's place; that she was to take care of Reuben and pay Rev. Meyer; that she was also to pay any expense necessary in the care of Reuben, and the funeral bill, and that "she should have for her own any balance that remained at Reuben's death." William then paid the $1,000 over to Mrs. Norton, who took Reuben into her home and cared for him until his death in the October following. She paid Rev. Meyer the $100, and also paid the sum of $242.14 for the expense of Reuben's last illness and funeral, leaving a balance in her hands of $657.86. The foregoing is all the testimony taken in the case, and was sufficient to establish a valid trust of personal property, which, having been fully performed, entitled the defendants to the judgment which was entered in their favor. Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659; Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370; Heitman v. Cutting, 37 Cal. App. 236, 174 Pac. 675.

The order appealed from is affirmed.

We concur: BARDIN, Presiding Justice pro tem.; RICHARDS, J.

(50 Cal. App. 382)

PEOPLE v. SAENZ. (Cr. 935.)

(District Court of Appeal, First District, Division 2, California. Dec. 14, 1920.)

1. Criminal law 🔑1141(2) — Action of trial court presumed regular and correct.

All presumptions are in favor of the regularity and correctness of the action of the trial court.

2. Criminal law 🔑1144(3)—Order dismissing former information presumed to state reasons in absence of record.

In murder prosecution in which it was claimed that defendant had been put in jeopardy by a previously dismissed information, the court, on appeal from judgment of conviction, must assume, in the absence of the proceedings under the first information, that the order dismissing the former information stated the reasons of the dismissal as required by Pen. Code, § 1385.

3. Criminal law 🔑1088(1), 1144(19)—Statements in brief not part of record and not presumed true.

Statements in a brief are no part of the record, and will not be assumed to be true by the appellate court.

4. Criminal law 🔑178—Defendant not placed in jeopardy by information dismissed before impaneling of jury.

Defendant was not placed in jeopardy under information dismissed before the jury was impaneled.

5. Criminal law 🔑438—Photograph of deceased taken at morgue held admissible.

In murder prosecution, a photograph of the deceased taken at the morgue, showing numerous cuts upon the head and face, *held* admissible to corroborate testimony that defendant had struck deceased three times with a chisel after he had fallen to the floor, and to corroborate testimony of physician who examined deceased's body, notwithstanding gruesomeness of picture, and possible effect thereof on jury.

6. Witnesses 🔑2(3)—Withholding of attachment against witness held not error.

Action of court in withholding attachment where witness was ill did not deprive defendant of any substantial right, where court in so doing stated that defendant might prepare affidavits stating the testimony which he expected to prove by such witness, and that such affidavits might be ground for a continuance, and where no such affidavits were prepared by defendant.

7. Criminal law 🔑641(3)—Appointment of attorney for defendant on failure of retained attorney to appear held proper.

Action of court in appointing as counsel for defendant a lawyer who had previously appeared for him, where other lawyer retained by defendant did not appear, *held* proper.

8. Criminal law 🔑719(4)—District attorney's reference to letter which had been ruled out by court held improper.

District attorney's reference in his argument to the jury to a letter written by defendant, in which he admitted the crime charged, but which letter had been ruled out by the court, *held* improper.

9. Criminal law 🔑1186(4) — District attorney's improper remark in argument to jury held not ground for reversal.

Prosecuting attorney's reference in argument to the jury to letter which had been ruled out by the court *held* not ground for reversal under Const. art. 6, § 4½, where the court directed that all reference to the letter be withdrawn and instructed jury to disregard it, and where evidence clearly proved defendant's guilt.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Carlos Saenz was convicted of murder in the first degree, with life imprisonment, and he appeals. Affirmed.

Richard K. Stewart, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal from a judgment of conviction of murder in the first degree, for which the defendant was sentenced to imprisonment in the state prison for life.

The first error assigned by the appellant is that the trial court erred in refusing to grant defendant's motion to dismiss the information against him, filed on April 10th, charging the defendant with murder in the first degree (upon which information defendant was tried), upon the ground that a former information filed herein on the 13th day of January, 1920, charging the defendant with murder in the second degree, had been dismissed by the court on March 2, 1920.

[1, 2] The proceedings under the first information are not before this court upon appeal; they have not been made a part of the record. Under the well-recognized rule that all presumptions are in favor of the regularity and correctness of the action of the trial court, we must assume that this order dismissing the former information was in all respects as required by section 1385, Penal Code. The case of People v. Disperati, 11 Cal. App. 469, 105 Pac. 617, cited by the defendant in his argument before the trial court does not aid the appellant here. It is true that that case states, at page 477 of 11 Cal. App., at page 620 of 105 Pac., that the order of the trial court did not recite the reasons upon which it was based; that the record shows the grounds upon which the motion to dismiss was made by the district attorney; but nothing in the order shows that these grounds were, or any of them was, the basis for the action of the court.

[3, 4] The appellant has stated in his brief that the motion was made in the present case by the district attorney upon the ground that he desired to charge the defendant with murder in the first degree, and therefore desired that the information for a lesser crime, growing out of the same offense, be dismissed. Appellant has also stated that the reasons for dismissing the information were not given in the order of the court. The statements in the brief are, of course, no part of the record, and we are not at liberty to assume that the order of the trial court did not specify the grounds of the dismissal. It is provided (section 1387, Pen. Code) that an order for the dismissal of an action is not a bar to a prosecution for the same offense if the offense is a felony. See, also, People v. Schmidt, 64 Cal. 263, 30 Pac. 814; People v. Campbell, 59 Cal. 243; People v. Breen, 130 Cal. 72, 62 Pac. 408; People v. Smith, 143 Cal. 597, 77 Pac. 449. The order of dismissal was made, according to appellant's statement, before the impaneling of the jury, and the defendant at that time had not been placed in jeopardy under the first information.

[5] Another objection urged is that error was committed by the trial court in admitting into evidence a picture of the deceased taken at the morgue, which picture shows numerous cuts and bruises upon the head and face. It is contended by appellant that this picture was prejudicial to the defendant because of its appeal to the emotions of the jury and that there was no justification for its admission. There existed in the present case the same reasons for the introduction of the photograph as existed in the case of People v. Balestieri, 23 Cal. App. 708, 139 Pac. 821, in which the admission of a photograph of the mutilated head of the deceased was upheld by division 1 of this court, and a rehearing by the Supreme Court was denied. It was stated in the Balestieri Case that the picture served to illustrate the testimony of a witness as to the manner and form of the assault of the defendant upon deceased, and also served to illustrate and clarify the testimony of the autopsy physician with reference to the character of the wounds and the causes of death. In the present case precisely the same situation exists. The principal witness for the people, Christobal Jaquez, described the events leading up to the death of the deceased, and stated that the defendant had struck deceased three times with a chisel after he had fallen to the floor from the first blow inflicted by the witness. This picture served, at least, to corroborate his testimony in so far as the actual infliction of the number and character of the blows was concerned, their location, etc. It was also of aid in comprehending the testimony of the physician who examined the body of the deceased. The fact that it was a gruesome object to bring to the attention of the jury is no argument against its admission, for, as stated in the Balestieri Case, if the rule were otherwise, then the more horrible a murder the more hampered would be the prosecution of those who had contributed the details of its horror. There is also a further argument for the admissibility of this picture arising from the fact that there was some question of identification involved, which arose by reason of the fact that deceased was a Japanese and was known to some of the witnesses as T. Shibata, but was known to one witness, a Chinaman, only

by the name of Ah Chee. This witness testified that he had found the body of Ah Chee in the truck, but also testified that he did not know T. Shibata.

The defendant further objected to the action of the trial court upon the following facts: When the case was called for trial no counsel appeared for the defendant and the court directed the sheriff to bring into court Richard K. Stewart, who, the court stated, had been the only attorney appearing in the proceedings had in the case in the superior court. Mr. Stewart was brought into court and protested that he was not the counsel for the defendant, and that one Brickley had been retained as such, and that any action which had been taken by Mr. Stewart in the case was merely for the accommodation of Mr. Brickley. The court stated that Mr. Stewart was the only attorney which the court had recognized in the proceedings before it, and that as Mr. Brickley was not present the court would call upon Mr. Stewart to proceed with the case. Mr. Stewart then desired a continuance, to which the district attorney objected for the reason that a number of witnesses had been brought from Coalinga to Fresno, where the trial was had, and that the trial had been set for that day and no continuance had been asked. Upon the insistence of Mr. Stewart, a short continuance was granted, within which it was agreed that Mr. Stewart would proceed to the ranch where Mr. Brickley was at the time accompanied by the sheriff, and would bring Mr. Brickley into court by 11:15 o'clock; upon the understanding, however, that if Mr. Brickley was not present at that time, the trial would proceed without him. At the appointed time, the case was called and the record shows that Mr. Stewart answered that the defendant was ready, without further objection. Mr. Brickley was not produced.

[6] At the close of the plaintiff's case, counsel for defendant asked that a bench warrant issue for Mr. Brickley to bring him into court for failure to obey a subpœna which had been regularly served. It was stated at that time that he was required as a witness for the defendant. The sheriff was then sworn and testified that he had served the subpœna upon Mr. Brickley at 10 o'clock on the morning of that day, and had found him in bed, apparently so ill that he was unable to stand upon his feet. The sheriff testified that Mr. Brickley could not sit up and was unable to raise himself in his bed to speak with him. The court said that, under the circumstances, it would withhold from the hands of the sheriff the attachment ordered issued, and that affidavits might be prepared by defendant's counsel embodying the testimony which he expected to prove by the said Brickley, and that such affidavits might be ground for a continuance. The affidavits were evidently not prepared and do not appear in the record. Under these circumstances, we see no error in the action of the trial court, and we do not think the defendant was deprived of any substantial right in being denied the process of the court to compel the attendance of this witness.

[7] As to the other question so strongly urged in connection with the absence of Mr. Brickley, i. e., that the defendant was deprived of the aid of counsel of his own choosing, we think it is also without merit. Admitting that Henry Brickley was the counsel for the defendant, the case had been set for trial for a day certain and Mr. Stewart had appeared for the defendant at other proceedings in the superior court in connection with this case. Mr. Brickley did not, and could not, according to the testimony of the sheriff, appear at the date set for trial. Mr. Stewart, however, was before the court at that time. The court was warranted, under the circumstances, in appointing counsel then and there to represent the defendant. People v. Russell, 156 Cal. 450, 105 Pac. 416. The language of the last-cited case seems quite pertinent to the case at bar. It was said:

> "On October 29, 1907, the case was set for trial on December 30, 1907, the defendant personally requesting that it be set for some time in December. At the time so fixed the case was called. Defendant said he was not ready for trial because his attorney was not present, but was in Seattle, where he had been trying a case for some weeks. This attorney had represented defendant up to this point. No continuance had previously been requested, or any intimation made that one would be asked be defendant, and a jury was present for the trial, as well as the prosecution and its witnesses. There was nothing, according to the showing made, to warrant the assumption that the case would not be tried at the time set. The trial court was not required to indefinitely wait for the return of defendant's counsel before proceeding with the trial. * * * The trial court stated to the defendant that he would appoint counsel for him, but defendant practically declined to avail himself of this offer, insisting that his original attorney should be present, and he subsequently conducted his own defense. * * * Defendant cannot now complain that he was not represented by counsel, that fact being due entirely to the further fact that he declined to accept the offer of the court in regard thereto."

Upon the contention of counsel for defendant that the case could have been conducted more ably by Mr. Brickley, the record speaks for itself, and it plainly shows that the case was very carefully tried for the defendant; that every objection was made and saved and the entire matter handled in all respects in a manner most creditable to the attorney and most advantageous to the defendant. There is absolutely nothing in the record to indicate that the defendant was in any way prejudiced by the fact that the case was conducted on his behalf by the attorney who represents him here upon appeal.

There is urged further on behalf of the defendant the objection that evidence of his confession to the sheriff should not have been introduced against him because it appears that it was obtained under a promise of immunity. The most that can be said for defendant upon this point is that conflicting inferences might be drawn from the testimony regarding the reasons for the making of the confession by the defendant, but we are convinced that there was sufficient evidence to justify the conclusion of the court that the confession was made voluntarily by the defendant and without the promise of any immunity. The testimony regarding the statements made to the defendant by the officers at the time of his confession is very similar to that set out in the opinion in the case of People v. Haney, 189 Pac. 338, and the court was entitled to accept this testimony, as against a different account of the matter given by the defendant, and conclude thereupon that the confession was a voluntary one, and, as such, entitled to be admitted in evidence.

[8, 9] The last error urged by the defendant is in reference to the conduct of the district attorney in referring in his argument to the jury to a letter written by the defendant to his brother in which he admitted the crime charged, which letter had been ruled out by the court. This was unquestionably improper. The court, however, upon the defendant's objection, directed that all reference to the letter be withdrawn and the jury instructed to disregard it. It will be presumed that the jury heeded this admonition of the court, most especially in view of the entire record, which clearly discloses the participation of the defendant in the commission of a most heinous crime. Under such circumstances, there has been no miscarriage of justice in the verdict of the jury and judgment of the court, and prejudice is not presumed from error since the enactment of section 4½ of article 6 of our Constitution.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

50 Cal. App. 397

DUFF v. ANDERSON. (Civ. 3601.)

(District Court of Appeal, First District, Division 1, California. Dec. 15, 1920.)

1. Appeal and error 🔑995—Weight of evidence for the trial court.

It was the province of the trial court, and not the appellate court, to weigh the evidence.

2. Sales 🔑181(11)—Evidence held to prove tender of bill of sale.

In seller's action for possession following buyer's default in payment of installments, evidence *held* to support finding that before commencement of the action seller tendered buyer a bill of sale.

3. Sales 🔑176(3)—Failure to specify objection to bill of sale waiver of objection.

. Buyer waived the right to object to the bill of sale for insufficiency of description, in seller's action for recovery of goods on ground of buyer's default, by failure to specify such objection on seller's tender of bill of sale on making demand on buyer for performance, under Code Civ. Proc. § 2076.

4. Contracts 🔑170(1)—Practical construction by parties considered.

Subsequent acts of the parties showing the construction they have put upon the agreement themselves are to be looked to by the court, and in some cases may be controlling.

5. Appeal and error 🔑1027—Demand in replevin for excessive damages harmless where possession recovered.

In replevin by seller following buyer's default in payment of installments, where seller obtained possession of goods at time of commencement of action, and where judgment merely awarded him possession without providing for money damages if delivery could not be had, plaintiff's demand for an amount in excess of that due *held* harmless.

6. Appeal and error 🔑1170(10)—Erroneous finding held harmless in view of judgment.

In replevin by seller of cattle to recover possession following a buyer's default in payment of installments, where judgment awarded seller possession merely, action of court in finding that buyer failed to feed or pasture the cattle as required by the contract, if error, *held* harmless under Code Civ. Proc. § 475, since seller was entitled to judgment for possession in view of buyer's default, regardless of such finding.

7. Judgment 🔑251(1), 256(1)—Award of possession of cattle with increase held erroneous in view of pleading.

In replevin by seller of cattle to recover possession following buyer's default in payment of installments, judgment for seller giving him possession *held* erroneous in so far as it entitled him to "all the increase of cattle had while in possession of defendant or $7 per head damages if possession could not be had," in absence of pleadings or findings specifying or describing any increase.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by H. S. Duff against M. A. Anderson. Judgment for plaintiff, and defendant appeals. Affirmed as modified.

Frank Kauke and Ernest Klette, both of Fresno, for appellant.

Geo. Cosgrave, of Fresno, for respondent.

WOOD, Presiding Justice pro tem. This is an ordinary action of replevin by which plaintiff obtained judgment for the possession of certain cattle theretofore delivered to defendant under an agreement of purchase and sale. Defendant appeals.

By the terms of an agreement which bears date April 3, 1918, respondent agreed to sell, and appellant to buy, 35 dairy cows for $4,375. Upon the execution of the agreement $1,000 was paid. The balance, with interest at 8 per cent. per annum, was payable within one year in any event, and installment payments were to be made on account in the sum of $150 per month on the 15th day of each and every month, commencing May 15, 1918, title to remain in seller until the purchase price was fully paid. The purchaser was given possession of the cattle upon the execution of the agreement, and was to receive a bill of sale upon full payment of the contract price.

The following covenant was inserted in the agreement:

> "The said stock and all thereof shall be held for six months from the date hereof and subject to what is commonly called tubercular test made in conformity to the laws of said state. All cows passing such test shall be accepted by the second party at that time. If any of said cows do not pass such test at such time, the same shall be held for an additional period of six months and a like test shall be made of them during that time, and all thereof which pass said test shall be accepted by the second party. At the end of one year from the date hereof if any of said cows fail to pass said test, then and in that event, the first party will withdraw the same from this contract and agreement and deduct $125 for each cow from the said purchase price, but the second party shall pay the first party $6 per month for each and every month of the milking period from the date hereof up to the time any animal is withdrawn by the first party for the reason that it does not pass said test."

During the six months following the execution of the agreement appellant made payments on account aggregating $765.17, but never made any thereafter.

On May 10th, and after the entire balance of the purchase price, with interest, amounting to $2,897.53, was due and unpaid, respondent delivered to appellant a written demand as follows:

> "Fresno, May 10, 1919.
>
> "To M. A. Anderson: Herewith is tendered to you a bill of sale conveying title to the cattle now in your possession belonging to me, and the same will be delivered on payment of the sum of $2,897.53, being the amount due on contract for the sale of the same, and demand is hereby made upon you for the said amount or in default of such payment possession of the cattle described in said bill of sale is hereby demanded. H. S. Duff."

The first point urged by appellant is that, as all the payments were due at the time of the demand, he could not be put in default until a bill of sale was tendered to him, and that the evidence is insufficient to support the finding that such a tender was made.

Upon the trial the appellant denied that respondent had exhibited or left with him any paper other than the written demand. The respondent, as a witness, upon being questioned whether he tendered the bill of sale, said that he did not; that he did not remember; that he had the bill of sale in his possession at the time; and that it was his recollection that, if Mr. Anderson (appellant) made any kind of settlement, he was to turn over to him the bill of sale. Upon cross-examination, however, he said:

> "I think I exhibited this [bill of sale]. Q. You would not be sure? A. No; but my instructions were to do it, and I think I did. Q. You did not leave it with him? A. I don't think I did."

[1] The evidence, at best, is weak. Still it was the province of the trial judge, and not ours, to pass upon its weight.

[2] It appears that respondent went to the appellant's ranch, acting under the instruction of his attorney; that he was contemplating the immediate commencement of an action against appellant; that he had the bill of sale with him; that the written demand expressly stated that he tendered a bill of sale; that he had made unsuccessful and repeated demands upon appellant for money during the previous four months; and that he had slight, if any, faith in the defendant making any settlement when he made the demand. In view of all the surrounding circumstances, we think that the finding is supported by the evidence, and shows an actual tender as found by the court.

It is next claimed that the bill of sale, as tendered, was insufficient, in that it contains no description of the cattle except by reference "to the agreement hereto attached," while the evidence shows that no such copy was attached.

[3] The court found upon sufficient evidence that there was an actual tender of the bill of sale, and under section 2076 of the Code of Civil Procedure it devolved upon appellant at such time to specify any objection he had as to the instrument; otherwise it was waived.

It is urged that it was the duty of respondent to have the tubercular test of the stock made, and that by failing so to do he himself was in default and cannot enforce the contract. The evidence shows that the provision providing for a test was incorporated in the contract at the suggestion of appellant. The cattle were in his possession. The clause was for his benefit, and it was his exclusive right to waive the test. The appellant did not have the test made until April 12, 1919, and more than a year after the date of the contract. According to his own testimony he wrote to the state veterinary, and received word that it was thought that the man would be there at a certain time to make the test, which was to be about six months after the making of the contract. Afterward he received word that the man would come as soon as he could, and he got him as early as possible. Respondent testified:

> "I asked him several times for his test and it was always a case of they had written and when he got the test he would let me know, and was to let me know before the test was made, because I wanted to be present."

[4] If there was any uncertainty as to who was to make the test, this evidence shows that the court was warranted in believing from the conduct of the parties that they considered it to be, and that it was, the duty of appellant to do so.

> "Subsequent acts of the parties, showing the construction they have put upon the agreement themselves, are to be looked to by the court, and in some cases may be controlling." 9 Cyc. 588, and cases there cited.

It is next urged that appellant was entitled to an additional credit of $1,875 on the contract price, being $250 for 4 head of cattle that died and $1,625 for 13 head that did not pass the tubercular test which appellant had made on April 12, 1919, more than one year after the date of the contract. This contention is based upon an instrument in writing signed by respondent and delivered to appellant, which is as follows:

> "Mr. M. A. Anderson: In regard to your complaint regarding the four cows that died, I will give you credit for $62.50 per head and will also receive the thirteen head turned down on test, and in final settlement deduct the amount from the contract. H. S. Duff."

[5] The court found upon sufficient evidence that there was no consideration for the instrument; that it was made at a time when all the payments on the contract were due, and as an offer of compromise. It appears that according to appellant's own construction of the contract there was at least $734.53 unpaid on the agreement at the time of the demand. In any event he was not injured by a demand in excess of the amount due. All the cattle referred to in the agreement, except the 4 that died, were taken by plaintiff upon a writ at the time of the commencement of the action. Defendant in his answer admitted that plaintiff was entitled to the possession of the 13 head mentioned. The court found that all the cattle described in the agreement, except these 4 cows that died, were so taken by plaintiff upon the writ and retained by him. The judgment declares plaintiff to be the owner and entitled to the possession, but does not award plaintiff any money or their value, if delivery cannot be had.

[6] It is claimed that the court seriously erred in admitting evidence to the effect, and in finding, that defendant failed to feed or pasture the live stock as required by the contract, inasmuch as no claim of such failure was ever made by plaintiff until the time of the trial. Assuming that the action of the court was erroneous, it must be disregarded, unless it appear that a different result would have been probable if the error had not occurred. Section 475, Code Civ. Proc. It is obvious that the respondent would be entitled to judgment even if this finding had been in favor of appellant.

Appellant failed to make his payments, although frequently urged so to do. He paid no money after December 24, 1918, nor did he make a tender of any after that date. While he alleged in his answer that at the time of the demand he offered to pay to plaintiff all sums due, it is apparent that his talk upon that subject at the time of the demand was a mere subterfuge to further postpone the day of settlement, while he was receiving the income from the dairy cows.

[7] Objection is made to the improper insertion of a clause in the judgment, following a description of the cattle of which plaintiff is adjudged entitled to the possession. There appears in neither the pleadings nor findings any suggestion as to the amount of, or as to the description of any increase, of cattle; yet plaintiff by the judgment was awarded possession in general terms "of all the increase of cattle had while in possession of defendant or $7 per head damages if possession could not be had." In practical effect it allows plaintiff carte blanche to levy a writ of execution upon the property of defendant.

The judgment is modified by striking out the following words:

> "Together with the increase thereof while in possession of defendant M. A. Anderson, or if delivery of the increase now in possession of defendant cannot be had then for $7 per head damages for its detention."

In all other respects the judgment is affirmed; each party to pay his own costs upon appeal.

We concur: KERRIGAN, J; RICHARDS, J.

(50 Cal. App. 427)

PEOPLE v. RICCARDI. (Cr. 903.)

(District Court of Appeal, First District, Division 1, California. Dec. 16, 1920. Hearing Denied by Supreme Court Feb. 14, 1921.)

1. Embezzlement 🔑32—Indictment charging embezzlement by a "bailee" sufficient to charge embezzlement by agent.

Indictment charging that defendant was "bailee" of named person, and that by virtue of his employment as such bailee there came into his possession a specified sum of money that he unlawfully and feloniously converted, embezzled, and appropriated to his own use, *held* sufficient to charge embezzlement by an "agent" under Pen. Code, § 508; the word "bailee" for the purposes of the indictment being synonymous with term "agent," since a bailee is a species of agent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bailee.]

2. Embezzlement 🔑32—Indictment need not allege nature of bailment.

In prosecution of a bailee for embezzlement under Pen. Code, § 508, it is not necessary to allege the nature, purpose, and object of the bailment.

3. Embezzlement 🔑44(5)—Evidence held to sustain conviction.

In prosecution of a lawyer for embezzlement of money given him by client as bail money defended on the ground that money so given him was his fee, evidence *held* to sustain conviction.

4. Criminal law 🔑741(1)—Weight of evidence for the jury.

The weight of the evidence is for the jury.

5. Criminal law 🔑742(1)—Credibility of witness for jury.

The credibility of a witness who has twice been convicted of a felony is for the jury.

6. Witnesses 🔑345(1)—Previous conviction of witness of felony considered in determining credibility.

That a witness had twice been convicted of a felony should be given great weight by the jury in determining his credibility.

7. Embezzlement 🔑6—Conviction of embezzlement by person to whom check had been delivered held proper.

Where client delivered check to his attorney to enable the attorney to deposit money as bail, the lawyer's conviction of embezzlement of the money *held* proper as against objection that it was the check, and not the money, that he converted, since he was the bailee not only of the check, but of the money.

8. Criminal law 🔑1166½(12)—Court's statement held not prejudicial misconduct.

In prosecution of a lawyer for embezzlement, statement by the trial judge that lawyer who acts as his own attorney has a fool for a client, where court expressly disavowed any personal imputation of folly to the defendant, *held* not prejudicial misconduct.

9. Criminal law 🔑782(13)—Requested instruction as to proving defense held misleading.

Refusal of instruction requested by defendant that a preponderance of the evidence is sufficient to establish a fact favorable to the defendant's innocence *held* proper, since to so instruct the jury might have misled it into supposing that the defendant must establish his innocence by a preponderance of the evidence.

10. Criminal law 🔑561(1)—Reasonable doubt as to guilt sufficient for acquittal.

All that is necessary to acquittal is that the evidence, taken as a whole, should leave a reasonable doubt in the minds of the jury as to defendant's guilt.

11. Criminal law 🔑778(4)—Instructions on burden of proof held sufficient.

Instruction that defendant need prove nothing, that all presumptions were in his favor and that every fact necessary to a conviction must be established by the people beyond a reasonable doubt, *held* sufficient.

12. Criminal law 🔑1035(3)—Misconduct of court should be immediately called to court's attention.

A trial court is entitled, if it is the intention of counsel to rely, upon an appeal, on the conduct of the trial court, to have the alleged transgressions called to the trial court's attention, so that he may in a proper case by an admonition to the jury, or by some other suitable mode, immediately remove the prejudice possibly caused thereby.

13. Criminal law 🔑1111(5)—Clerk's minutes held to control reporter's transcript.

Recital in the clerk's minutes of the trial that the plea of the defendant was stated to the jury *held* controlling in support of the verdict, over reporter's transcript.

Appeal from Superior Court, City and County of San Francisco; G. A. Sturtevant, Judge.

C. Vincent Riccardi was convicted of embezzlement, and from judgment of conviction and from order denying motion for new trial, he appeals. Affirmed.

J. J. Dunne, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

BEASLY, Justice pro tem. The defendant was found guilty of embezzlement upon an indictment, was adjudged thereon to be imprisoned in the state prison, and appeals from this judgment and from an order denying his motion for a new trial.

The indictment charges that the defendant, Riccardi, was bailee of one Alberto Rolatti; that by virtue of his employment as such bailee there came into the possession, care, custody, and control of him, the said Riccardi, $1,000 in lawful money of the United

States of America and of the value of $1,000 in gold coin of the United States of America, and of the personal property of the said Alberto Rolatti, and that he, the said Riccardi, after the said personal property had come into his possession, care, custody, and control as aforesaid, did then and there willfully, unlawfully, fraudulently, and feloniously convert, embezzle and appropriate the same to his own use and to uses and purposes not in the due and lawful execution of such trust as such bailee as aforesaid.

This indictment is attacked as not complying with the provisions of section 507 or section 508 of the Penal Code upon one or the other of which, under the facts in evidence and instructions of the court, the prosecution must of necessity have based its theory of the case. The answer to this contention is that the indictment is within the provisions of section 508 of said Code, which reads as follows:

"Sec. 508. When Clerk, Agent, or Servant Guilty of Embezzlement. Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

[1] It is true, as claimed, that the indictment charges the conversion by Riccardi as bailee, and that the term "bailee" is not found in section 508; but the word "bailee" is for the purposes of the indictment synonymous with the term "agent," a bailee being a species of agent. People v. Walker, 144 Cal. 1, 77 Pac. 705.

"The offense charged in the information," says the court in that case, "though stated in slightly different language, is essentially the same as that for which the defendant was committed. Every agent who, by virtue of his employment, receives into his possession the property of his principal, is as to that property the bailee of his principal so long as the title to the property remains in the principal, and every bailee of property who by the owner is intrusted with it is, for the purpose of its safe-keeping, the agent of the owner. It is immaterial whether the bailee receives the property directly from the owner or from third persons on behalf of the owner. In either case he is, in contemplation of law, intrusted with the property of the owner, and is an agent as well as a bailee. The two terms are, with respect to the persons and property and the particular offense here involved, but different names for the same relation. When, therefore, the information charged the defendant with embezzling money of the company received by him as its agent and by virtue of his said employment, it did, in legal effect, charge him with embezzling money of the company intrusted to him as bailee by the company, which was precisely the crime described in the original complaint, and for which he was committed."

[2] The indictment contains all of the specifications necessary to charge the defendant under section 508 of the Penal Code, in view of the rules laid down in People v. Gordon, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174, and People v. Walker, supra. Although they seem very technical, we will dispose of certain specific criticisms of the indictment. It seems to us, for example, that the indictment sufficiently alleges that the defendant was bailee of the $1,000, and that it also alleges with sufficient clearness that this money was intrusted to Riccardi as bailee. It is not necessary to allege the nature, purpose, or object of the bailment. People v. Goodrich, 142 Cal. 216, 75 Pac. 796; People v. Gordon, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174. Says the court in the latter case:

"Stating that the property was intrusted to the defendant as bailee sufficiently shows a fiduciary relation, and it was not necessary to allege the circumstances of the felonious conversion, especially so in the absence of a demurrer."

[3] The defendant claims that the evidence is not sufficient to support the verdict; that there is in the record only slight evidence supporting the charge of embezzlement. He admits a conflict in the evidence, but contends that the verdict finds support only in the evidence of Rolatti, the prosecuting witness, and that, as Rolatti was shown to have been twice convicted of a felony, his evidence is discredited to such an extent as not to furnish more than slight proof of guilt. The evidence of Rolatti, if believed, clearly establishes the guilt of Riccardi. It is simple and may be briefly narrated: Rolatti was arrested for a felony in March, 1918, and lodged in the city prison of the city and county of San Francisco. He was presently called to the reception room of the prison, and there met Riccardi. Rolatti did not know Riccardi at all, but the latter introduced himself as a lawyer, and told Rolatti that the latter was in great trouble. After Riccardi had advised Rolatti not to employ an American lawyer on the ground that the latter would not be able to assist him, the two agreed upon a fee of $400 for Riccardi for his services in the latter's behalf. Rolatti had $1,500 in bank. Riccardi received all of the $1,500 of Rolatti's money. One thousand of this was retained by Riccardi for the purpose of procuring the release of Rolatti on bail, and was obtained upon a representation of Riccardi, who informed Rolatti that he could be liberated on bail in the sum of $1,000 in cash. Rolatti had this sum on deposit in the bank. Riccardi, under Rolatti's direction, obtained the latter's bank book from a suit case belonging to Rolatti. Riccardi thereupon showed Rolatti what purported to be an order for bail signed by a

police magistrate of the city and county of San Francisco. Thereupon Rolatti signed and delivered to Riccardi a bank check. Riccardi presented this check to the bank. When so presented it was filled out for $1,000, and marked on the face in Riccardi's handwriting, "Paid as fee." The check was cashed, and Riccardi did not use the money to procure the release of Rolatti on bail, but claimed at the trial that the $1,000 was paid as a fee, and not as bail money. Riccardi kept the $1,000 and also the other $500.

[4, 5] It is clear from the foregoing, if the jury believed the testimony, that the complaining witness, Rolatti, intrusted the $1,000 of his funds to the defendant for the sole purpose of being deposited as bail money. That it was never used for this purpose, but was appropriated by the defendant Riccardi, is conceded by the very nature of his defense, wherein he admits that he received $1,500 from the complaining witness, Rolatti, but contends that he so received it upon an understanding had with the complaining witness that it was to be his fee. There was certain testimony which, if believed, corroborated Riccardi in this contention. The jury, however, evidently rejected this evidence of the defense, and chose to believe that of the prosecuting witness to the effect that the money was not paid to the defendant Riccardi as a fee, but was delivered to Riccardi to be deposited as bail. There was also the evidence of circumstances and some evidence arising out of the contradictory nature of the testimony of Riccardi which tended to corroborate Rolatti. The evidence was sufficient, if believed by the jury, to sustain the verdict. It was the function of the jury to pass upon the weight of the evidence and the credibility of the witness Rolatti.

[6] It is conceded by the appellant that there is a conflict in the evidence, and that upon such conflict this court will not interfere with the verdict of the jury where the evidence is substantial as contradistinguished from slight. The fact that Rolatti had twice been convicted of a felony should have been given great weight by the jury in determining his credibility. Nevertheless to the jury is left by the law in such case the question of determining whether or not the testimony of the witness with his felonious record was to be believed as against that of Riccardi and other witnesses. The jury saw the witness Rolatti, had an opportunity to observe the other witnesses, and upon the jury the law lays the burden of determining whether Rolatti or Riccardi should be credited. If any other rule obtained, the felon would be helpless against any rogue who might find himself in a position to swindle him. The evidence of Rolatti cannot be said to have been slight as a matter of law, and the question whether it should be believed was one for the jury. That body determined it against Riccardi, and he must abide that determination.

The appellant also contends that the evidence, if believed, established the commission by him of grand larceny, and not of embezzlement. This contention is based upon an admission that the defendant obtained the $1,000 through the instrumentality of a forged, false, and fictitious order admitting the latter to bail in the sum of $1,000. No evidence was introduced, however, to show whether the paper, purporting to be an order for bail, submitted to Rolatti, was forged or false. Neither the justice whose name was attached to it nor any one else was called to testify that such order, or signature of the magistrate thereon, was false or forged. The paper itself was not in existence; and there is nothing whatever in the evidence to show or indicate that the order was not genuine.

The appellant further contends, at least inferentially, that what he embezzled, if anything, was the check, and not the cash. But he did with the check exactly what it was intended he should do; he cashed it; and the obtaining of the check was only a circumstance in the chain of facts. He embezzled, if anything, the cash, and not the check. As to when the defendant formed the intent to convert the money to his own use, the evidence was quite sufficient to support the conclusion that it was after the money came into his possession that he formed and executed that intent. A similar construction was given to similar evidence in People v. Gordon, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174, and upheld by the Supreme Court.

[7] The appellant argues that he was not the bailee of the money, but only of the check, if anything. As the record above quoted shows, he obtained the money for a specific purpose. He was the agent of Rolatti to execute that purpose by depositing the money as bail, and as such he was the bailee of the money until it was deposited. He failed to so deposit it. He converted it to his own use, and claims it was paid as a fee, a claim which the jury discarded. He was the bailee under such circumstances not only of the check, but of the money. People v. Walker, supra.

It is contended that the instructions in the case were incorrect because the court, so it is said, did not instruct the jury concerning embezzlement by a bailee, nor give any instructions predicated on section 507 of the Penal Code, defining embezzlement by a bailee. The contention of the appellant that the court did not instruct the jury relative to the contents of section 507 of the Penal Code falls to the ground, for, as has been said, the prosecution must be taken to have been conducted under section 508 of said Code.

[8] It is claimed that the trial judge com-

mitted prejudicial misconduct in stating that a lawyer who acts as his own attorney has a fool for a client. The statement of this adage of lawyers, which has in it as much of truth as of humor, could have done the defendant no harm, because the judge expressly disavowed any personal imputation of folly to the defendant.

[9-11] The refusal of the court to give the instruction offered by the defendant that a preponderance of the evidence is sufficient to establish a fact favorable to the defendant's innocence, was not error. In the first place, the proposition as stated might have misled the jury into supposing that the defendant must establish his innocence by a preponderance of the evidence; whereas all that was necessary to his acquittal was that the evidence, taken as a whole, should leave a reasonable doubt in the minds of the jury as to his guilt. Courts should be careful of giving such instructions, even when requested by the defendant. The court, upon the other hand, clearly instructed the jury with emphasis that the defendant need prove nothing, that all presumptions were in his favor, and that every fact necessary to a conviction must be established by the people beyond a reasonable doubt. This was all that should have been given in the way of instructions.

[12] The other strictures upon the conduct of the trial judge are not such, we think, as to call for comment. If they were, there is no record of any exception to them; or, if there is such record, our attention has not been called to them, and no request was made of the court to instruct the jury to disregard them. A trial court is entitled, if it is the intention of counsel to rely upon an appeal on the conduct of the trial court, to have the alleged transgressions called to the trial judge's attention, so that he may in a proper case, by an admonition to the jury or by some other suitable mode, immediately remove the prejudice possibly caused thereby.

[13] It is finally contended that the plea of the defendant was not stated to the jury. The clerk's minutes of the trial contain these words:

> "Thereupon an indictment was read and the plea stated to the jury by the clerk."

In the reporter's transcript the following appears:

> "A jury having been selected and sworn to try the case, the following proceedings were had:
>
> "Clerk, to the Court: Shall I read the indictment, your honor?
>
> "The Court: Yes.
>
> "The clerk thereupon read the indictment."

Under the circumstances, in support of the verdict, we must hold that the clerk's version showing that the clerk's duty was properly performed is controlling.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

50 Cal. App. 451

LUNDY v. LETTUNICH. (Civ. 3441.)

(District Court of Appeal, First District, Division 2, California. Dec. 18, 1920.)

1. Venue 🔑66—Affidavit of defense amendable.

An affidavit served and filed with a demurrer and a demand in writing for a change of place of trial under Code Civ. Proc. § 396, is amendable, under section 473.

2. Venue 🔑56—Filing of affidavit and demand all that is necessary to establish right to have venue changed.

A filing of an affidavit and demand at the time of the first appearance is all that is required to establish the right of a defendant in a personal action to have the place of trial changed to the county of his residence under Code Civ. Proc. §§ 395, 396, so that it is immaterial that affidavit of merits is insufficient, as it may be amended.

3. Venue 🔑58, 75 — Order of court necessary to change place of trial to residence of defendant.

The filing of the demand for change of place of trial to the county of defendant's residence and an affidavit do not operate ipso facto to change the place of trial, an order of court being necessary, under Code Civ. Proc. §§ 395–397, 1003, and the defendant must make separate application or motion for such an order.

4. Venue 🔑63—Notice of application for order transferring cause to county of defendant's residence necessary.

Notice to plaintiff of application or motion for change of place of trial to the county of defendant's residence is necessary, unless waived, under Code Civ. Proc. §§ 395–397, 1003.

5. Venue 🔑61—Motion for change to be made at earliest opportunity.

An application or motion for change of place of trial to the county of residence of defendant must be made at the earliest opportunity after the filing of the affidavit and demand, under Code Civ. Proc. §§ 395–397, 1003.

6. Venue 🔑43 — Court properly considered second motion for change of place of trial to residence of defendant.

Court properly entertained a second motion for a change of place of trial to the county of defendant's residence under Code Civ. Proc. §§ 395–397, 1003, where the notice for the first motion was insufficient, and it was denied without prejudice, the motion based on the second notice, there being really only one motion and two notices, coming on at the first call of the calendar after the appearance, affidavit, and demand were filed.

7. Venue 🔑66—Objection to affidavit of defense on merits held supertechnical.

An objection that an affidavit on the merits accompanying a demand for change of place of trial to the county of defendant's residence was insufficient in that it failed to state that the person whose advice was sought was an attorney *held* technical and without merit.

8. Venue 🔑61—Motion for change need not be made at time demurrer or answer filed.

Motion by defendant for change of place of trial to the county of defendant's residence under Code Civ. Proc. §§ 396, 397, 1003, 1005, 1010, need not be made at the time the demurrer or answer is filed.

9. Venue 🔑77 — Right to change may be waived.

The right to have the place of trial changed to the county of defendant's residence under Code Civ. Proc. §§ 395–397, may be waived.

10. Venue 🔑34 — Statute giving right of change to be liberally construed.

The provisions of Code Civ. Proc. §§ 395–397, giving defendant right to have proceeding transferred to the county of his residence, are to be liberally construed to promote justice, and not to be technically warped to defeat a fixed right in view of section 4.

11. Venue 🔑56 — Defendant desiring change of place of trial to county of residence held not guilty of laches.

Defendant, proceeding for change of place of trial to county of his residence under Code Civ. Proc. §§ 396–397, *held* not guilty of laches in failing to file his demurrer affidavit and demand until five days after service.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. L. Lundy against E. B. Lettunich. From an order denying a motion for a change of venue, defendant appealed. Defendant dying pending appeal, Stella E. Lettunich, as executrix of his will, was substituted in his place. Reversed.

Sans & Hudson, of Watsonville (Thos. W. Firby, of San Francisco, of counsel), for appellant.

R. H. Countryman, of San Francisco, for respondent.

LANGDON, P. J. The defendant, E. B. Lettunich, appealed from an order denying a motion for change of venue. Upon his death Stella E. Lettunich, as executrix of his will, was substituted in his place.

[1-3] The action, which is personal in its nature, having been commenced in the city and county of San Francisco, summons was regularly served on June 16, 1919, in the county of Santa Cruz. The defendant appeared by filing a demurrer on July 16, 1919; service of the demurrer having been admitted by endorsement under date of July 11. With the demurrer was served and filed an affidavit showing, among other things, that the defendant was a resident of Santa Cruz county. At the same time the statutory demand in writing was served and filed that the trial be had in the proper county. Code Civ. Proc. § 396. It is contended by the respondent that the affidavit of merits was insufficient. The contention appears to be unfounded, but its consideration is unnecessary. The appellant in his brief asserts that whether or not it was sufficient is immaterial. This is true, because such an affidavit is amendable. Code Civ. Proc. § 473; Palmer, etc., v. Barclay, 92 Cal. 201, 28 Pac. 226; Pittman v. Carstenbrook, 11 Cal. App. 229, 104 Pac. 699; Jaques v. Owens, 18 Cal. App. 114, 122 Pac. 430. The filing of the affidavit and demand at the time of the first appearance is all that is required to establish the right of a defendant in a personal action to have the place of trial changed to the county of his residence. Code Civ. Proc. §§ 395, 396, but as was pointed out in Bohn v. Bohn, 164 Cal. 535, 129 Pac. 983, the remedy by which this right is to be enforced is a different thing. It was there said:

> "While an absolute right, if it is insisted on, it is one which a defendant may waive, and which he does waive unless he follows the procedure provided for asserting it."

Section 397 provides that the court may on motion change the place of trial. In the Bohn Case, 164 Cal. 536, 129 Pac. 983, the court said:

> "The filing of the demand and affidavit do not operate ipso facto to change the place of trial. They have no such force. The change can only be effected through an order of the court after its judicial action has been invoked, by bringing the matter on for hearing, where the right of the defendant to the transfer can be contested by the plaintiff. The court must be applied to for an order of transfer. Such application is a motion (Code Civ. Proc. § 1003), and under section 397 a motion for the change must be made in addition to the demand and affidavit, as one of the necessary steps in the procedure to obtain the order of transfer."

[4, 5] So far as the court is informed, there is no decision holding that the notice of motion must accompany the affidavit and demand. They are entirely separate matters. Section 396 requires only the demand and affidavit to be served and filed with the demurrer or answer. The motion could not be made at that time unless notice under section 1003 were waived. The proceeding, it is true, must be prosecuted with diligence. Cook v. Pendergast, 61 Cal. 79. The motion should be made at the earliest opportunity. Pearkes v. Freer, 9 Cal. 642; Jones v. Frost, 28 Cal. 246. If it is made afterwards, the applicant must explain any seeming lack of diligence on his part. Smith v. Pelton Water Wheel Co., 151 Cal. 401, 90 Pac. 932, 1135.

In the present case a notice of motion was served and filed with the demurrer and other papers, in which the time of presentation was fixed as July 18, 1919. There was no order shortening time. The time allowed was less than that required by section 1005, Code of Civil Procedure. There was no calendar called on July 18. On July 22 an order shortening time of service was made and a new notice of motion for July 25 was served and filed. On that day the record shows that an order was made, which, omitting immaterial matters, was as follows:

> "The motion to change the venue herein, the notice of which was filed July 16, 1919, coming on regularly to be heard, * * * it is now by consent of counsel for defendant ordered said motion be denied without prejudice. Thereupon the motion for change of venue, the notice of which was filed on July 23, 1919, came on to be heard and objection was made by plaintiff that the notice of motion was filed too late, and that it was not given at the time of the defendant's first appearance, and that defendant's affidavit of merits was not sufficient."

The court, over the plaintiff's objection, granted the defendant five days to amend the affidavit of merits. This was done; and the matter again coming on on August 29, after evidence and argument, it was submitted. On September 30, 1919, the motion for change of venue was denied.

[6] While in the respondent's brief the argument is divided into ten sections, there are really but two points involved in the appeal. They are, first, whether or not the court had power to consider the motion made on the second notice, and, if so, whether the showing of right on the part of the appellant was sufficient. Following the respondent's elaboration of these two points, a conclusion in favor of the appellant is reached on both.

1. The respondent relies on the decision in McNeill, etc., v. Doe, 163 Cal. 339, 125 Pac. 345, to support his proposition that the denial by consent of the motion insufficiently noticed exhausted the power of the court. In that case it was decided that unconnected and successive motions for change of venue could not be entertained because the statute contemplated a single and prompt assertion of the substantive right. Under the facts disclosed by the record in this case, the first notice being insufficient, the court could not properly have entertained the motion based upon it. The motion based on the second notice came on at the first call of the calendar after the appearance, affidavit, and demand were filed. There is no difference in substance between a statement that the single motion was made, as it was on the second notice, and the statement that the motion on the first and insufficient notice was denied without prejudice. The court immediately and properly entertained what was in effect the only motion presented for judicial action and the only one which the record shows was contested.

2. It has already been stated that whether or not the first affidavit of merits was sufficient is conceded by the respondent to be immaterial, and that it was amendable. Permission to amend was granted properly and the amendment made to meet the objections to the original, which objections appear to have been unfounded.

3. It is argued that the original affidavit was insufficient, but as the respondent states that is immaterial to this appeal.

[7] 4. It is contended that the amended affidavit is insufficient because it fails to state when the defendant stated the facts to his attorney, A. W. Sans, or when the latter advised him he had a good defense. The second notice of motion stated that it would be made on the papers, files, and records of the proceeding, and the bill of exceptions settled by the judge shows that on the hearing he had before him both the original and the amended affidavits. The original affidavit was verified on July 10, before any appearance in the action by the defendant. In it, after stating that he was the defendant and had been served with summons in Santa Cruz county, the defendant averred that he had fully and fairly stated the case to Sans & Hudson, his attorneys, and after such statement he had been advised by them, and he verily believed, he had a good defense on the merits to the action. He further alleged that he was then, at the time of the commencement of the action, and for a long time prior thereto had been, a resident of Santa Cruz county, and was not and never had been a resident of the city and county of San Francisco. On behalf of the respondent it was contended that under this affidavit it did not appear that Sans & Hudson were attorneys, nor which of them advised the defendant he had a good defense.

In the amended affidavit, which was verified on July 29, 1919, the defendant set forth the other necessary matters, and averred that he had fully and fairly stated the case to A. W. Sans, an attorney at law and one of the members of the firm of Sans & Hudson, and after such statement he was advised by him, and he verily believed, he had a good and substantial defense on the merits of said action. The amended affidavit in no way contradicts the original from which it appeared that the facts were stated and the advice given by both members of the firm before the demand for change of place of trial was filed. The objections appear to be supertechnical and without merit. Nolan v. McDuffie, 125 Cal. 336, 58 Pac. 4.

5. It has already been shown there is a clear distinction between the demand for change of place of trial which must be, and in this case was, served and filed with the demurrer and the motion which cannot then be made unless notice of hearing be waived

[8] 6. The foregoing statement answers the contention that the motion must be made at the time the demurrer or answer is filed. The statute requires nothing of the sort. Code Civ. Proc. §§ 396, 397, 1003, 1005, and 1010.

[9] 7. The right to have the place of trial changed may be waived, but in this case far from there being a waiver, the defendant at all times insisted, and still insists, upon the enforcement of this established right.

[10] 8. The proceedings are statutory, and in this case in all matters of substance the statute was followed by the defendant. The provisions of the statute are to be liberally construed to promote justice, not to be technically warped to defeat a fixed right. Code Civ. Proc. § 4.

9. There was really but one motion to enforce the right which vested in the defendant, although there were two notices. Code Civ. Proc. §§ 395 and 396.

[11] 10. The defendant was guilty of no laches. The conditions would not have been changed if he had filed the demurrer, affidavit, and demand on the day they were served instead of five days later. They were filed within the time permitted by the statute.

The order in this case cannot be upheld upon the presumption that the order of the trial court was made because of unreasonable and unexplained delay. In the case of Hart v. Forgeous (Sup.) 193 Pac. 764, there was such a delay, but in the present case the record shows the only motion which was effective was made on the first call of the motion calendar after the demurrer demand for change, and affidavit were filed.

The order appealed from is reversed, with directions to the trial court to make an order granting the motion for change of place of trial.

We concur: BRITTAIN, J.; NOURSE, J.

50 Cal. App. 507

SCHWEPPE v. SANDBERG. (Civ. 3629.)

(District Court of Appeal, First District, Division 1, California. Dec. 22, 1920. Hearing Denied by Supreme Court Feb. 17, 1921.)

Contracts 🔑131—Landowner may urge upon officers the adoption of a route for highway to or through his land.

One owning property within a region through which it is proposed to construct a public highway, the precise route of which has not been determined, may lawfully present or have his agent present to such public officials facts and arguments upon the merits of a particular route running to or through his property, and such a contract with his agent is not void as against public policy; since, where a contract can be performed legally, it will not be presumed that the parties intended to perform it in an illegal manner.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by W. H. Schweppe against H. Sandberg. Judgment for defendant, and plaintiff appeals. Reversed with directions.

Kemp, Mitchell & Silberberg and Alex. W. Davis, all of Los Angeles, for appellant.

Cunningham & Hays, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant after an order sustaining his demurrer to the plaintiff's complaint.

The action was one brought to recover the sum of $2,500 alleged to be due from the defendant to the plaintiff for certain services rendered in representing the defendant before the California State Highway Commission in relation to the location of a certain route for the state highway which, if adopted, would bring said highway to or through the lands of the defendant, and also for procuring for the defendant a loan of $3,000, to be secured by a mortgage upon said lands, the amount to be paid for said services to become payable upon the procurement of said loan and upon the construction of the said highway along said proposed route to or through any portion of the defendant's land. The complaint, in pleading the agreement for the plaintiff's said employment, does not set forth in terms the writing embodying the same, but pleads said agreement in substance as follows: The plaintiff is alleged to have "agreed to perform certain services for and on behalf of the defendant in representing the defendant before the California State Highway Commission, and in presenting to the State Highway Commission, as the representative of the defendant, the merits of a route for the location of the state highway which would bring the said highway to or through the lands of the defendant above described." The plaintiff also agreed to procure for the defendant, within five days after said November 24, 1911, a loan of $3,000, to be secured by a mortgage on the land of defendant above described. That the defendant, in consideration of said agreement by the plaintiff and in consideration of services theretofore performed by the plaintiff at the special instance and request of the defendant, in appearing before said State Highway Commission as the representative of the defendant in presenting the merits of said route, agreed to pay to the said plaintiff the sum of $2,500 upon the securing of said loan of $3,000 within five days after said November 24, 1911, and upon the construction of said state highway to or through any part of the said property, as above described. The complaint further proceeds to allege that the plaintiff duly performed all the conditions of said contract on his part; that he secured the loan in question promptly; that he appeared before the State Highway Commission as the representative of the defendant, and presented to the said State Highway Commission the merits of the route for the location of the said state highway, which would bring said highway to and through the property of the defendant; that he procured and presented to the commission maps and profiles showing the location of said route, and the length of said route and the grades to be encountered; that said Highway Commission was informed that plaintiff appeared before it as the representative of a property owner along said proposed route and not on his own behalf; that the state highway was located on said route and was constructed through the property of the defendant on or about August 1, 1918. Then follow the allegations of the plaintiff's demand for payment and the refusal thereof by the defendant, and prayer for judgment for the amount alleged to be due.

The demurrer to said complaint was general, and was also special in one particular to be hereafter noted. The order sustaining the demurrer was general and was made without leave to amend. Judgment of dismissal of the action followed the entry of said order.

The contention of the defendant upon the hearing of said demurrer was—and it is also made upon this appeal—that the contract which the plaintiff had pleaded in substance and effect was one against public policy, and was therefore void. The trial court evidently adopted this view in its order sustaining the defendant's demurrer and in its judgment of dismissal. We are totally unable to perceive that there is any basis whatever to be found in the body of the plaintiff's complaint for the conclusion thus arrived at by the trial court. That the owner of property lying within a region through which it is proposed to construct a public highway, the precise route of which has not yet been determined upon by the public officials who are charged with the duty of selecting the same, may not honestly and in good faith present before such officials facts and arguments with relation to the merits of a particular route which, if selected, will run to or through his property, no one will for a moment question, and it follows necessarily that what such property owner may in good faith do in person in that regard he may do through another, and he may for that purpose select an attorney or agent to act as his representative in presenting the merits of the particular location of said highway which he desires to have selected, and hence, of course, he may agree to pay his attorney, agent, or representative a stipulated regard for the performance of such services. There is nothing illegal or immoral or against public policy in such a transaction or service. It is not necessary to go afield in the search for authorities to sustain this view. In the case of Bergin v. Frisbie, 125 Cal. 168, 57 Pac. 784, an agreement much similar to that presented in the instant case was pleaded and proven, and the Supreme Court, in passing upon its validity, used the following language:

> "We have carefully scanned the face of this contract, and find nothing whatever to justify a judicial declaration that it is against good morals. There was no secrecy, no deception, no fraud, no corruption. It was an ordinary, everyday contract. Thousands of similar import probably have been made and executed. * * * The means and manner to be employed are the all-important factors in marking the validity or invalidity of the contract. We see no one of its provisions that stamp it void as against public policy and good morals; neither do we find anything in the evidence indicating any act done by the plaintiff that to any degree could be construed improper. The employment of persons to influence legislation, or to influence decisions of the land department, or even the decisions of judicial tribunals, in a proper way, is not against sound public policy, and this, too, even though the compensation for the labor to be performed is contingent upon successful results. The means and methods to be used must be improper, or else such employment is perfectly legitimate in the eyes of the law."

An examination of the complaint before us shows that the means which the plaintiff was to employ in the performance of his stipulated service for the defendant were such as would serve to present to the State Highway Commission "the merits of a route for the location of the state highway which would bring the said highway through or to the land of the defendant." And the means which the plaintiff is alleged to have actually employed in the performance of his said agreement were those of appearing before the Commission to urge the merits of said route, and of procuring and presenting to the Commission maps and profiles showing the location of said route and the length of said route and the grades to be encountered. It thus affirmatively appears that the means which the plaintiff was to employ and which he actually did employ in the fulfillment of his said agreement were such as were "perfectly legitimate in the eyes of the law."

The case of Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60, is also quite in point in its bearing upon the case at bar, as is also the case of Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384, in both of which cases it is held that the appearance of a representative of an interested party before a public body to urge the adoption of a particular measure or policy is neither illegal nor improper when the means employed are open and have for their purpose the presentation of the merits of the advocated matter.

The case of Fites v. Marsh, 171 Cal. 488, 153 Pac. 927, has also its direct bearing upon the question before us since the Supreme Court therein declares that—

> "It is the universal presumption of law that where a contract can be performed legally, it will not be presumed that the parties intended to perform it in an illegal manner."

The cases from the courts of this state relied upon by the respondent herein have no application to the question before us, since they refer in each instance to the proposed performance of such illegal acts as the procurement of false witnesses or the presentation of evidence of nonexistent facts. Such contracts are, of course, illegal; but such is not the nature of the contract between the parties hereto so far as its contents are revealed in the complaint. The trial court was therefore in error in sustaining the defendant's general demurrer.

As to the special demurrer, the point made therein has no merit; but even if it were meritorious the plaintiff should have been permitted in that respect to amend his complaint.

The judgment is reversed, with directions to the trial court to overrule the defendant's demurrer and require him to further plead to the plaintiff's complaint.

We concur: SEAWELL, Presiding Justice pro tem.; KERRIGAN, J.

50 Cal. App. 436

PEOPLE v. POWELL. (Cr. 721.)

(District Court of Appeal, Second District, Division 2, California. Dec. 16, 1920. Rehearing Denied Jan. 12, 1921. Hearing Denied by Supreme Court Feb. 14, 1921.)

1. Indictment and information 🔑119, 129(1)—Information sufficient despite surplus statement prefacing second count; counts for extortion and bribery properly joined.

Information against a police officer of a city in two counts, the first charging the crime of extortion, while the second charged the crime of bribery, opening with the statement, "and for a further and separate cause of action, being a different statement of the offense set forth in count one hereof," etc., *held* legally sufficient in both counts, the offenses charged referring to one transaction being properly joined by virtue of Pen. Code, § 954, and the preliminary statement of the second count being a mere legal conclusion of the pleader which might be treated as surplusage.

2. Criminal law 🔑798½—Instruction defendant charged with extortion and bribery might be found guilty or not guilty on either count or both held erroneous.

In a prosecution under two counts charging extortion, in violation of Pen. Code, § 518, and bribery, in violation of section 68, instruction that defendant was accused of two separate offenses, naming them, and that he might be convicted of either of the offenses charged, etc., and that if the jury believed that the first count charging extortion was a different statement of the same offense charged in count 2, charging bribery, they might as to count 1 and count 2 find defendant not guilty on both, guilty on both, or guilty on one and not guilty on the other, *held* erroneous.

3. Extortion 🔑5—Obtaining money from violator of city ordinance by threat of arrest by policeman "extortion."

Under Pen. Code, § 518, obtaining payment of money from a violator of the rooming house ordinance of a city by a threat of arrest and detention if payment was not made was extortion by defendant policeman of the city without regard to the exercise of good faith in threatening to make the arrest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extort—Extortion.]

4. Criminal law 🔑29—Defendant guilty of receiving bribe not guilty of extortion.

A defendant guilty of receiving a bribe, denounced by Pen. Code, § 68, cannot as a result of the same transaction likewise be guilty of the offense of extortion, denounced by section 518.

5. Bribery 🔑1(1)—Party solicited need not consent to give bribe; "asking a bribe."

To constitute the crime of "asking a bribe," denounced by Pen. Code, § 518, on any agreement or understanding the official conduct of the party asking shall be influenced, it is not necessary that the party solicited shall consent to give the bribe, or that there shall be a meeting of the minds, or mutual understanding or agreement between him and the party asking the bribe; it being sufficient if the latter is ready and willing to enter into the corrupt agreement or understanding that his official conduct shall be influenced.

6. Bribery 🔑11—Evidence sufficient to justify conviction of policeman for asking bribe.

Evidence *held* to justify verdict finding defendant policeman guilty of asking a bribe in violation of Pen. Code, § 518.

7. Criminal law 🔑507(1)—Complaining witness not an "accomplice" in policeman's crime of asking bribe.

Complaining witness in a prosecution of a policeman for extortion, denounced by Pen. Code, § 518, and bribery, denounced by section 68, *held* not an accomplice in the crime of asking a bribe, so that defendant could be convicted of the crime on the sole testimony of the witness; an "accomplice," under section 1111, being one liable to prosecution for the identical offense charged against defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

8. Criminal law 🔑1186(4)—Error in prosecution for extortion and bribery harmless.

In a prosecution under an information charging in two counts extortion, in violation of

Pen. Code, § 518, and bribery, in violation of section 68, instruction erroneous in that it directed the jury they might find defendant not guilty on both counts, guilty on both, or guilty on one and not guilty on the other, *held* harmless to defendant, so that there was no miscarriage of justice justifying reversal under Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Ralph E. Powell was convicted of bribery, and from the judgment and an order denying his motion for new trial he appeals. Affirmed.

Swaffield & Swaffield and Herbert Moore, all of Long Beach, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and Thomas A. Wood, of Los Angeles, for the People.

THOMAS, J. This is an appeal from a judgment of imprisonment upon a conviction of the crime of bribery, and from an order denying defendant's motion for a new trial.

The information charged defendant with being, at all times therein mentioned, a duly appointed, commissioned, and acting police officer of the city of Long Beach, i. e., an "executive officer," and was in two counts, the first count, by proper and apt allegation, charging the crime of extortion, while the second count charged the crime of bribery—opening with the following statement:

> "And for a further and separate cause of action, *being a different statement of the* offense set forth in count 1 hereof," etc. (Italics ours.)

A demurrer, both general and special in character, was interposed to the information and by the court overruled. On the issues thus presented the case was tried.

The jury returned two verdicts, one finding the defendant guilty of extortion as charged in count 1, and the other finding him guilty of bribery as charged in count 2. Defendant moved in arrest of judgment and for a new trial, the motions being granted as to the first count. Thereafter the court, on motion, dismissed the case as to count 1; and the judgment from which this appeal is taken was imposed and entered.

Upon the submission of the case as made, the learned trial judge gave the following instruction, among others, to the jury:

> "The defendant in this case is accused by the information filed herein of two separate offenses, to wit, the crime of extortion in count 1 thereof, and the crime of bribery in count 2 thereof. An information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses under separate counts. The defendant may be convicted upon either of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict. You may find the defendant guilty or not guilty upon each of the separate counts of the information; *and if you believe that count 1 is a different statement of the same offense as charged in count 2, you may as to said count 1 and count 2 find the defendant not guilty upon both, guilty upon both, or guilty upon one and not guilty upon the other.*" (Italics ours.)

Appellant claims: (1) That the giving of the foregoing instruction was error; (2) that the two verdicts rendered are inconsistent, and hence that a judgment entered on either cannot stand; and (3) that the complaining witness was an accomplice, upon whose uncorroborated testimony defendant cannot be convicted.

[1] As to the information, both counts were legally sufficient. Being connected together in their commission the offenses charged were, by virtue of section 954 of the Penal Code, properly joined in the information. The evidence relied on to convict upon both was the same, founded upon the same incident and referred to but one transaction occurring on the day charged in the information. Yet while it was proper thus to charge defendant with two offenses in separate and distinct counts, he could not be convicted of the crime of extortion under section 518 of the Penal Code and also of the crime of *receiving* a bribe under section 68 of the same Code; although, for reasons which will presently appear, we think he could be convicted of the crime of extortion and likewise of the crime of *asking* a bribe.

As to the preliminary statement with which the second count opens, and which we have italicised above, we think it entirely immaterial, being but a legal conclusion of the pleader, and for that reason it may be treated as surplusage. It adds nothing to, nor does it take anything from, the essential averments of the information. Such being the case, the language of the court in People v. Piner, 11 Cal. App. 542, 546, 105 Pac. 780, 781, may be considered applicable here:

> "There is no claim put forward here that section 954 of the Penal Code, as amended in 1905, violates any provision of the Constitution, nor can we see how such a claim could be sustained if it were urged. As we have suggested, there is no ground for apprehending that any injury would result to a defendant from the method of criminal pleading authorized by section 954, for only one set of facts and circumstances, directed to a single act or event, could be proved, and, of course, it would not only be competent, but absolutely necessary, to prove those same facts and circumstances where but one offense was charged. Therefore, we can think of no principle forbidding the Legislature to authorize the setting out of two distinct offenses in as many counts in cases where the circumstances under which a criminal act is committed are such as to inspire in the prose-

cuting officer serious doubt as to *which of two offenses* the evidence would show had been committed. Such a method, while obviously innocuous in its effect upon any of the rights of the accused, must result in a just administration of the criminal law. For where, as under the old method, the result of not proving the specific charge would be the acquittal of the accused and to cause another trial of the same facts with its attendant trouble and expense, assuming that once in jeopardy and former acquittal could not be successfully pleaded at the subsequent trial, under the present method the jury, under the court's instructions, could return a verdict of guilty of *that offense of the two charged which the evidence disclosed had been committed*, and thus there would be avoided, in a large measure, the mistrials which too often result from a want of correspondence between the proof and the allegations of the indictment or information." (Italics ours.)

That extortion and bribery are two separate and distinct offenses is, we think, beyond dispute. The former is the obtaining of property from another with his consent, induced by fear or force, or under color of official right (section 518, supra); while the latter is defined by section 68, supra, as follows:

"Every executive officer * * * who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his * * * action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable," etc.

For the violation of the former a punishment of not exceeding five years in the state prison is prescribed; while for the latter, *not more than fourteen years*, and the defendant, "*in addition thereto, forfeits his office, and is forever disqualified from holding* any office in this state." (Italics ours.) In the first, the victim of the extortion is not and cannot be an accomplice; in the latter, the one of whom the bribe is received, as we shall later see, may be. The former involves an element of coercion by one of the parties; the latter—receiving a bribe upon an agreement or understanding that the official conduct of the one receiving the bribe shall be influenced thereby—necessarily involves a willing co-operation by both.

[2] This brings us to the consideration of the instruction above quoted, and which is objected to by defendant. The instruction was clearly erroneous; but, for reasons presently to be stated, the error, in our opinion, was without prejudice. Defendant having been legally charged with two separate offenses relating to "the same act, transaction, and event," the proof whereof being dependent upon the same evidence, he could not, in the instant case—except as we shall hereafter see—be legally found guilty of both; but, after hearing the evidence, the jury, "under the court's instructions, could return a verdict of guilty of that offense of the two charged which the evidence disclosed had been committed." People v. Piner, supra; People v. Warriner, 37 Cal. App. 107, 173 Pac. 489.

[3] The next point urged by appellant is the inconsistency of the verdicts. If the defendant was guilty of the crime of extortion, the crime consisted in obtaining from the complaining witness the latter's property, viz., a certain sum of money, with his consent, induced by a wrongful use of fear produced by the threat to accuse the complaining witness of the crime of violating the rooming house ordinance of the city of Long Beach. The record discloses without conflict that the complaining witness was in fact guilty of a violation of this ordinance; and, this being true, he was subject to lawful arrest. Subdivision 1 of section 519 of the Penal Code recites that fear, such as will constitute extortion, may be influenced by a threat "to do an *unlawful injury* to the person or property of the individual threatened, or to any relative of his, or member of his family." But we do not think that, merely because of the conceded guilt of the complaining witness, defendant is thereby relieved of the pains and penalties of the offense charged—extortion. In our opinion it cannot be said that the "injury" in such case was not an "unlawful injury." Under section 518, supra, obtaining the payment of money from a violator of the ordinance referred to by a threat of arrest and detention, if the payment be not made, is extortion, and this without regard to the exercise of good faith in threatening to make the arrest. People v. Beggs, 178 Cal. 79, 172 Pac. 152.

[4] Where property is obtained by extortion, the consent of the person who parts with the property is not free and voluntary, but is, in a measure, coerced, i. e., induced by the wrongful use of force or fear or under color of official right. Where a bribe is actually *received*, the property or money given by the briber is not obtained from him through any coercion of his will. It is given and received upon agreement or understanding that the official conduct of the person receiving it shall be influenced thereby. From this it follows that a defendant, if he be guilty of *receiving* a bribe, cannot as a result of the same transaction, likewise be guilty of the offense of extortion. For this reason we think the court erred in instructing the jury that they could find the defendant guilty of the two crimes as charged in the two counts of the information. But this error, for the reasons we are now about to state, did not involve a miscarriage of justice, within the meaning of section 4½ of article 6 of the Constitution.

[5] Under section 518 of the Penal Code one may be guilty of the crime of *asking* or of *receiving* a bribe, or of asking *and* receiving a bribe. In other words, bribery may

consist of either one of two entirely different and distinct acts, namely, the act of asking a bribe or the act of receiving a bribe. To constitute the crime of asking a bribe "upon any agreement or understanding" that the official conduct of the party asking shall be influenced thereby, it is not necessary that the party solicited shall consent to give the bribe, or that there shall be a meeting of the minds or mutual understanding or agreement between him and the party asking the bribe. It is sufficient if the latter is ready and willing to enter into a corrupt agreement or understanding that his official conduct shall be influenced by the bribe. People v. Squires, 99 Cal. 327, 33 Pac. 1092; State v. Durnam, 73 Minn. 150, 75 N. W. 1127. In the case at bar, the count of the information that charged the defendant with bribery alleges that he did corruptly and feloniously "*ask*, offer to receive and receive" the sum of $70. The jury found him guilty of bribery as charged in the information. It thus will be seen that defendant was charged with *asking*, as well as receiving, a bribe, and that the jury, by finding him guilty of bribery as charged, found him guilty of *asking* as well as of receiving the bribe. The instant that defendant asked for a bribe, if he was then and there ready and willing to enter into a corrupt agreement or understanding with the complaining witness that his official conduct should be influenced thereby, he was guilty of the crime of bribery. It follows, therefore, that if the evidence is sufficient to sustain a verdict finding the defendant guilty of *asking* the bribe, he was guilty of the crime of bribery, as defined in section 68 of the Penal Code, even though he immediately thereafter received from the complaining witness money or property under such circumstances that his obtaining the same constituted the crime of extortion and not bribery.

There is sufficient evidence, we think, to sustain that part of the verdict which, in effect, finds the defendant guilty of asking a bribe. As is usual in this class of cases, the defendant did not boldly and in direct language ask a bribe. His words and acts, however, as testified to by the complaining witness, unmistakably carried the import that it was a bribe that he was asking. The complaining witness testified that defendant asked him if he had any money with which to furnish bail. He testified that he took a five or ten dollar bill from his pocket and said to defendant, "This is all I got." Defendant, according to the witness, replied, "I am not that cheap." Afterwards, the defendant also said to the complaining witness: "Have you got any jewelry?" These statements, coupled with other circumstances disclosed by the record, are sufficient to indicate that the defendant did not intend to be understood as asking the complaining witness for bail money, but that he intended that the latter should understand that he was being solicited for a bribe with the understanding that if it were given he would not be prosecuted for a violation of the ordinance referred to.

[6] For these reasons we conclude that there is sufficient evidence to justify that part of the verdict which finds the defendant guilty of asking a bribe; that the crime of asking a bribe is committed the moment the bribe is asked and before any money or other thing of value is received by the one asking it; that the crime of asking a bribe may be consummated before any bribe money is obtained, and therefore, before the existence of the transaction that may constitute either the crime of receiving a bribe or the crime of obtaining property by extortion; whether it be one or the other depending upon whether the money or property is given on an agreement or understanding that the official conduct of the person receiving it is to be influenced thereby, or is obtained through a consent induced by the wrongful use of force or fear or under color of official right. It follows, therefore, that there is no inconsistency between the crime of extortion—which we are inclined to think was the crime committed by the defendant when he actually received the money from the complaining witness—and the crime of asking the bribe.

[7] Under these circumstances, we think, it logically and necessarily follows that the complaining witness was not an accomplice in the crime of asking a bribe, and therefore defendant can be convicted of that crime upon the sole testimony of that witness. People v. Beggs, supra. Under section 1111 of the Penal Code, an "accomplice" is defined to be one "who is liable to prosecution for the identical offense charged against the defendant upon trial in the case in which the testimony of the accomplice is given." As we have seen, among other offenses charged against the defendant is the crime of asking a bribe. That offense could be committed without any co-operation on the part of the complaining witness, and was completed the moment the bribe was asked. It was not necessary, therefore, that the person of whom the bribe was solicited should consent to give it, or that he should have any kind of an agreement or understanding with the person asking for it. People v. Squires, supra; State v. Durnam, supra. The complaining witness, therefore, could not be convicted as an aider or abettor to the crime of asking a bribe, though he doubtless could be convicted as an aider or abettor in the crime of receiving a bribe.

[8] Viewing the case in the large, and upon the entire record before us, for the reasons above set forth, we cannot say that there has been a "miscarriage of justice"

herein, within the meaning of section 4½ of article 6 of the Constitution.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

50 Cal. App. 457

WALTER v. ARNOLD. (Civ. 3600.)

(District Court of Appeal, First District, Division 1, California. Dec. 18, 1920. Hearing Denied by Supreme Court Feb. 14, 1921.)

1. Landlord and tenant 🔑41—Lease of building held terminable by disposal of land or building or either.

Where lease of part of a building was terminable on sale or lease of the entire building to another, *held*, in view of the parties' construction of the words "building," and "entire building," that tenancy could be terminated by disposal of both the land and the building, whether by sale or lease of both, or a sale of one and lease of the other.

2. Landlord and tenant 🔑94(3)—Notice to quit tenancy held sufficient in view of lease.

Where a notice demanding surrender of premises within 60 days after its receipt stated the premises had been leased, while the evidence showed the land was leased and the building sold, the notice was sufficient, the lease permitting termination on lease or sale.

3. Landlord and tenant 🔑109(2)—Landlord's tender of agreed sum on sale of property not invalid because not deposited in bank.

Where landlord in writing made a tender to tenant for the remaining part of the term, to be paid upon vacation and surrender of premises, such money was not required to be deposited in bank by Civ. Code, § 1500, which relates to the extinguishment of an obligation to pay money, and not to the extinguishment of a tenant's right to occupy premises.

4. Landlord and tenant 🔑291(9)—Denial of landlord's ability to comply with agreement for payment on sale of property held evasive.

In landlord's unlawful detainer action against a tenant, a claim that there is no evidence to comply with the terms of Civ. Code, § 1495, in showing that landlord was able and willing to perform her offer of payment is not well taken where there is no denial that she was so able and ready to pay, defendant's pleading that he "denied that *she* was able to pay it, pursuant to *his* contract so to do," being evasive.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by Hannah Walter against Max Arnold. From that portion of the judgment awarding possession to plaintiff, the defendant appeals. Affirmed.

G. C. Ringole, of San Francisco, for appellant.

Sloss, Ackerman & Bradley and Edgar Sinton, all of San Francisco, for respondent.

WOOD, Presiding Justice pro tem. This is an action in unlawful detainer to recover possession of the ground floor of a four-story building on Van Ness avenue in San Francisco. There was a directed verdict for possession of the premises, but the court submitted the question of damages to the jury. The defendant appeals from that portion of the judgment that awards such possession to plaintiff.

The lease under which appellant, Arnold, entered into possession contained the following reservation:

> "It is understood and agreed that the lessor reserves the right to lease or sell the entire building in which the leased premises are located, and in the event such a sale or lease of the entire building is made the lessee shall vacate and surrender the premises as soon as he conveniently can, but in any event within sixty (60) days after notice of such sale or lease."

During the occupation of the premises by appellant, and prior to April 29, 1919, the respondent agreed to lease the land with a new concrete building to be erected thereon in place of the old one to the Peacock Motar Sales Company for a period of 10 years from the completion of the building, which was to be constructed without delay and completed before January 1st following.

On April 21st the old building was sold to a wrecking firm. There is a dispute as to the date that the appellant was given notice of this sale, but on April 29th he received a written notice that the premises had been leased, that such notice was given in compliance with the written lease between her and Arnold, and that he was required to vacate within 60 days after receipt of the notice. This action was commenced after July 2d.

It appears that the upper floors of the old building were reached only by a stairway leading from the ground floor and through the main entrance, and that this made it difficult to obtain a tenant or tenants for the other floors. The lease in this case was made for a period of but one year at a monthly rental, payable monthly, of the sum of $200 per month and 1 per cent. of the gross sales in excess of $10,000 per month. No option of any kind was given to the lessee for a renewal, or to save his tenancy from forfeiture in case of a sale or lease, but if he was required to surrender possession on account of such sale or lease, respondent was to pay him the sum of $250 per month for the remaining months of his term.

Appellant has cited authorities to the effect that the word "building" mentioned in the reservation includes the land upon which it stands, and respondent concedes that such construction was placed upon the words "building" or "entire building" by the parties in executing the lease.

Appellant contends that he could not be required to vacate and surrender possession upon a lease of the land and sale of the building for wrecking purposes, and that his tenancy could not be terminated under the reservation unless respondent either sold both the land and the improvements, or leased both.

> "A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor." Civ. Code, § 1069.

It may be conceded, as claimed by appellant, that his lease could not be terminated by a mere sale of the building for wrecking purposes. Likewise it may be conceded that it could not be terminated by a sale of the land only with a reservation of the building. Inasmuch as the parties in executing the lease intended that the words "entire building" should mean the land and the building, appellant could not have been misled by the statement claimed to have been made by respondent at the time and prior to the execution of the lease that she desired to cancel the lease only in the contingency "that if she was able to lease or rent the entire building" or "if she sold the property."

[1] In view of the construction that the parties themselves have placed upon the words "building" and "entire building," it must be held that appellant's tenancy could be terminated by a disposal of both the land and building whether it was affected by a sale or lease of both land and building, or by a sale of one and a lease of the other; for the essential thing that the reservation was intended to secure was an income from the entire land and improvements.

[2] It does not follow that, because the written notice to surrender the premises stated that they had been leased, while the evidence showed that the land was leased and the building sold, the owner was not entitled to possession. The lease contained no requirements as to the form or character of the notice. The lessee agreed to vacate and surrender within 60 days after notice of sale or lease. He, as a witness, testified that around or prior to April 15th he had knowledge or belief that the building was to be wrecked.

In the note to Pacific Warehouse Co. v. McKenzie Hunt Paper Co., Ann. Cas. 1916B at page 312, it is said:

> "The rule seems to be that a notice is not construed strictly; it being sufficient if the intention of the party to exercise the option to terminate the lease is fairly communicated."

The same language is quoted in 16 R. C. L. p. 1113. In Re Coatsworth, 160 N. Y. 114, 54 N. E. 665, the lease contained a provision that there should be a renewal of the lease unless the lessors gave at least 6 months' notice before the end of the term of their election to take possession of the premises at the expiration of the lease and to pay for the buildings, vaults, and sidewalks at the appraised value. The notice was:

> "We * * * hereby elect to take possession of the said demised premises, pursuant to the provisions of said lease," etc.

This was held to be a substantial compliance with the terms of the lease.

In the instant case the notice demanded a surrender of the premises within 60 days after receipt of the notice, and it stated that it was given in compliance with the terms of that certain lease, etc. Of course, respondent was required to prove at the trial that in good faith she had disposed of the property according to the conditions that required the tenant to surrender possession. We conclude that appellant had sufficient notice that the owner had exercised her privilege under the reservation in the lease.

[3] The respondent in writing made a tender of $1,000 to appellant for the remaining 4 months of the term, to be paid if he would vacate and surrender the premises. No objection of any kind was made to the tender. It is now claimed that this tender was insufficient to extinguish the tenant's interest in the property, because the money was not deposited in a bank, and that such deposit is made necessary by the provisions of section 1500 of the Civil Code, which reads as follows:

> "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor."

This section does not purport to refer to the extinguishment of any obligation, other than one for the payment of money. When applied to the instant case it means that the obligation of respondent to pay to appellant the sum of $250 per month for the balance of appellant's term has not been "extinguished." It does not mean that the obligation of respondent to permit appellant to occupy the premises is not extinguished.

[4] It is claimed that there is no evidence to comply with the terms of section 1495 of the Civil Code in showing that respondent was able and willing to perform her offer to pay $1000. As to this, there is no denial "that she is and was ready * * * and willing to pay said sum of one thousand dollars." All the evidence indicates that she was at all times able to pay it, and there is none from which a different inference can be

drawn, and out of the mouth of the appellant on the witness stand it appeared that she was wealthy. Moreover, the denial is evasive, as he "denied that *she* was able to pay it, pursuant to *his* contract so to do," and we cannot believe in view of the record before us that appellant intended to make oath in his answer that respondent had or has not the ability to pay this sum.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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50 Cal. App. 420

W. J. SOMERS CO. v. SMITH. (Civ. 3284.)

(District Court of Appeal, First District, Division 2, California. Dec. 16, 1920.)

1. Appeal and error ⚷553(2)—Party seeking relief from order denying certified transcript must show diligence.

A prime requisite for relief under Code Civ. Proc. § 473, by having a prior order denying a motion to have a transcript certified for use on appeal is that the party claiming injury from mistake, inadvertence, surprise, or excusable neglect shall show affirmatively his diligence after discovering facts.

2. Appeal and error ⚷553(2) — Appellant seeking relief from order denying motion to vacate prior order held not diligent.

Upon an appeal from an order denying a motion under Code Civ. Proc. § 473, to vacate a prior order denying motion for certified transcript, record *held* not to show diligence on the part of appellant.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by the W. J. Somers Company against J. L. Smith, trustee for the creditors of the Force Hewitt Company. From an order denying his motion to vacate a prior order denying a motion to have a certified transcript for use on appeal, the defendant appeals. Affirmed.

See, also, 188 Pac. 311.

J. L. Smith, of San Francisco, for appellant.

McNair & Stoker, of San Francisco, for respondent.

BRITTAIN, J. The defendant appeals from an order denying his motion, made under the provisions of section 473 of the Code of Civil Procedure, to vacate a prior order denying a motion to have certified a transcript for use on appeal from a judgment dated May 15, 1917.

The appellant, as trustee for the creditors of the lessee of property of the plaintiff corporation, was used for rent of the premises during his occupancy after the original lessee had made to him a general assignment for the benefit of creditors. The judgment was for $970.85 and costs. Motion for new trial being denied, on August 21, 1917, the statutory notice was given the clerk of the court, and a copy thereof to the official reporter, for the preparation of transcript of the clerk's record and the trial proceedings. Notice of appeal was filed under the alternative method on September 15, 1917. No transcript was filed until April 4, 1918, when notice was given that it would be presented for settlement on April 8, 1918. Objections on several grounds to the settlement and certification of the transcript were presented to the judge before whom the matter was pending. The record fails to show formally when the matter was submitted, but, since it appears that the counter affidavits on behalf of the appellant in reply to the respondent's affidavits concerning the certification were filed in open court on June 5, 1918, and no further proceedings before determination appear, it may be assumed the matter was submitted on that day or shortly thereafter. Nearly a year later, May 14, 1919, there was a minute order denying the motion. The motion to vacate this order was noticed for June 20, 1919, on the grounds of mistake, inadvertence, surprise, and excusable neglect. The hearing was partly had and postponed from time to time until November 14, 1919, when the motion was denied. Notice of appeal from this order was filed November 26, 1919. The typewritten transcript bears a filing date in the superior court, January 2, 1920. It was certified by the clerk and filed in this court on April 5, 1920, and the appellant's closing brief was not filed until September 7, 1920. It does not appear that any of the many delays in bringing up for review the judgment for rent entered 3½ years ago were caused by the respondent or its attorneys.

[1, 2] A prime requisite for relief under the provisions of section 473 of the Code of Civil Procedure is that the party claiming injury from mistake, inadvertence, surprise, or excusable neglect shall show affirmatively diligence on his own part after discovery of the facts. In the affidavits filed in support of each of the motions and in opposition to them are set forth at great length many immaterial and impertinent matters. The substantial statements relied on by the appellant on the motion to certify the transcript on the appeal from the judgment are that the reporter was inducted into military service shortly after the notice to prepare the transcript was given, and its preparation was thereby delayed; that the reporter, through ignorance or neglect, failed to prepare the clerk's transcript; that the appellant was compelled to employ outside help to have the transcript completed, when it was filed on April 4, 1918, 7½ months

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

after the order for the transcript was given. He contended also that there was an agreement between himself and the reporter that the clerk's transcript and the reporter's transcript should cost only $225. According to the reporter's affidavit, that figure was given by him as an approximate estimate of what the reporter's transcript alone would cost. The reporter's transcript was delivered to the appellant on November 15, 1917, and in January, 1918, the appellant and the reporter, who were wrangling over the payment of the reporter's bill, adjusted between themselves their difficulties. The appellant was away from San Francisco a great deal of the time during the first 3 months of 1918. His stenographer, who copied the clerk's transcript, also copied for the appellant's use the reporter's transcript, and a considerable portion of the delay in filing the transcript was caused by this work undertaken for the appellant's benefit. No stipulation or orders were obtained by the appellant for extensions of the statutory 20 days for the filing of the transcript. No proceedings were instituted to compel the reporter to perform his duty, and no formal motion was made for relief because of inadvertence or excusable neglect. The element of surprise was wholly lacking. Because of the delay the certification of the transcript was opposed. The facts were before the judge when the motion for certification was submitted, and in the exercise of his discretion, on the conflicting evidence before him, he might have relieved the appellant from the consequences of delay. The certification was also opposed on the ground that the transcript was unreliable because for a period of something over 4 months it had been out of control of the court, and while no suggestion is made that it had been in any way altered it was argued that the statute contemplates the transcript shall remain exclusively under the control of the court, to the end that the certifying judge may rely upon the assurances of verity given by the reporter and the clerk. It was also maintained that for the same reason the statute requires the transcript prepared under the new method to be filed by the reporter. A fourth objection was that certain exhibits had been omitted from the transcript, but the respondent admits that this could have been obviated. It does not appear necessary at this time to consider the other objections. Upon the question of delay and its excuse, the judge, upon evidence susceptible of a construction favorable to either party, decided the matter against the appellant. If the decision had been made promptly and the motion to vacate the order had been made upon the showing now before the court, it could not be determined that there was an abuse of judicial discretion in denying the motion. Murphy v. Stelling, 138 Cal. 643, 72 Pac. 176; Miller v. American Central Ins. Co., 2 Cal. App. 274, 83 Pac. 289. No new matter of substance pertinent to the motion was presented by the affidavits on the second application. The only showing of mistake, inadvertence, and neglect was a repetition of what had been urged on the first motion, and apparently the only surprise was that the former decision was contrary to the appellant's expectations. There is no showing that during the long period of nearly a year that the first motion was under submission the appellant took any measures to bring about its determination. The entire record fails to show any diligence on the part of the appellant in bringing to hearing an appeal from a judgment which is presumably correct and of which the prevailing party was ostensibly entitled to the fruits nearly 4 years ago.

The order appealed from is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

50 Cal. App. 444

YOLO WATER & POWER CO. v. EDMANDS et al. (Civ. 1857.)

(District Court of Appeal, Third District, California. Dec. 17, 1920. Hearing Denied by Supreme Court Feb. 14, 1921.)

1. Appeal and error 🔑959(1)—Pleading 🔑236(1)—Amendments allowed with great liberality.

The allowance of an amendent to pleading when not of course rests in the sound discretion of the trial court, and the appellate court will not interfere with this discretion unless it has been abused, but the policy of the law is to allow amendments with great liberality to the end that exact justice may be done and complete justice may be reached.

2. Eminent domain 🔑194—Plaintiff entitled to amend description of lands sought to be condemned.

The court erred in denying the plaintiff's motion to amend its description of the lands sought to be condemned so as to leave lands above high-water mark, thus waiving the right to condemn lands below the high-water mark, since Code Civ. Proc. § 1255a, confers upon plaintiff right to abandon the proceeding at any time, although the plaintiffs set up in their answer a claim for damages by way of compensation for the taking the lands sought to be condemned if condemnation be granted.

3. Evidence 🔑113(19)—Valuation of assessor not evidence of market value.

Valuation placed upon land by the assessor is not evidence of market value.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Yolo Water & Power Company against William O. Edmands and others. From an adverse judgment, the plaintiff appeals. Reversed, with directions.

See, also, 187 Pac. 755.

Theodore A. Bell, of San Francisco, Arthur C. Huston, of Woodland, and W. P. Thomas, of Ukiah, for appellant.

John S. Partridge, of San Francisco, H. E. Witherspoon, of Lakeport, Preston & Preston, of Ukiah, and Ben C. Jones, of Lakeport, for respondents.

PREWETT, Presiding Justice pro tem. Action in condemnation. This action was brought by the appellant, a public service corporation, against defendants and some 200 other persons to condemn certain real property situated on the shores of Clear Lake, in Lake county, in this state. The action was dismissed as to all save the above-named defendants, respondents herein. After a trial by jury a judgment was rendered by the superior court of the county of Mendocino on the 22d day of October, 1917, condemning the lands sought by the appellant and fixing the damages at the gross sum of $105,600.

Clear Lake is a navigable body of water situated at a considerable elevation above the valley lands of Yolo county. Its only outlet is Cache creek. This stream, after leaving the lake, finds its way down a narrow and rocky canyon toward the valley, and its waters finally reach the ocean. The drainage of the lake covers a territory embracing some 500 square miles, and its shore line is about 100 miles in length. The land along this shore line is owned by a large number of farmers, stated to be about 200 in number. On the north shore of an arm of the lake, called Robinson Lake, are located the properties of the defendants. The normal fluctuations of the waters of the lake are from zero on the Rumsey gauge to 7 or 8 feet above that mark, while the extreme fluctuations are nearly twice that figure. This action was commenced in April, 1912.

The appellant has heretofore constructed in Cache creek an impounding dam of sufficient height to raise the waters of Clear Lake to the 10-foot mark on the Rumsey gauge. This height is sufficient to result in the inundation of a large area of lowlands around the margin of the lake, which lands during a large part of the year are free from water. This renders necessary the condemnation of such of these marginal lands as are reduced to private ownership. It appears from the evidence in the case that respondent Harriet Lee Hammond claims about 15.40 acres of land below the zero mark, about 50 acres between the zero mark and the 7:56 mark, and 7.04 acres between the 7:56 mark and the 10-foot mark. In the W. O. Edmands tract No. 1 there are about 164.61 acres between the zero mark and the 7:56 mark and about 10.47 acres between that mark and the 10-foot mark. In the W. O. Edmands tract No. 2 there are about 16.26 acres below the zero mark, about 41.81 acres between the zero mark and the 7:56 mark, and about 4.16 acres between that mark and the 10-foot mark. In the estate of C. M. Hammond tract there are about 25.43 acres below the zero mark, about 215.28 acres between the zero mark and the 7:56 mark, and about 13.66 acres between that mark and the 10-foot mark.

These figures aggregate 57.09 acres below the zero mark; 472.65 acres between that mark and the alleged high-water level at 7:56. This leaves but 35.33 acres above the latter mark. The action was brought to condemn the whole, but the plaintiff now seeks an amendment waiving as to all below the high-water mark.

This would restrict the condemnation to the above-mentioned 35.33 acres. The real controversy in the case is whether or not the plaintiff must be compelled against its wish to condemn and pay for the tract of 472.65 acres lying below high-water mark.

Before any jurors were sworn to try the case, the plaintiff asked leave to file an amended complaint, which differs in three particulars from the original complaint. First, it claims certain riparian rights, but, as the court exercised its discretion later in the case and allowed, in substance, this portion of the amendment, the point requires no further notice at this time. A second point is a claim of right to flood the lands up to the high-water mark, under the theory that these lands constitute in law a part of the bed of Clear Lake, and as such are inalienable by the state by means of the swamp land patents under which the defendants claim, and that therefore the defendants, having no title thereto, have no right to forbid the plaintiff from flooding them. The third point is a waiver by the plaintiff of all claim in this action to condemn any lands except the small tract of 35.33 acres lying above high-water mark. This waiver is based upon the assumption that the state owns all lands below the high-water mark in virtue of its sovereignty, as above set out (Churchill v. Kingsbury, 178 Cal. 554, 174 Pac. 329, and Maginnis v. Hurlbutt, 193 Pac. 606, No. 1594, October term, 1920, and earlier cases), and on the further assumption that the state, holding the same in perpetuity in trust for the benefit of the people of the state, could not, at least under the swamp land acts, convey any title, and that therefore the defendants have no title that could be condemned. It seeks by the amendment, in effect, to dismiss so much of its action as relates to these lands lying below high-water mark. The importance of this point is seen when it is recalled that the jury by its verdict awarded the very large sum of $105,600 as damages, and this, too, for lands which in the year 1912 and every year since have, in connection with 900 acres of other lands, making a total of about 1,400 acres, rented for the insignificant sum of $400 per annum. Less than 30 acres have been reduced to cultivation, and the income derived from this cultivation is not included within the above rental. The motion for leave to amend was denied.

Before offering any evidence, the plaintiff renewed its motion to amend, but in this last motion it asked only to amend its description of the lands sought to be condemned so as to leave only the above 35.33 acres, thus waiving the right to condemn in this action the tract of 472.65 acres. This motion also was denied.

[1, 2] Conceding, without deciding, that the action of the court in denying the first motion should be upheld on the ground that the plaintiff was seeking to raise conflicting claims to lands which in the same amendment it was excluding from condemnation, it is clear that the second motion to amend should have been allowed. It is true that the allowance of an amendment, when not of course, rests usually in the sound discretion of the trial court, and this court will not interfere with the exercise of such discretion unless it has been abused. But the policy of the law is to allow amendments with great liberality, to the end "that exact justice may be done" and "complete justice may be reached."

This motion differs from the ordinary motion to amend in that the plaintiff, instead of trying to support a defective allegation, is really conceding to the defendants a part of their claim as set out in their answer. The answer denies the right of plaintiff to condemn and the necessity for the condemnation.

The plaintiff to the extent of this 472.65-acre tract is conceding this. The motion is, in substance, a dismissal as to a portion of the property in controversy. The defendants are in no wise injured by the dismissal, since they are prevailing in their contention to the extent of the dismissal.

But condemnation proceedings stand in a class by themselves. Section 1255a of the Code of Civil Procedure confers upon a plaintiff in condemnation the unconditional right to abandon the proceeding at any time during the trial and even after judgment. And before the enactment of this section it was held in Pool v. Butler, 141 Cal. 46, 74 Pac. 444:

> "The proceeding in eminent domain is an exercise of the sovereign power of the state. * * * It is an adversary proceeding wherein the state appropriates the land for the use of the public. * * * But a plaintiff seeking to condemn land for a public use does not, by bringing the action to condemn, bind himself to take the land. * * * Hence a plaintiff * * * is conceded to have a right to abandon the proceeding and decline to take the land. * * * I think plaintiffs had the right to abandon at any time before the defendants were willing to receive it, or were in a position to demand it."

From the foregoing many portions of the opinion not relevant to this case are omitted. The Pool Case is mentioned with approval in Lincoln Northern, etc., v. Wiswell, 8 Cal. App. 578, 97 Pac. 536, wherein the court adds:

> "In the proceeding under the statute to condemn there is no element of contract."

The court in that case quotes from Lewis on Eminent Domain, § 656, as follows:

> "The weight of authority is that, in the absence of statutory provision upon the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the awarded judgment."

It is true that the plaintiff in this case does not seek by amendment to abandon its entire claim, but the fact that it could at any time have done so argues that it might, in the same manner, by amendment seasonably offered, abandon a portion thereof.

In Crosby v. Clark, 132 Cal. 1, 63 Pac. 1022, the court says:

> "Amendments to pleadings so as to enable the party to prove all the facts necessary to his cause of action or defense are favored. If by reason of such amendment the opposite party is taken by surprise, the cause can be continued, or time allowed to meet the amendment, or such other terms imposed as may be just under the circumstances. It can very rarely happen that a court would be justified in refusing a party leave to amend his pleading so that he may properly present his case"—and citing several cases in support thereof.

In the above case the amendment was allowed after the completion of the trial.

Although the defendants set up in their answer their claim for damages by way of compensation for taking the lands sought to be condemned, such claim is not a cross-demand nor is it in the ordinary sense a claim for affirmative relief, since they ask such relief only in the event that the prayer of the plaintiff in condemnation be granted. In no sense is it such an independent demand for affirmative relief as might be prosecuted to judgment either in this or any other action in the event that the plaintiff should be nonsuited. A dismissal of any portion of the demand of the plaintiff carries with it a corresponding portion of the claim of the defendants. With the reasons for the amendment by the plaintiff and the wisdom thereof we are in no way concerned. We conclude that it had a right to waive a portion of its demand. Since this amendment eliminates the entire tract situated below high-water mark from the action so far as concerns its condemnation, it eliminates also the claim of the plaintiff that it has a right, as agent of the state, to flood this tract. Such claim is not a part of the condemnation proceeding and cannot be litigated therein. The court would have power, if the occasion demanded that course, to determine conflicting claims to the land sought to be condemned, but not to go beyond that point and adjudicate claims to other lands not sought to be condemned.

[3] Other alleged errors do not require special notice. It may be added, however, that the court did not err in the then state of the pleadings, in denying to the plaintiff the right to introduce in evidence the various title papers, although on a retrial of the case on the amendment these documents should be admitted. The valuation placed upon the property by the assessor is not evidence of market value.

The judgment is reversed, and the trial court is directed to permit the plaintiff to amend its complaint.

We concur: HART, J.; BURNETT, J.

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50 Cal. App. 485

MERCANTILE TRUST CO. OF SAN FRANCISCO v. SUNSET ROAD OIL CO. et al.

DANIEL v. CROSS.

(Civ. 3483.)

(District Court of Appeal, First District, Division 2, California. Dec. 22, 1920, as Modified Jan. 3, 1921. Rehearing Denied Jan. 17, 1921. Hearing Denied by Supreme Court Feb. 17, 1921.)

1. Mortgages ⚷476—Title of adverse claimants not triable in foreclosure proceedings.

In a foreclosure proceeding, the court cannot try the title of those claiming adversely to both the mortgagor and the mortgagee, although, if the adverse claimants subject themselves to the jurisdiction of the court in the foreclosure suit, it being before a court of equity, complete justice may be done.

2. Mortgages ⚷465½ — In foreclosure proceedings court could not annul sale on execution in partition proceeding.

In foreclosure proceedings the court was without power, in ancillary proceeding on petition of the receiver in the foreclosure, to annul an execution sale of the premises in partition suit or restrain the purchaser, who was not a party to the original foreclosure proceedings, from selling or dealing with his claim, but could restrain the purchaser from interfering with the receiver's possession.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by the Mercantile Trust Company of San Francisco against the Sunset Road Oil Company, in which John Daniel was appointed receiver, and others. From an order made on the petition of the receiver vacating an execution and enjoining R. H. Cross from selling or dealing with his claim thereunder or from interfering or attempting to interfere with the receiver's possession, R. H. Cross appeals. Order reversed in part, and affirmed in part.

See, also, 176 Cal. 451, 168 Pac. 1033; 176 Cal. 458, 168 Pac. 1036; 176 Cal. 461, 168 Pac. 1037.

Arthur H. Brandt and R. H. Cross, both of San Francisco, for appellant.

George E. Whitaker, of Bakersfield, for respondent.

LANGDON, P. J. This is an appeal from an order by the superior court of the county of Kern on the action of Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co. vacating, annulling, and setting aside on execution sale of certain real property at which R. H. Cross, the appellant, was the purchaser, and permanently enjoining him from selling, mortgaging, pledging, hypothecating, or in any other way disposing of or attempting to dispose of the property, and from interfering or attempting to interfere with the possession of the receiver thereof. The proceeding which terminated in this order was a collateral proceeding in that action, and it is necessary to make a somewhat extended statement of the facts because of their complexity.

On the 11th day of March, 1911, the Mercantile Trust Company of San Francisco commenced an action in the superior court of the county of Kern against the Sunset Road Oil Company and others for the purpose of foreclosing a mortgage given by the Sunset Road Oil Company to the Mercantile Trust Company of San Francisco as security for a bonded indebtedness of $2,000,000. In that action John Daniel was on the 13th day of March, 1911, appointed receiver.

On the 20th day of December, 1916, the receiver filed in this foreclosure action a petition praying for an order adjudging the appellant here, who was not a party to that action, guilty of contempt of court, and for an order permanently enjoining him from interfering or attempting to interfere with the possession of the receiver of certain real property therein described, and from in any manner disposing or attempting to dispose of it. As a basis for such an order the receiver alleged that appellant had been the attorney for the plaintiffs in a certain partition action entitled Anita M. Dewey and D. W. Hobson v. H. A. Blodget, Sunset Road Oil Co., Mercantile Trust Co. of San Francisco, et al., which had been commenced in the superior court of Kern county on April 26, 1910; that a final decree had been made and entered in that action on the 6th day of August, 1913; that on the 10th day of December, 1913 appellant, acting as the attorney for the plaintiffs in that action, had caused an execution to be issued to the sheriff of the county of Kern directing him to levy upon and sell under execution certain real property belonging to the Sunset Road Oil Company, and which had been set aside to it in that action; that this execution was issued for the purpose of enforcing and satisfying a judgment for costs which had been fixed and imposed as a lien on that property by the final decree in the action; that a sale on such execution was had on January 23, 1914, at which appellant became the purchaser; that a certificate of sale had been issued to him; that thereafter, and on the 17th day of May, 1915, he had received a sheriff's deed; that said real property so levied upon and sold was a portion of the property covered by the mortgage given by the Sunset Road Oil Company to the Mercantile Trust Company, and a part of the subject-matter of the foreclosure action in which petitioner had been appointed receiver; that upon his appointment he had entered into possession of said property; that neither the plaintiffs in the partition action nor R. H. Cross had obtained leave from the court in the action of Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co. et al. to issue said execution, and that the same was issued without the knowledge and without the authority of the court having jurisdiction of that action; that appellant, acting under the sheriff's deed was claiming to own said lands, and was endeavoring to sell, mortgage, pledge, hypothecate, or otherwise dispose of them; and that he was interfering with the possession of the receiver and was threatening to dispossess him.

Upon the filing of this petition the court issued its order requiring appellant to appear before it on the 30th day of December, 1916, to show cause why he should not be adjudged guilty of contempt and permanently enjoined and restrained, as prayed for by the petitioner, and, without requiring any bond on the part of the petitioner, restrained appellant from interfering or attempting to interfere with his possession and from selling or otherwise disposing of the property. On January 22, 1917, to which date the hearing had been continued, appellant specially appearing for that purpose, moved that the petition and all proceedings on the receiver's application be dismissed on the ground that the court was without jurisdiction, and that any order made in conformity with the prayer of the petition would be in excess of the power of the court. Reserving his rights under his motion to dismiss, appellant then filed a demurrer and answer to the petition. The motion to dismiss was taken under submission and was thereafter denied, and the demurrer to the petition was overruled. The court, by its order, kept the restraining order in force until a final hearing should be had on the petition and order to show cause.

Upon the denial of his motion to dismiss appellant petitioned the Supreme Court for a writ of prohibition to be directed to the lower court restraining it from further proceedings on the petition. An alternative writ was issued, but on the day before the writ was made returnable the lower court, upon the ex parte application of the receiver, vacated and set aside the order previously made, and entered a new order nunc pro tunc as of February 26, 1917, the date of the original order. By this last order appellant's motion to dismiss was in part granted, and the proceeding, so far as it sought a judgment of contempt against him, dismissed. The order restraining him from interfering with the possession of the receiver and from selling or otherwise disposing of the property was kept in force, however, and he was required to show cause why a permanent injunction should not issue as prayed. Thereafter the judge of the lower court filed a return to appellant's petition for a writ of prohibition, in which he set forth his action in vacating the prior order and entering the new order nunc pro tunc. Thereupon the Supreme Court, holding that an appeal would lie from any injunction which might be issued in said proceeding, discharged the alternative writ.

On June 21, 1917, appellant served and filed his affidavit and motion based thereon for an order transferring the proceeding to another department of the court, or that another judge be called in to hear it on the ground that he could not have a fair and impartial trial because of the bias and prejudice of the judge before whom it was then pending. The motion was noticed for the 29th day of June, 1917, to which date, by consent, the hearing had been continued. On that date, over the objection of appellant that they came too late, counter affidavits were filed and the motion was denied.

Upon the denial of the said motion petitioner, without having given any previous notice thereof to appellant, or to his attorney, and without having served his proposed amendments, moved the court for leave to file an amended petition and requested a new order to show cause and a continuance. Over appellant's objection, this motion was granted. The amended petition was accordingly filed, in which all allegations bearing upon the charge of contempt were omitted. Anita M. Yeo (formerly Anita M. Dewey) and B. W. Hobson were joined as parties, and the proceeding converted from one of contempt to a proceeding to vacate and set aside the execution sale which had been had in the case of Dewey and Hobson v. Blodget et al. The restraining order which had been issued on the filing of the original petition was dissolved, and the court immediately issued a new restraining order in the same form. Appellant demanded the filing of a bond by the petitioner before the issuance of the restraining order, but such bond was not required by the court.

Upon the hearing of the amended petition of the receiver, appellant renewed his motion to dismiss, and, subject to such motion, filed a demurrer and an answer. The rulings on the motion to dismiss and the demurrer were taken under advisement by the court, and a hearing upon the amended petition was had. Appellant then formally requested and demanded of the court that, in the event that the court should hold that the petitioner was entitled to question the execution sale in the case of Dewey v. Blodget in a summary proceeding, and that on the merits he was entitled to an order granting his petition, an order granting his petition be made conditional upon the receiver paying to the appellant the amount that was paid by him for the purchase of the property, and that the said R. H. Cross, the appellant here, have judgment for the amount stated by the receiver to have been tendered Mr. Cross, and that the court order and direct the receiver to deposit said sum with the clerk of the court for the use and benefit of Mr. Cross, or to retain it in his custody until the final determination of the proceeding.

The matter was submitted, and the court later made its findings and entered the order from which this appeal is taken. By this order the issuance of the writ of execution in the case of Dewey and Hobson v. Blodget, the sale thereunder, and the certificate of sale and deed delivered to appellant were annulled, vacated, and set aside; he was permanently enjoined from selling, mortgaging, pledging, hypothecating, or in any other manner disposing of said property or attempting to dispose of it, and was permanently restrained from interfering or attempting to interfere with the possession of the receiver thereof.

The appellant has filed most learned and comprehensive briefs, in which he makes many objections to the action of the trial court. We think, however, it will be necessary to discuss only his main objection, which is that the court in which the foreclosure proceedings were pending could not, on the application of its receiver, appointed in the foreclosure suit, in a summary proceeding, annul and vacate all proceedings on execution taken in another and distinct action, without in any manner preserving or protecting appellant's rights, and cannot strip the purchaser at said execution sale of every right and incident of ownership where no fraud has been charged or proven.

It seems necessary, at this point, to consider somewhat in detail the facts with relation to the partition suit, in which action the execution under which sale was made to appellant was issued. The facts with reference to this matter are uncontradicted, and many of them appear in the amended petition of the receiver and have heretofore been referred to. On the 26th day of April, 1910, Anita N. Dewey (whose name was subsequently changed to Anita M. Yeo) and D. W. Hobson commenced an action in the superior court of the county of Kern against H. A. Blodget, Sunset Road Oil Company, Mercantile Trust Company of San Francisco, Union Oil Company, Sunset Railroad Company, and others. This action was brought for the purpose of establishing in the plaintiffs a $^2/_{25}$ undivided interest in certain real property situated in the county of Kern, comprising about 480 acres, and for a partition of this property among the parties, according to their respective interests. At the time of the commencement of this action a lis pendens was filed in the office of the county recorder of Kern county. The action was assigned to department one of the court and was there determined. The cause proceeded regularly, and on June 5, 1912, an interlocutory decree was made and entered by which it was adjudged that the plaintiffs were the owners in fee simple absolute, share and share alike, of an undivided $^2/_{25}$ interest in the property, and that the defendant Sunset Road Oil Company was the owner in fee simple of an undivided $^{23}/_{25}$ interest, and that the interest of the Sunset Road Oil Company was subject to a bonded indebtedness of that company in the sum of $2,000,000, evidenced by certain bonds secured by a deed of trust to Mercantile Trust Company of San Francisco dated July 15, 1905.

The referees appointed by the interlocutory decree in partition duly made partition and filed their report, which report was confirmed and final judgment entered. By this final decree a designated 36 acres were partitioned and set aside to the plaintiffs, free and clear of all incumbrances, and the balance of said land was set aside to Sunset Road Oil Company, subject to the mortgage of Mercantile Trust Company. The portion of the decree from which appellant's right flows, contains a provision for the recovery by plaintiffs of costs and attorney's fees, and the amount of such costs and fees is—

> "adjudged to be a lien upon the respective interests of the parties hereto in the following proportions, to wit: That $^2/_{25}$ part thereof be a lien upon the said lands set apart to plaintiffs as aforesaid, and that $^{23}/_{25}$ part thereof be a lien upon the lands set apart to defendant Sunset Road Oil Company, and that said $^{23}/_{25}$ of said sum be, and it is hereby decreed and adjudged to be, a lien on said lands prior to the said mortgages and liens hereinbefore mentioned and described."

After the commencement of the partition suit and on March 11, 1911, the foreclosure action hereinbefore mentioned was commenced by Mercantile Trust Company. The plaintiffs in the partition suit were not made parties to this foreclosure action. The foreclosure action was assigned to department 1 of the superior court (the same department in which the partition suit had been tried), but was later transferred to another department. On March 13, 1911, John Daniel, the petitioner here, was appointed receiver in said foreclosure action. By the order appointing him he was empowered and directed to demand, collect, and receive all personal property described in the deed of trust or mortgage, all rents due and unpaid or thereafter to become due, and all issues, income, and profits from the premises, and to keep the buildings and other personal property insured and to pay the rentals, taxes, and assessments which might accrue. The 480 acres, the subject-matter of the partition suit (and which were then held in undivided ownership by Anita M. Dewey, D. W. Hobson, and Sunset Road Oil Company), was one of the pieces which were included in the mortgage to the Mercantile Trust Company, and was a portion of the subject-matter of the foreclosure suit. Though the partition suit was then undetermined, the receiver did not intervene therein.

Mr. Cross, the appellant, was the attorney for Anita M. Dewey and D. W. Hobson in the partition suit. As such, during the pendency of the partition suit, he had considerable correspondence, which appears in the record, with the attorney for the receiver with reference to an amicable partition of the property and other matters in connection with such partition suit. Subsequent to the entry of the final decree in the partition suit, appellant, in the performance of his duty as attorney for the plaintiffs in that action, sought to effect collection of the judgment for costs which had been made a first lien upon the property involved in the partition suit. He called upon the trust officer of the Mercantile Trust Company and requested payment of the amount of the judgment. The trust company advised him that it had advanced in the case all money that it was going to advance, and that it did not know where he could procure the amount to satisfy the judgment. No further action was taken in the matter of the execution, however, until November, and at that time appellant secured a writ of execution and delivered the same to the sheriff for levy and sale. Appellant immediately notified the trust company of the issuance of execution and of the date of the sale. The sale was subsequently held on January 13, 1914, and, there being no other bidders, appellant purchased the property for $1,307.70. A sheriff's certificate was issued to him, and the sheriff returned the writ satisfied. A year having elapsed after the sale, and no redemption having been made, the sheriff, on May 13, 1915, delivered to appellant a sheriff's deed transferring the property to him, which deed was duly recorded. It was not until three years after the delivery of the sheriff's deed that the receiver in the foreclosure action filed his petition herein.

It is, of course, well settled that in a foreclosure proceeding the court cannot try the question of the title of one claiming adversely to both the mortgagor and mortgagee. Murray v. Etchepare, 129 Cal. 318, 61 Pac. 930; Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391. This question is one to be settled in another action after the adjustment of the relative rights of the mortgagor and mortgagee in the foreclosure proceeding. Murray v. Etchepare, supra. The order in the present case annulling the deed to appellant cannot be justified, therefore, upon the ground of an adjudication of title as between the appellant and the mortgagor and those claiming under it, because the lower court was powerless to make such an adjudication. But, in reality, the present case does not present a situation where the court attempted to try title as between the mortgagor and one claiming adversely. The action of the lower court here prevented the appellant from acquiring any title to the property, regardless of the force and effect of such title against either or both the mortgagor or mortgagee. The court in the foreclosure proceeding did not inquire into the merits of appellant's title as against the mortgagor or mortgagee; it did not try the question of title, but simply set aside whatever title or evidence of title appellant had, without any adjudication upon the merits, but apparently solely upon the ground that the acquisition of title by the appellant, whatever its value, without leave of the court appointing the receiver, was an interference with the possession of the receiver, and therefore might be annulled regardless of the equities between the parties. In the cases last cited the court said that the title of one claiming adversely to both the mortgagor and mortgagee must be passed upon in another and distinct action; but in the present case the action of the lower court in divesting the appellant of his title would preclude him from this right of an independent determination of the merits of his claim. He has nothing upon which to found a claim in an independent action, having been stripped of all his right, title, and interest in the property.

However, respondent does not maintain that the trial court could in a foreclosure proceeding settle adverse claims to the property, but seeks to sustain this order upon the theory that, regardless of the ultimate rights of the appellant or the value of the title which he had acquired at the execution sale, he could not sell under execution property in the hands of the receiver for the reason that such a sale would be an interference with the possession of said receiver which the appointing court would enjoin unless effected with the consent of said court. It is contended that this action would be taken by the court regardless of what might be the rights of the execution debtor after the foreclosure proceedings had been terminated; that, regardless of the general rule limiting the power of courts in foreclosure actions, any court appointing a receiver has power to do any and everything that is required to protect the possession of its receiver of the property consigned to his care, and that the action of the court in annulling the deed in the present case was the exercise of a power necessarily incident to the protection of the possession of its receiver; that the possession of the receiver was interfered with by the execution sale, and the vacating of the deed was a necessary and proper means to prevent such interference.

Appellant contends that the court in the foreclosure proceeding was without power or jurisdiction to annul the deed to him as a general proposition of law; that, if such power was necessarily incident to its larger power to protect the possession of its receiver, then such incidental power would only come into being when the possession of the receiver was being interfered with; and that a sale under execution is not an interference with such possession.

There is, of course, no dispute between the parties as to the general principles of law applicable in cases of receiverships, such as the nature of a receiver, his relation to the parties, and the power of the court over him, or the fact that he is entitled to be protected in his possession of the property intrusted to his management and control. There is, as we shall discuss later, no substantial evidence in the present case of any actual interference with the possession of the receiver, and the first question presented, therefore, is whether or not a sale under execution, by a prior lienor, without the permission of the court appointing the receiver, is, of itself, such an interference with the possession of a receiver in a foreclosure proceeding as to warrant the making of the order appealed from.

In an action for the foreclosure of a mortgage, the holders of paramount liens are neither necessary nor proper parties, the action being designed merely to cut off subsequent liens, and no portion of the proceeds of the foreclosure suit can be applied to the payment of such prior liens. Wiltsie on Mortgage Foreclosure, vol. 1, § 188, p. 266; Jones on Mortgages, vol. 2, § 1439; Beronio v. Ventura Lumber Co., 129 Cal. 237, 61 Pac. 958, 79 Am. St. Rep. 118. The purpose of the appointment of a receiver in such an action is that he may take charge of the mortgaged property during the pendency of the action where it appears that the property is in danger of being lost or materially injured, and the property is probably insufficient to discharge the mortgage debt. Section 564, Code Civ. Proc.; Title Ins. Co. v. Calif. Dev. Co., 164 Cal. 58, 127 Pac. 502. From the nature of a foreclosure proceeding and the duties of the receiver appointed therein it is apparent that a transfer of the legal title does not interfere with the possession of the receiver. "A receiver has no title to the property, and that is all that is affected or changed by a sale." High on Receivers, § 5; Hickox v. Holladay (C. C.) 29 Fed. 226, 234. A mere conveyance of the legal title to the property can have no effect upon the possession of the receiver nor embarrass him in carrying out his duties with relation to the same. Klauber v. San Diego Street Car Co., 95 Cal. 353, 30 Pac. 555; Petaluma Savings Bank v. Superior Court, 111 Cal. 500, 44 Pac. 177.

For, if the sale is under a lien subsequent to the lien for the protection of which the receiver is in possession of the property, then the sale is made subject to the prior mortgage and the possession of the receiver. If the sale is under a lien which is paramount to that under which the receiver was appointed, then this paramount right is one which could not in any way be curtailed by the foreclosure proceedings under the subsequent lien or the appointment of a receiver therein. The legal title and the right to the possession of the property may, of course, exist simultaneously in different persons, and the purchaser at the execution sale would purchase subject to the temporary possession of the receiver just as he would purchase subject to the possession of a lessee were there one in possession of the property. It is to be observed that no injustice can be caused by the operation of such a rule, for the subsequent lienor in whose interest the receiver is holding possession has the right, under the Code, to redeem from any sale made in satisfaction of a prior lien. He is a redemptioner, and as such fully protected. Because he fails to avail himself of this right does not entitle him to curtail the rights of the prior lienor. The mortgagee may proceed with his remedy against the mortgagor, and the purchaser at the foreclosure sale would succeed to all rights of the mortgagor in the property. The question of title as between such purchaser and one in the position of the appellant here is then one which remains judicially undetermined. It is not a matter properly before the court in the foreclosure proceedings, nor before this court here, and it cannot be foreclosed and settled in advance against the appellant here by the court in the foreclosure proceedings in annulling the deed to appellant.

It is admitted by appellant that in a certain class of cases, such as creditors' bills, insolvency proceedings, and the like, where a fund has been sequestered for the benefit of all creditors and is being administered by the court for all claimants who may come in, a levy and sale on execution against real property, without leave of court, is of no effect. But it is maintained that this is not because such levy would interfere with the possession of the receiver, but because the whole estate is being administered for the benefit of all creditors who may care to come in, and the proceedings involve a sequestration of all assets. On the other hand, it is pointed out that in receiverships such as those incidental to a divorce proceeding or mortgage foreclosure, which are for the sole benefit of the plaintiff and for his further security, and in actions over which he has exclusive control, the property is not sequestered for the benefit of creditors, and in such cases it is only an actual interference with the possession of the receiver which will be enjoined by the court, and that a sale under execution by one having a paramount right to the plaintiff in the action in which the receiver is appointed will be upheld. Whatever confusion or doubt may exist upon this question in other jurisdictions, we are of the opinion that this distinction is clearly made by the cases in this state. Adams v. Woods, 7 Cal. 187; Id., 8 Cal. 152, 68 Am. Dec. 313; Id., 9 Cal. 24. Petaluma Savings Bank v. Superior Court, 111 Cal. 488, 44 Pac. 177; Klauber v. San Diego Street Railway Co., 95 Cal. 353, 30 Pac. 555. Also in the case of De Forrest v. Coffey, 154 Cal. 444, 98 Pac. 27, the distinction claimed by appellant is clearly recognized, where it is said:

> "A receiver in a divorce case only conserves the property of the husband for the purpose of securing the wife in her claim to alimony. He has nothing to do with claims of the creditors of the husband. In the case cited [Petaluma Savings Bank v. Superior Court, supra] no question of permission to sue the receiver was involved. No such application could have been made, as there was no suit to be brought against him, and the enforcement of the lien of the judgment obtained by the bank could not at all physically disturb the possession of the receiver. The bank was enforcing a pure, fixed, legal right, the exercise of which it was held the court appointing the receiver could not control. But in an insolvency proceeding the court sequesters the estate of the insolvent and its receiver holds it for the benefit of all the creditors. It has plenary power over the assets of the estate, and one who asserts a claim against them must not only apply for permission to do so, but under the authorities it is discretionary with the court to reserve to itself the determination of the validity of the claim, or to permit it to be litigated in some other competent tribunal, and as far as the nature of the claim asserted here is concerned, the opinion in the Petaluma Bank Case contains nothing contrary to the general rule as established by the authorities to which we have heretofore referred."

Respondent contends that a receivership in a mortgage foreclosure action is analogous to a receivership in insolvency, and not to a receivership in a divorce action. In so far as it is analogous to either, it appears to us, in its scope and purpose and legal effect, to be more nearly like the provisional remedy in a divorce action. It is not a sequestration of the assets of the defendant, but a mere administration of the assets covered by the mortgage for the sole and exclusive benefit of the mortgagor and mortgagee. It seeks not to protect other creditors, and in a foreclosure suit the rights of prior lienors cannot be barred. The foreclosure suit is under the control of the mortgagor—the plaintiff—and may be dismissed by him at pleasure without reference to the rights of any other creditor. In a divorce proceeding a receiver administers the assets of the defendant merely to conserve the same to satisfy a possible judgment for alimony, but the rights of those having prior claims cannot be barred or affected. Other creditors are not protected in such proceedings, and cannot, therefore, be deprived of their legal rights by such proceedings.

We are therefore of the opinion that, both upon reason and authority, there is a clear distinction between a receivership in a liquidation proceeding, and one which is but a provisional remedy for the sole and exclusive benefit of the plaintiff; and we are also of the opinion that the receivership in the present case falls within the latter class. This being true, and a sale under execution not being an interference with the possession of the receiver in the foreclosure action, the order of the court in that action annulling the deed to appellant and enjoining him from selling, mortgaging, pledging, or hypothecating or in any other way disposing of, or attempting to dispose of, the said real property, was erroneous.

However, in addition to said last-mentioned provisions of the decree, there was a provision permanently restraining and enjoining the appellant from interfering with the possession of the receiver in and to said real property. This portion of the decree was based upon the finding that the appellant was "interfering with the possession of the receiver in said lands, and is threatening to dispossess said receiver." Appellant attacks this finding as unsupported by the evidence. In view of the fact that the receiver himself testified positively that his possession had not been interfered with in any way since his appointment, it is somewhat difficult to understand upon what evidence the trial court predicated this finding, unless it be the testimony of the appellant that after his purchase at the execution sale he had driven over the property and had spoken to a man who was living in a house located thereon, and had told him if he paid any rent for the house to pay it to the appellant; that the man said he was not paying any rent to any one, and never did pay any rent to appellant.

Assuming that this testimony by appellant with reference to his actions was sufficient to raise a conflict upon the question of an attempted interference with possession, and that the finding of the court upon this subject was therefore one that cannot be disturbed upon appeal, this finding would warrant an affirmance only of that portion of the order of the trial court which restrains the appellant from interfering or attempting to interfere with the possession of the receiver. This portion of the order, however, is of minor importance under the facts here, because an affirmance of the same can in no way prejudice the appellant, he having taken the position that he never has interfered nor attempted to interfere with the possession of the receiver and does not intend to do so, and therefore such an order is not prejudicial to him. This is especially true in view of the fact that it is clear from all the cases, and indeed it is admitted by appellant, that, whatever the character of the receivership, the court appointing the receiver has power to restrain an actual interference with the possession of its receiver, and a recognition of this rule of law by appellant should have upon his future conduct the same force and effect as the restraining order already issued. Conceding, then, in support of the finding of the trial court, that there is a conflict in the evidence as to the interference or attempted interference with the possession of the receiver, the portion of the order restraining such interference must be affirmed.

There are several other matters ably urged by appellant in his briefs which seem to us to have much merit, but, in view of our conclusion upon the main question involved, a discussion of these other matters becomes unnecessary.

The portion of the decree appealed from which declares the sale under execution to be null and void, and the portion thereof which restrains and enjoins appellant from selling, mortgaging, hypothecating, or in any other way disposing of, or attempting to dispose of, the property involved herein, is reversed; the other portions of the order to stand affirmed.

BRITTAIN, J. (specially concurring). While I concur in the decision reversing the order appealed from in so far as it declared the execution sale to be void and in so far as it restrained the appellant from hypothecating or disposing of the property involved, I cannot agree with the grounds stated in the opinion by Mr. Presiding Justice LANGDON as those upon which the decision has been reached. In my view of the law and of the duty of this court that opinion is objectionable in three particulars:

[1] First. In the opinion of the presiding justice it is stated that it is well settled that in a foreclosure proceeding the court cannot try the question of title of those claiming adversely to both the mortgagor and mortgagee. Murray v. Etchepare, 129 Cal. 318, 61 Pac. 930; Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391. This rule is correctly applied in the further statement that—

> "The order in the present case annulling the deed to the appellant cannot be justified, therefore, upon the ground of an adjudication of title as between the appellant and the mortgagor and those claiming under it, because the lower court was powerless to make such an adjudication."

Based upon this statement and a review of cases, including the Petaluma Savings Bank Case (Petaluma Savings Bank v. Superior Court, 111 Cal. 488, 44 Pac. 177), in the opinion of the Presiding Justice the conclusion is reached that a receivership in a mortgage foreclosure case "is but a provisional remedy for the sole and exclusive benefit of the plaintiff," and for that reason, a sale under execution not being an interference with the possession of the receiver, the order of the court annulling the deed to the appellant and enjoining him from mortgaging or disposing of the property was erroneous. This amounts to a decision that the execution sale was valid. In my opinion, such an adjudication was not necessary to the determination of this appeal; it is revolutionary in character and opens the door to vexatious litigation.

A lengthy argument was made on behalf of the appellant to show that under the decision of the Supreme Court in the case of Petaluma Savings Bank v. Superior Court, supra, a receivership in a foreclosure proceeding is differentiable from a general receivership. On the other hand, the respondent, in reliance upon the case of Grosscup v. German Savings & Loan Society (C. C.) 162 Fed. 947, maintains that the same rules apply to a receivership in a foreclosure proceeding as are generally recognized. It is wholly unnecessary and would be improper on this appeal to determine this question, because, even though the respondent's broadest contentions should be upheld, and all the rules applicable to federal receiverships applied, the order purporting to vacate the execution sale could not be sustained.

The general rules to which reference has been made not only permit, but require, a court to protect the possession of its receiver.

> "No other court of co-ordinate jurisdiction has any power or authority to interfere or meddle with the property in the hands of a receiver. * * * This rule is essential to the orderly administration of justice and to prevent unseemly conflict between courts whose jurisdiction embraces the same subjects and persons, and has no reference to the superiority of one tribunal over the other, nor to the superiority in rank of the several claims, in behalf of which the conflicting jurisdictions are invoked." 23 R. C. L. Receivers, § 71.

These general rules have been modified to some extent in this state in their application to receiverships granted in divorce cases. The Petaluma Savings Bank Case, in my opinion, does not support the conclusion reached by the presiding justice in this case. It is differentiable from the present case in three particulars: First, the receiver appointed in the divorce case was not in possession of any of the lands, but was claiming to be in possession and was actually endeavoring to take possession at the time of the execution sale; secondly, as was pointed out in the opinion by Mr. Chief Justice Beatty, the sole authority for the appointment of a receiver in a divorce case is to enable the court to require the husband to give reasonable security for providing maintenance and making payments of alimony. In a foreclosure suit, subject to the rights of third parties, the court takes possession of the corpus of the property by a receiver for the purpose of conserving the rents, issues, and profits, for the benefit of any one who may in that proceeding establish a right thereto. Lastly, the final judgment in the divorce action involved in the Petaluma Bank Case (White v. White, 130 Cal. 597, 62 Pac. 1062, 80 Am. St. Rep. 150) was rendered before the recovery of the judgment of the Petaluma Savings Bank. As was stated also in the opinion of White v. White, the receiver had not taken possession of any property, and the functions originally vested in him terminated with the entry of the judgment. Any new duties conferred upon him by the judgment were in excess of the jurisdiction of the court.

If the Petaluma Bank Case is authority for the sale of property in the hands of the receiver in a divorce case under process issued out of a court of co-ordinate jurisdiction, it is an exception to the general rule, and the exception ought not to be extended to other cases of receiverships. To extend this exception to foreclosure receiverships would amount to an invitation for collusive sales pending foreclosure by which a mortgagee entitled to satisfaction upon a defaulted mortgage debt might be held in litigation for years during the pendency of appeals involving the determination of whether or not buyers at such sales acquired title. The effect of the rule stated in the opinion of the presiding justice amounts to an adjudication that the appellant in the present case acquired title under the execution sale. If the trial court on this proceeding had no power to adjudicate that the appellant did acquire title by the sale, this court is without power to adjudicate that the sale was good. Such an adjudication amounts to a determination of the question of title.

Second. In the suit pending for the foreclosure of the mortgage, in which a receiver had been appointed, the receiver, who is the sole respondent on this appeal, procured an order of the superior court in a proceeding instituted by him against the appellant, who was never made a party to that suit, in terms purporting to vacate and annul a sale under execution of another judgment to the appellant of certain real property included within the mortgage, and further enjoining the appellant from interfering with the possession of the receiver or dealing with the title to the property. The mortgage involved in the foreclosure proceeding was to secure the payment of bonds aggregating $2,000,000 issued by the Sunset Road Oil Company. The mortgagee was the Mercantile Trust Company of San Francisco. The mortgage, among other property, covered certain lands held by the Sunset Road Oil Company and others as tenants in common. Prior to the commencement of the foreclosure suit, two of the tenants in common, Anita M. Dewey and D. W. Hobson, sued the other tenants in common and the mortgagee in partition, lis pendens being filed when the suit was commenced. While that suit was pending, the foreclosure suit was commenced, and John Daniel, the present respondent, was appointed and qualified as receiver of the mortgaged property. He did not seek to intervene in the pending partition suit, and it was not necessary that he should have been made a party to that suit.

The final decree in the partition suit awarded specific property free from all liens to the plaintiffs in that suit and awarded to the Sunset Road Oil Company other specific property subject to the mortgage of the Mercantile Trust Company. The decree provided that the plaintiffs were entitled to $1,182.75 and costs, of which the sum of $1,000 was allowed as an attorney's fee to the present appellant, who was the attorney for the plaintiffs in the partition suit. The decree further provided that $^2/_{25}$ of the amount so determined should be a lien on the land set apart to the plaintiffs, and that $^{23}/_{25}$ thereof should be a lien upon the land set apart to the defendant Sunset Road Oil Company "prior to the said mortgages and liens" theretofore mentioned in the decree.

None of the defendants in the partition suit appealed from the judgment establishing the priority of the lien so imposed. In legal effect, as between the parties, this was a consent judgment making the lien of the mortgage then in suit subordinate to the lien of the $^{23}/_{25}$ of the amount awarded in the partition suit. Except as thus stated, the judgment in the partition suit had no effect upon the foreclosure suit or the receivership. It must be borne in mind that the prior lien was the lien of the plaintiffs in the partition suit. The present appellant received nothing by virtue of that decree. The plaintiffs in the partition suit were simply prior lien holders.

In the foreclosure suit the prior lien holders were not necessary parties. They might have been made parties by their own intervention, and had they been made parties by proper pleadings, their right as prior lien holders would necessarily have been protected in the foreclosure suit, either by preliminary order or in the final decree. While it is generally the rule that claims adverse to both the mortgagor and mortgagee cannot be litigated in a foreclosure suit, if the adverse claimants subject themselves to the jurisdiction of the court in the foreclosure suit, it being before a court of equity, complete justice may be done. Van Loben Sels v. Bunnell, 131 Cal. 489, 63 Pac. 773; Dobbins v. Economic Gas Co. (Sup.) 189 Pac. 1073. The undisputed evidence shows that, instead of intervening in the foreclosure suit, the plaintiffs in the partition suit, through the appellant, as their attorney, sought to collect the amount of the lien upon the property involved in the foreclosure suit from the mortgagee and its attorneys, and that the appellant made no attempt to make such collection from the receiver, nor was any application made to the court in the foreclosure suit for leave to enforce the prior lien imposed on the mortgaged property by sale under execution issued on the judgment in the partition suit. Regardless of any reasons or excuses advanced for not applying to the court having jurisdiction of the receiver when payment was not made by or on behalf of the mortgagee, as a matter of fact execution was issued on the judgment in the partition suit and levy was made, followed by a sale under that judgment. The certificate of sale was duly recorded on February 18, 1914. In May, 1915, there having been no redemption nor offer of redemption, a sheriff's deed issued on the certificate and was duly recorded on May 17, 1915, sale being made to the appellant for $1,307.70.

On December 20, 1916, in the foreclosure suit the receiver filed a petition setting forth with some elaboration the foregoing facts, praying for an order directing the appellant to show cause why he should not be adjudged guilty of contempt of court for interfering or attempting to interfere with the possession of the receiver, also for a temporary restraining order to prevent him from interfering with such possession and from selling, pledging, mortgaging, hypothecating, or in any other way disposing or attempting to dispose of the property in question. The record shows that, when this matter came on for hearing, it was very definitely agreed between the parties that all proceedings for contempt be abandoned and the right to proceed for contempt for past acts be waived. Thereafter, by amendment, the proceeding was changed so that the restraining order was maintained in force until the order appealed from was made, and by amendment of the petition the court undertook to determine the validity of the execution sale. It is to be noted that the appellant at all times reserved his objections to the court proceeding with the hearing because of its lack of power to determine the question of title upon the amended petition, and that the allegations of the petition upon which the proceeding was based were wholly insufficient to warrant the relief sought by the petitioner. Upon this record, the receiver with the approval of the court having waived all right to proceed against the appellant for contempt based on past acts, the court was without power to make any order except one of injunction as to future acts. It certainly could not in this ancillary proceeding adjudicate upon the validity of the execution sale.

Third. In addition to the facts stated in the opinion of the Presiding Justice the record shows that of the properties mortgaged to secure the payment of the issue of bonds of $2,000,000, of which there were outstanding bonds of the value of $1,190,000, the appellant as the attorney for the plaintiffs in the partition suit caused to be sold to satisfy the lien of about $1,200 over 400 acres of the land which was the original refining property of the oil company, on which there were a number of buildings and structures, pipe lines, and all sorts of equipment necessary for a refinery. Under this sale the appellant bought all that property for $1,307.70. He made no application to the receiver, who had sufficient money in his hands to pay the prior lien, and who, after learning of the sale, tendered to the appellant all money he had expended, with interest, which tender was rejected on the sole ground that it was not made in gold coin. Neither did he apply to the court for leave to sue the receiver or to sell the property under execution. The receivers, relying upon the general rule prohibiting interference with receivers, could not in this proceeding take the opposing positions on one hand that the sale was void, and, on the other hand, that it should be set aside upon equitable grounds, if such grounds exist. If this court announces the rule that in a foreclosure suit property in the hands of a receiver may be sold under process of a court of co-ordinate jurisdiction, the bondholders, the mortgagee, the bondsman of the receiver, and the receiver himself, will be deprived of any possibility of litigating before a court having power to determine whether the execution sale was void or voidable, or valid, any question of equitable cognizance which might possibly be raised in such a suit.

[2] Solely on the ground that the trial court in this proceeding was without power to adjudicate on the question of title and in recognition of the fact that the appellant acquired at the sale something which eventual-

ly may or may not be determined to have vested him with title, I concur in the conclusion that the order appealed from, in so far as it purports to vacate the execution sale and in so far as it purports to restrain the appellant from selling or dealing with his justiciable claim of title acquired while the property was sub judice, must be reversed. The order appealed from should be affirmed in so far as it restrains the appellant from interfering with the possession of the receiver.

NOURSE, J. I concur in the judgment for the reasons stated in the opinion of Justice BRITTAIN.

50 Cal. App. 512

DUERR v. SLOAN et al. (Civ. 3445.)

(District Court of Appeal, First District, Division 2, California. Dec. 22, 1920. Hearing Denied by Supreme Court Feb. 17, 1921.)

1. Appeal and error 🔑1236—Facts held to warrant entry of judgment against sureties on appeal.

Where an appeal bond under Code Civ. Proc. § 942, stipulated that if appellant did not make payment within 30 days after filing of remittitur on affirmance by the Supreme Court judgment might be entered against sureties without notice, a stay of entry of the judgment against them could have been granted only on showing that these conditions did not exist, and an objection of failure to present the claim in the estate of appellant, since deceased, was another matter and could not be considered.

2. Appeal and error 🔑154(4)—Sureties on appeal bond, having consented to judgment on appellant's default, cannot appeal therefrom.

Sureties on an appeal bond, having by stipulation consented that judgment might be entered against them without notice if appellant failed to pay within 30 days after filing of remittitur, on affirming, cannot appeal therefrom.

3. Appeal and error 🔑1236—Entry of judgment on appeal bond by a judge other than the one to whom case was assigned held not error.

A rule of court that an order entering judgment against sureties on an appeal bond after filing of remittitur to the Supreme Court should be made by the judge to whom the case had been assigned is to save the various judges from imposition, and does not limit their jurisdiction, and the entry of such a judgment by the presiding judge, where the court is left no discretion because of sureties' consent to judgment and waiving of notice, was not error.

4. Appeal and error 🔑523(2)—Facts recited in affidavit supporting an unauthorized motion are not part of record.

Facts recited in an affidavit, filed in support of an unauthorized motion to suspend proceedings relating to judgment against the sureties on an appeal bond, were no part of the record.

5. Appeal and error 🔑1227—Sureties on appeal bond not relieved by failure to present judgment as claim against estate.

Where appeal bond sureties specifically promised to pay at a fixed time after filing of remittitur affirming the judgment upon the sole condition that the debtor had not paid, in view of Civ. Code, § 2844, providing that the surety has all the rights of a guarantor, sections 2825, 2840, relating to guarantor's exoneration, and section 2445, relating to right to demand that a creditor proceed against its principal, where no demand was made by the sureties on the creditor to present her claims against the estate of the deceased appellant, the sureties were not released by such failure.

6. Principal and surety 🔑125—Creditor's failure to file claim against principal's estate does not release surety.

Failure of a creditor to file his claim against the estate of the principal debtor does not release the surety.

7. Appeal and error 🔑1236—If judgment against sureties is valid on its face, independent equity suit is required to give relief.

Except by an independent suit in equity, the Code does not provide for motion to stay the entry of a judgment against appeal bond sureties, valid on its face and based upon the consent of the parties, or to set aside such judgment or to recall execution thereon, where such motions are based upon extraneous facts which, if true, would make the entry and enforcement of such judgment inequitable.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy and George H. Cabaniss, Judges.

Action by A. C. Duerr against Sarah A. Bryan, in which, upon defendant's death, William R. Sloan and another, as her executors, were substituted as defendants, and against William R. Sloan and another as sureties on the appeal bond. From orders and a judgment denying motions to stay proceedings, entering judgment against the sureties on the appeal bond, denying sureties' motion to set aside the judgment and denying motion to recall execution, the defendants appeal. Appeal from the judgment dismissed, and the orders involved in other appeals affirmed.

Sterling Carr, of San Francisco, for appellants.

Keogh & Olds, of San Francisco, for respondent.

NOURSE, J. On the 9th day of April, 1914, plaintiff commenced an action against Sarah A. Bryan to recover the sum of $2,500 on an account stated; on the 14th day of May, 1917, judgment was rendered in favor of plaintiff and against the said Sarah A.

Bryan for the sum prayed for; on the 11th day of July of the same year the defendant Sarah A. Bryan served and filed her notice of appeal from said judgment, and on the following day filed a cost and stay bond in form prescribed by section 942, Code of Civil Procedure, with William R. Sloan and George A. Scott as sureties thereon. While said appeal was pending, and on the 2d day of April, 1918, said Sarah A. Bryan died, and after probate proceedings were regularly taken, William R. Sloan, her brother, and John S. Bryan, her son, were appointed executors of the estate, and duly qualified as such. On the 19th day of August, 1918, while said appeal was still pending, the said executors upon their own request and motion, were duly substituted as defendants in said action. On the 15th day of April, 1919, said judgment was affirmed by this court (Duerr v. Sloan, 40 Cal. App. 653, 181 Pac. 407), and on the 17th day of June, 1919, the remittitur affirming said judgment was duly filed in the superior court. Pending the appeal the executors duly and regularly caused notice to creditors to be made, and the time for presentation of claims against the estate of said Sarah A. Bryan expired on the 22d day of March, 1919, or about four weeks prior to the affirmanec of the judgment by this court. After the remittitur had been filed in the superior court as above stated, and on the 11th day of July, 1919, the executors of said estate and the two sureties on the appeal bond gave notice of their intention to move the superior court for an order staying further proceedings on the part of plaintiff by virtue of the judgment, said motion being made upon the sole ground that the plaintiff in said action had failed to file with the executors of said estate a claim based upon her said judgment. Said motion was duly heard by the superior court, and on the 16th day of July, 1919, denied. On the following day counsel for the moving parties called upon the judge presiding in department No. 3 of said superior court, to which department said cause had been regularly assigned, and persuaded said judge to agree with him that no judgment would be entered against the sureties upon the appeal bond without giving said counsel an opportunity to appear and make objection thereto. On the 18th day of July, which was after the expiration of the 30-day period from the filing of the remittitur, counsel for plaintiff appeared before the acting presiding judge of said superior court, who at that time was sitting in department No. 6 of said court, and made a motion that judgment be entered against the said sureties upon the appeal bond, said motion being based upon the bond and the record in said action. Said motion was granted, and judgment in favor of said plaintiff and against the sureties William R. Sloan and George A. Scott in the sum of $3,153.45, with interest and costs of suit, was regularly entered and recorded on the 19th day of July, 1919. Thereafter execution was issued upon said judgment. The sureties obtained a stay of said execution, and moved the superior court to set aside the judgment against them, and also to recall the execution, both motions being made upon the ground that no claim had been filed by plaintiff against the said estate, and upon the ground that the judgment against them was irregularly made by the acting presiding judge while sitting in department No. 6, as heretofore detailed. These motions having been denied, four appeals were prosecuted: (1) An appeal by the executors and the sureties from the order denying the motion to stay the proceedings; (2) an appeal by the sureties alone from the judgment entered against them; (3) an appeal by the sureties from the order denying their motion to set aside this judgment; and (4) an appeal by the sureties from the order denying their motion to recall the execution. These four appeals have been consolidated for hearing by stipulation of counsel.

[1] 1. The appeal from the order denying the motion to stay proceedings must be affirmed. The motion was based upon the sole ground that the plaintiff had failed to present a claim to the executors of the estate of the deceased defendant. The motion did not present a legal ground for the stay of the entry of a judgment against the sureties. In the bond which they executed in accordance with section 942, Code of Civil Procedure, they stipulated:

> "That if the said defendant and appellant does not make such payment within thirty days (30) after the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered in the said action on motion of the plaintiff and respondent, and without notice to the undersigned in her favor and against the undersigned and each of them."

This stipulation is a consent on the part of the sureties that judgment may be entered against them if the conditions contained in the stipulation exist, and without regard to any extraneous matters. Assuming, therefore, that the superior court had jurisdiction to entertain a motion to stay the entry of judgment against the sureties, a stay could have been granted only upon a showing that these conditions did not exist. The failure to present a claim against the estate of the principal raised an entirely new issue, an issue which could not be determined upon a mere motion to stay the entry of the judgment, but, if at all, in a suit in equity where the sureties, having sought equity, would be required to do equity. In other words, when a party has consented to the entry of judgment against him upon certain specified conditions and within a certain fixed time, he cannot delay the entry of said judgment upon a mere motion based upon the ground that same unrelated facts have arisen which would make the entry of said judgment inequitable.

[2] 2. The appeal of the sureties from the judgment must be dismissed. By the stipulation which they made in the appeal bond they consented that judgment might be entered against them without notice if the defendant and appellant in the main suit failed to pay within 30 days after the filing of the remittitur in the superior court. Thus, at the expiration of 30 days from the date of the filing of the remittitur, the plaintiff in the main suit was entitled to the entry of judgment against the sureties, without notice to them, upon presentation of the record in the case showing that said judgment had not been paid within the time stipulated. Having consented to the entry of such judgment, the sureties cannot be heard in an appeal therefrom. Erlanger v. S. P. R. R. Co., 109 Cal. 395, 42 Pac. 31; Mecham v. McKay, 37 Cal. 154, 158; Judnick v. Judnick, 190 Pac. 480. Nothing herein is inconsistent with Hawley v. Gray, 127 Cal. 560, 60 Pac. 437. Where, as in that case, a judgment is entered prior to the expiration of the 30-day period, it is not a "consent" judgment; that is to say, the judgment is not in accord with the consent given.

[3] 3. The appeal from the order denying the motion to vacate and set aside the judgment against the sureties must be affirmed. The first ground assigned—that it was improperly and irregularly entered by the presiding judge—is without merit. The facts alleged in the affidavit and upon which this ground was urged are that the cause was originally tried in department No. 13; that when the remittitur came down the judge of that department was absent on his vacation, and the cause was by the presiding judge reassigned to department No. 3; that the motion to stay the entry of the judgment was heard by the judge regularly sitting in department No. 3, and denied by him; that thereafter the record in the case was presented to the presiding judge, who at that time was sitting in department No. 6. The presiding judge ordered that judgment be entered in favor of plaintiff and against the sureties, and an amended order to that effect was duly and regularly entered in the records of department No. 3, with a recital that the presiding judge was "sitting for dept. No. 3." It is argued that the judge regularly assigned to department No. 3 of the superior court was present throughout the whole of this particular day when this order was made, and that it was unnecessary for counsel for plaintiff to appeal to the presiding judge for the order. The rules of the superior court are cited to the effect that motions connected with a case, if made in open court, shall be made in the department to which the case has been assigned, and that if the motion is made at the chambers it must be made to the judge of that department, except in case of his absence or inability to act. The clear purpose of this rule is to save the various judges from imposition; it does not limit their jurisdiction. In the present case, however, there is no discretion left to the judge, the duty of entry of judgment being mandatory. Appellants were not entitled to a hearing on the motion, and it could have been made at any time after the expiration of the 30-day period without notice. The court had to decide upon the record and files of the case the single question of law whether or not plaintiff was entitled to judgment. Meredith v. Santa Clara Min. Ass'n, 60 Cal. 617, 621; Gray v. Cotton, 174 Cal. 256, 258, 162 Pac. 1019.

[4] Facts recited in the affidavit filed in support of an unauthorized motion to suspend proceedings were no part of the record. Appellants, therefore, have suffered no injury by the fact that the judgment was ordered entered by the presiding judge rather than the judge regularly sitting in department No. 3.

[5] The second ground upon which the motion to set aside the judgment was made, like the motion to stay the proceedings, raises a new issue, namely, the failure of the creditor to pursue her remedy against the estate of the deceased principal. This ground, which in fact is the basis of all four appeals, is that because respondent is unable to enforce her judgment against the estate of the appellant in the original case the sureties on the bond for that appeal are now relieved from all liability. Assuming that this question could be raised in the manner attempted by appellants in this case, it is sufficient to say that the great weight of authority is against the position urged by them. The bond which they signed was a definite and specific promise to pay at a fixed time after the filing of the remittitur affirming the judgment, upon the sole condition that the original debtor had not paid. No obligation was placed upon respondent to seek payment from the appellant prior to enforcing the obligation of the sureties. Section 2844, Civil Code, provides that the surety has all the rights of a guarantor. Section 2825 of the same Code provides that—

> "A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor."

Section 2840 of the same Code provides that—

> "A surety is exonerated: 1. In like manner with a guarantor; 2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his

rights, or which lessens his security; or, 3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do."

These sections must all be read together, and so reading them it must follow that the "intervention or omission" of the creditor referred to in section 2825 is such intervention of omission as is mentioned in section 2840—that is, a deliberate or unjustifiable act of the creditor which lessens the security or an omission of the creditor to do something which it is his duty to do when he is required to do so by the surety. The right to demand a creditor to proceed against his principal is very strictly defined by section 2845 of the same Code. It does not appear that any demand was made by the sureties in this case upon the creditor that she present her claim to the executors of the estate; but even if one were made, it is apparent that it would not come within the terms of section 2845, the failure to comply with which would result in exoneration of the sureties.

[6] The precise question was determined by the Supreme Court of North Dakota in Yerxa v. Ruthruff, 19 N. D. 13, 120 N. W. 758, 25 L. R. A. (N. S.) 139, Ann. Cas. 1912D, 809, where the court, in holding that the failure of the creditor to present a claim against the estate of the deceased principal did not exonerate the sureties, said:

> "It is no part of his contract that he will take active measures to collect the debt. The duty to act rests with the debtors. * * * Appellant could have paid the note and filed the amount she was obliged to pay as a claim against the estate of her codefendant, or she could, without paying it, have filed it as a contingent claim against the said estate, and thus have protected herself."

In the case at bar the sureties could have protected themselves in like manner. If they did not do so, it was no fault of the creditor. In any event, the great weight of authority is that the failure of a creditor to file his claim against the estate of the principal debtor does not release the surety. California cases supporting this general principal are: Sichel v. De Carrillo, 42 Cal. 493, 500; Bull v. Coe, 77 Cal. 54, 60, 18 Pac. 808, 11 Am. St. Rep. 235; Los Angeles v. Lankershim, 100 Cal. 525, 534, 35 Pac. 153, 556; Murdock v. Brooks, 38 Cal. 596, 604; London, etc., Bank v. Smith, 101 Cal. 415, 420, 35 Pac. 1027; Carver v. Steele, 116 Cal. 116, 119, 47 Pac. 1007, 58 Am. St. Rep. 156; Kinsel v. Ballou, 151 Cal. 754, 761, 91 Pac. 620; Whiting v. Clark, 17 Cal. 407, 411.

In Bull v. Coe, supra, 77 Cal. 60, 18 Pac. 810, 11 Am. St. Rep. 235, the court said:

> "It was well settled in this state, as elsewhere, that mere delay of the creditor to proceed against the principal would not discharge the surety"—citing cases. "And this is still the law. Preston v. Hood, 64 Cal. 408; Civ. Code, § 2823. In extension of this principle it was held that the surety was not discharged, even if the delay of the creditor was such that his remedy against the principal became barred by limitation. Whiting v. Clark, 17 Cal. 407. And it was but a short step from this to the position that the loss of the creditor's remedy against the estate of the principal, by nonaction as to presentation of the claim, did not discharge the surety. This was the decision in Sichel v. Carrillo. And the point has been ruled the same way in other states."

In Carver v. Steele, supra, the court expressed the general rule as follows (116 Cal. 119, 47 Pac. 1008, 58 Am. St. Rep. 156):

> "In general, unless some agreement or special circumstance imposes diligence upon the creditor as a duty, he does not, by mere failure to pursue the person primarily liable, discharge the guarantor, surety or indorser, even though his passivity in this regard may result in barring his remedy against the original debtor."

In the case at bar there was no agreement or special circumstance imposing upon the creditor the duty to present her claim against the estate. So far as appears from the record the estate may have been insolvent and the presentation of such a claim would have been an idle and useless formality. Again, if she had done so, it is not at all unlikely that she would have been met with the argument that she had waived the right of payment of the claim within 30 days from the filing of the remittitur, and had consented to await payment of her claim in due course of administration. She was at all times entitled to rest upon the stipulations in the bond that the sureties would pay within 30 days from the filing of the remittitur if the judgment had not been paid by the principal debtor. It would not have been her duty to seek payment from the original debtor if she had been alive when the remittitur came down, and no process of reasoning can sustain the proposition that such a duty was imposed upon her by the death of the original debtor.

4. The appeal from the order denying appellants' motion to recall the execution is based upon the same grounds urged on the motion to set aside the judgment, and for the reasons heretofore given said order must be affirmed.

In affirming the orders involved in the three appeals heretofore discussed, it is proper to say that such action should not be taken as in any way indicating that any of said motions conform with our method of procedure. This statement seems necessary, because counsel have cited opinions of the appellate courts affirming similar orders, and have inferred therefrom that such opinions justified the procedure taken. The rules of procedure are to be determined from the

Code of Civil Procedure, and not from inferences drawn from opinions of the appellate courts. When a party has recovered a judgment he should not be denied the fruits of that judgment by frivolous and vexatious motions not authorized by the prescribed forms of procedure. In Benning v. Superior Court, 34 Cal. App. 296, 299, 167 Pac. 291, 293, it was said:

> "A judgment can be nullified by the court which rendered it only, first, on motion for a new trial; second, by a motion under the provisions of section 473 of the Code of Civil Procedure, where the judgment is inadvertently made, and where application is made to set it aside within six months; third, by motion therefor at any time where the judgment is void on its face; fourth, by an independent suit in equity where the judgment is regular on its face, but extrinsically void for want of jurisdiction, or by reason of fraud or mistake."

[7] A petition for hearing in the Supreme Court in that case was denied, and the statement quoted can be taken as fairly declaring the law of this state upon that subject. Possibly, to be more exact, reference should be made to the provisions of section 663, Code of Civil Procedure, which covers the special case of a correction of the conclusions of law which are not supported by the findings of fact and a judgment which is inconsistent with a special verdict. But, except in the cases just noted, the Code does not provide for a motion to stay the entry of a judgment valid upon its face and based upon the consent of the parties, or to set aside such a judgment, or to recall execution issued thereon where such motions are based upon extraneous facts which, if true, would make the entry and enforcement of such judgment inequitable. For relief in such a case the parties must resort to an independent suit in equity.

The appeal from the judgment is dismissed. The orders involved in the other appeals are affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

184 Cal. 721

STEPHENS et al. v. STATE TREASURER et al. (S. F. 9677.)

(Supreme Court of California. Jan. 24, 1921.)

1. States 🔑153—Board of Control and Treasurer must meet and determine that there is available money before purchasing bonds.

Where bonds were authorized by Const. art. 16, § 2, to which was added section 3, requiring unsold bonds to be canceled and others issued as therein stated, the Treasurer cannot successfully resist a mandamus proceeding to compel such cancellation on the ground that such bonds were sold to the Board of Control under St. 1913, p. 563, without showing that the Board and Treasurer met and determined, as required by section 2 as a condition precedent, that there is available surplus money with which the Board could purchase such bonds.

2. States 🔑153—Agreement to sell highway bonds to Board of Control when surplus money would be available not valid.

In view of St. 1915, p. 652, § 4, requiring a sale of highway bonds to the Board of Control must be made for cash to be paid immediately into the state treasury, an executory agreement to sell at a future time when surplus money should be available is not a valid sale such as would prevent the Treasurer's destroying the bonds and issuing others as required by Const. art. 16, § 3.

3. States 🔑153—State officers selling and purchasing bonds have no power except as expressly given by statute.

State's officers in exercising the power of sale and purchase of bonds conferred by Const. art. 16, §§ 2, 3, Stat. 1913, p. 563, §§ 2, 3, and Stat. 1915, p. 652, § 4, are agents exercising a special power over the state's property, and have no power in relation thereto except as expressly given by the statute.

4. Constitutional law 🔑121(1)—States 🔑153—Treasurer's agreement to sell bonds held not a "sale" within constitutional requirement of destruction of unsold bonds.

The Board of Control's bid for bonds, if accepted by the Treasurer, where there are no funds immediately available for transfer in payment and no transfer is then or subsequently made, is not a compliance with St. 1913, p. 563, and is not a "sale" of bonds within the meaning of Const. art. 16, § 3, requiring destruction of unsold bonds, and so setting aside such agreement impairs no obligation of any valid outstanding contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

In Bank.

Petition by William D. Stephens and the State Highway Finance Board for writ of mandate against the State Treasurer and others. Writ granted.

U. S. Webb, of San Francisco, for petitioners.

George D. Squires, of Redwood City, for respondents.

WILBUR, J. [1] Petitioners pray for writ of mandate directed to the State Treasurer requiring him to cancel certain bonds of the state of California prepared by him pursuant to the provisions of section 2 of article 16 of the Constitution of the state of California, which authorized the issuance and sale of 40,000 bonds of $1,000 each. Petitioners' prayer is based upon the amendment to the Constitution adopted by the people of the state at the election November 2, 1920, wherein a new section, No. 3, was added to article 16 of the Constitution which provided, among other things, as follows:

> "Sec. 3. * * * All of said forty thousand bonds which shall remain unsold at the time of the adoption of this section shall be canceled and destroyed by the State Treasurer, and in lieu thereof bonds in the same amount shall be prepared and sold as hereinafter stated."

The respondent Treasurer contends that the bonds in question have been sold and for that reason declines to cancel the same. Respondent's contention is based upon the fact that at the time when 12,000 of these bonds were offered for sale to the highest bidder for cash, in accordance with law, on February 26, 1920, the State Board of Control, acting under and by virtue of the authority vested in them by the Legislature of the state (Stats. 1913, p. 563), bid for said 12,000 bonds par, and that subsequent to that bid from time to time bonds have been issued and delivered to the State Board of Control in pursuance of said bid. The question here relates solely to the portion of such 12,000 bonds as remain undelivered in the custody of the Treasurer and for which no payment has been made. The question, then, resolves itself into this proposition: Did the making of the bid by the State Board of Control for the 12,000 bonds and the acceptance of said bid by the State Treasurer constitute a sale thereof within the meaning of the constitutional amendment?

By the statute of 1913 (Stats. 1913, p. 563), the State Board of Control were authorized to use any surplus monies in the state treasury for the purchase of bonds of this state. The statute provides (section 2) the method of determining what funds shall constitute surplus funds within the meaning of the act and that—

> "Thereupon the state board of control shall proceed to invest the same in the purchase of bonds of any of the classes described in section one of this act."

It is further provided in section 3 as follows:

> "Any bonds purchased or held under the provisions of this act may be sold or exchanged for other bonds of any of the classes described in section one of this act, and the money received from any such sale may be reinvested by the state board of control in the purchase of any such bonds; provided, that no such sale or exchange shall be made at a price which will result in a net loss to the state."

[2] The State Board of Control cannot buy bonds for the state at all until after it and the State Treasurer have met and determined that there is "surplus money" which is available in payment of bonds so purchased (section 2, supra). This is a condition precedent to the power of the State Board of Control to make either a purchase or a contract of purchase of any bonds with public money. In the record before us there is no statement or intimation that any such meeting had been held or determination made or that there was any "surplus money" on hand at the time of the supposed purchase by the State Board of Control from the State Treasurer or any money available, either then or afterwards, to pay for these bonds claimed to have been purchased and now remaining undelivered. Furthermore, under section 4 of the act of 1915 authorizing the sale of the highway bonds (Stats. 1915, p. 652), such sale must be made for cash and immediately thereafter the Treasurer must pay the same into the state treasury. These provisions show clearly that it was not contemplated that there should be an executory agreement for the sale of the bonds on the condition that payment should be made at some time in the future when "surplus money" should be available, or at such time as might be convenient for the purchaser. The so-called sale and acceptance by the Treasurer were made in February, 1920. Up to the time of the passing of the constitutional amendment on November 2, 1920, there had been no payment of cash and no delivery of these bonds in controversy in pursuance of said supposed sale. From the facts stated in the record and advanced at the hearing, no other conclusion can be drawn than that the alleged sale was made on credit and that payment was to be made at a time in the future when "surplus money" should be duly declared to be available for their purchase.

[3] The officers of the state, in exercising the power of sale and purchase conferred by these statutes, are agents exercising a special power over property of the state. Such agents have no power except that which is expressly given by the statute, or is necessarily implied from the express provisions. The provisions of the statutes do not either expressly or by implication allow a sale to be made upon such terms as those which are here shown, or at a time when there is no "surplus money" with which to pay for the same, and by requiring the sale to be for cash, in effect prohibit a sale to either the State Board of Control or to private bidders on credit.

It necessarily follows that the contract of sale attempted to be made in this manner is utterly void as to the bonds still unpaid for and undelivered for the want of power upon the part of either party to make such contract.

[4] A bid for bonds by the State Board of Control, even if accepted by the State Treasurer, where there are no funds immediately available for transfer in payment therefor, and where no such transfer is then or subsequently made of such funds, is not a sale of such bonds within the meaning of the constitutional amendment of 1920, which requires the destruction of unsold bonds. Christensen v. Cram, 156 Cal. 635, 105 Pac. 950. The purpose of the constitutional amendment was to permit an increase of interest in accordance with the market rate so that bonds would be salable at par. In the argument for the adoption of the constitutional amendment mailed to each voter it was said:

> "State highway bonds are now unsalable as the law will not permit their being sold at less than par. No state bond bearing but four and

one-half per cent. interest can hope to compete with the United States bonds now purchasable to yield seven per cent. nor with the many excellent industrial bonds which are selling to yield eight per cent. or more. * * * Like other commodities, money must be paid for when needed at the going market rate. Its value cannot be fixed by state legislation and the proposed plan appears to be well within the scope of sound business."

In the argument against the proposed constitutional amendment mailed to all the voters of the state it was said:

> "This measure should be emphatically rejected and defeated.
>
> "The foremost intent of the proposed amendment is to authorize an increase in the rate of interest rate on about $37,000,000 worth of unsold bonds of the third highway issue, from 4½ per cent. to a maximum of 6 per cent."

The $37,000,000 includes all of the 12,000 bonds not heretofore transferred and delivered to the State Board of Control. The argument in favor of the constitutional amendment would also point to the conclusion that the bonds yet undelivered by the State Treasurer to the State Board of Control should not be so delivered for the reason that if delivered they could not be sold as the law requires, namely, at a sum which will not net a loss to the state. Stats. 1913, p. 563. It is clear that the constitutional amendment contemplated the destruction of the bonds in question as "unsold" bonds and that when so construed the amendment does not impair the obligation of any valid outstanding contract of sale.

Let the writ issue.

We concur: SHAW, J.; SLOANE, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.

I concur in the judgment on the last ground stated in the opinion: ANGELLOTTI, C. J.

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184 Cal. 748

TALCOTT LAND CO. v. HERSHISER et al.
(S. F. 8951, 8998.)

(Supreme Court of California. Jan. 27, 1921. Rehearing Denied Feb. 26, 1921.)

1. Corporations 🔑312(1) — Distribution of assets to stockholders held made with "consent of stockholders."

Where all the stockholders sold their stock to purchaser of corporation's assets who paid for stock out of such assets, the stockholders consented to such distribution of the assets, within Civ. Code, § 309, as amended by St. 1917, p. 658, § 2, providing (subdivision 2) that directors should not be liable for distribution of capital to stockholders where corporation has no debts and where distribution is with stockholders' consent, though amount received was fixed by negotiation, and was not a pro rata proportion of the capital stock.

2. Corporations 🔑312(1) — Affairs must be wound up to exempt directors from liability for distribution of assets to stockholders.

Civ. Code, § 309, as amended by St. 1917, p. 658, § 2, exempting directors from liability for distribution of capital to stockholders where corporation has no debts or liabilities, is applicable only where the affairs of the corporation have been wound up by the consent of all parties.

3. Corporations 🔑312(1)—Obligation to convey land held a "liability" within statute exempting directors from liability for distributing assets.

The obligation to convey land under a contract is a "liability" of a corporation within Civ. Code, § 309, as amended by St. 1917, p. 658, § 2, exempting directors from liability for distribution of assets to stockholders where all debts and liabilities have been paid, though person other than party to such contract to whom land is conveyed assumes obligation of the contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liability.]

4. Appeal and error 🔑877(5)—Appellant cannot complain of verdict in favor of his codefendants.

Where judgment was rendered against one of a number of defendants whose liability was joint and several, such defendant on appeal cannot complain of the verdict in favor of his codefendant.

5. Corporations 🔑312(1)—Director liable for distribution of assets, though codirectors did not share in unlawful intent.

A director is liable under Civ. Code, § 309, for distribution of assets to stockholders regardless of whether his codirectors shared in his unlawful intent.

6. Corporations 🔑312(1) — Assets held distributed to stockholders.

Where stockholders sold their stock to purchaser of the assets of the corporation, who paid for the stock with such assets, and in so doing distributed total amount thereof to the stockholders in return for their stock, there was a transfer of the corporate assets to the stockholders in violation of Civ. Code, § 309, making directors liable in such case.

7. Corporations 🔑312(1) — Statute authorizing distribution of land inapplicable to distribution of proceeds.

Civ. Code, § 309, permitting, prior to amendment of 1917, a real estate corporation to distribute land to stockholders in proportion to their holdings of stock, did not authorize such a corporation, after conversion of its land into money, to distribute such money to its stockholders, since in such case the corporation's creditors had no lien to protect them.

8. Corporations 🔑312(1)—Directors' liability for distribution of assets not dependent on injury.

Directors are liable for distribution of assets to stockholders under Civ. Code, § 309, regardless of whether any one has been injured by the transaction.

9. Corporations ⚷615½, New, vol. 14 Key-No. Series—Revival after dissolution for nonpayment of tax reinstated corporation with duties and powers.

Revival of corporation by payment of tax following its dissolution for nonpayment thereof reinstated corporation with all its powers, rights, duties, and obligations.

10. Attachment ⚷4—No attachment in corporation's action against directors for statutory liability; "action on contract, express or implied."

Corporation's action against directors to enforce liability prescribed by Civ. Code, § 309, as amended by St. 1917, p. 658, § 2, for distribution of assets to stockholders, *held* not an action on a contract, express or implied for direct payment of money within Code Civ. Proc. § 537, authorizing attachments in such cases only; the director's obligation being statutory, and not contractual.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action on Contract.]

In Bank.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by the Talcott Land Company against W. A. Hershiser and others. From judgment for plaintiff against the named defendant, and from the order taxing costs, named defendant appeals. Judgment reversed, and order taxing costs reversed.

Chapman & Trefethen and M. C. Chapman, all of Oakland, Frank J. Solinsky, of San Francisco, and Peck, Bunker & Cole and James F. Peck, all of Oakland (Charles W. Byrnes, of San Francisco, of counsel), for appellant.

Street & Street, of San Francisco, C. M. Delameter, of Sonora, and Henshaw, Black & Goldberg and Thomas R. White, all of San Francisco, for respondent.

WILBUR, J. This is an action by the plaintiff corporation to recover from the defendants, its former directors, the amount of its entire capital alleged to have been illegally divided among the stockholders. Plaintiff claimed judgment for the full amount claimed, $122,750, against defendant W. A. Hershiser only, who appeals from the judgment and also from the order taxing costs. Both appeals will be considered together, as the latter appeal involves the costs for levying an attachment, and the ground of objection thereto is that the action is not one on a contract express or implied.

The section of the Civil Code (section 309) which prohibits the directors of a corporation from declaring dividends except from surplus profits arising out of the business, and from dividing, withdrawing, or paying to the stockholders or any of them any part of the capital stock, authorizes a recovery of the full amount of the capital stock so divided, withdrawn, paid out, or reduced from the directors under whose administration such distribution has occurred. The plaintiff claims that the division, although not made directly, was effected by means of a subterfuge, by which there was substituted for the assets of the corporation a worthless promissory note of one W. M. Martin for $237,623.55, given ostensibly as the purchase price of the corporate assets. The plaintiff corporation was organized in 1908. The appellant, W. A. Hershiser, was one of the original incorporators. His father-in-law, Henry F. Greer, was also one of the original incorporators, having 65,000 shares of the capital stock. On January 6, 1916, there were outstanding 122,750 shares of the capital stock of the plaintiff corporation of the par value of $1 per share. The appellant had purchased the shares of Henry F. Greer for $100,000, executing in payment therefor his promissory note for the payment of which the shares were pledged. In December, 1912, H. F. Greer died, bequeathing the note in question to his daughter, the wife of the defendant, and to her brother, F. A. Greer, both thereupon becoming directors of the plaintiff corporation. The other directors were M. T. Minnie, the appellant, W. A. Hershiser, Mr. Lowell, and F. A. Greer. In September and October, 1915, M. T. Minnie obtained an option to purchase all stock from all of the stockholders of the plaintiff corporation with a view of selling the stock to Mr. O'Bear. In connection with these options, in order to induce the purchaser to take the stock, it was agreed by some of the stockholders that they would purchase some of the lots belonging to the plaintiff corporation, which was engaged in the business of selling and subdividing land for the purposes of sale. The negotiations which were conducted by O'Bear resulted in P. B. Cross becoming a probable purchaser, but Cross decided that he would prefer to purchase the assets of the corporation rather than its stock. Thereupon the following plan was devised: The corporation plaintiff entered into a contract with Cross for the sale to him of the most of the assets of the corporation for $162,230.66 in cash and certain mortgages aggregating over $31,000. This contract, together with all the remaining assets of the corporation, except certain lots, was transferred to W. M. Martin, a brother-in-law of M. T. Minnie, who in payment therefor executed his promissory note as above stated. The remaining lots were transferred to M. T. Minnie as commission for making the sale to Cross. On the same date Martin secured options to purchase their stock from all the stockholders in the corporation at various amounts fixed in the respective options, paying therefor with the assets of the corporation turned over to him in pursuance of the agreement of sale to him in consideration of his promissory note. Martin paid each stockholder the amount called for by his respective option and took an assignment of the stock. By this method the entire assets of the corporation were distributed to the stockholders and in exchange therefor the several stockholders assigned their stock to Martin, who thus became the sole stockholder of the plaintiff, whose sole asset was his own promissory note. The transaction having been completed on February 25, 1916, Martin instructed the Central National Bank to deliver all the shares of capital stock of the plaintiff corporation to M. T. Minnie, and, in pursuance of his instructions 122,000 shares of the capital stock were so delivered. No consideration passed from Minnie to Martin, but the transfer of the stock was not made until Minnie had agreed with the defendant, W. A. Hershiser, to pay certain costs and attorney's fees, amounting to less than $5,000. The state corporation license tax was not paid, and so, on the first Monday in March, 1916, the charter of the plaintiff corporation was forfeited. Immediately thereafter, however, on March 14, 1916, the directors, W. A. Hershiser, Julia M. Hershiser, F. A. Greer, and M. T. Minnie, took the necessary steps to reinstate the corporate charter. Thereafter M. T. Minnie caused certain other corporations in which he was a large stockholder to convey to the plaintiff corporation for the nominal sum of $10 two new subdivisions of land known as the Hollywood tract and the Beverly tract. Both these tracts were subject to large mortgages, amounting to about $300,000, and the plaintiff corporation assumed and agreed to pay these mortgages. M. T. Minnie placed the 122,000 shares of stock upon the market and sold the stock to various purchasers. The new venture proved to be a failure, the corporation lost all its property, and the new stockholders transferred the stock to the present holders, on whose behalf the directors have begun this proceeding. It should be stated in passing that it appears from the evidence, and seems to have been the view of the court, that in the sale of the stock by Minnie he informed all the proposed purchasers fully in regard to the distribution of the assets of the corporation and solicited their purchase solely upon the faith of the new venture.

Appellant contends that the distribution prohibited by section 309, Civil Code, must be by corporate act of the board of directors, and that, as the jury in this case found that two of the directors did not participate in the unlawful intent, there was no corporate act looking to the distribution of the assets to the stockholders, and further contends that there was no distribution of the capital to the stockholders, for the reason that the very scheme of distribution by which the title to the assets of the corporation was vested in the stockholders called upon the stockholder to surrender his stock in payment therefor. In other words, he ceased to be a stockholder either before or at the time of the distribution to him. In furtherance of this view it is urged by appellant that the proceedings are penal in their nature, and that a strict construction should obtain with relation to the application of the law to the facts, and in the interpretation of the law itself. On the other hand, the respondent contends that the law will look to the substance of the transaction, and that the net result of the transaction in question was that the entire assets of the corporation were vested in the stockholders, and that the directors and Martin and Minnie, in securing the assignment of the stockholders' stock, must be deemed to be their trustees, and that the title really did not pass, but remained in the original stockholders. Of course, if this view were strictly applied, it would follow that the present stockholders have no interest in the stock unless Minnie may also be held to have been their agent in the subsequent sale of the stock. During the pendency of this action the attorneys for the defendant appealed to the Legislature for relief and succeeded in securing the passage of an amendment to section 309 of the Civil Code, whereby the stockholders of a corporation who had theretofore incurred the liability under the provisions of section 309 would be exonerated in the case mentioned in the proposed amendment. Section 2 of the amendment (St. 1917, p. 658) provided:

> "* * * The liability of a director of a corporation heretofore incurred shall not exist in any case where, all of the debts and liabilities of the corporation to creditors having been paid, the capital stock divided, withdrawn, or paid out constituted all of the capital stock of the corporation and the same was paid out, withdrawn, or divided with the consent of all of the stockholders to or among themselves."

[1] The respondent questions the constitutional authority of the Legislature to enact such a statute, and also claims that the statute is not applicable by its terms to the situation here for the reason that all the debts and liabilities of the corporation were not paid. It is also claimed that the stockholders did not consent to the distribution in the sense contemplated by the statute for the reason that each consented separately to take money for his stock, and the amount he received was fixed by negotiation, and was not a pro rata proportion of the capital stock of the corporation. Indeed, the contention of the respondent is that this whole scheme was devised in order that the defendant W. A. Hershiser might receive a larger proportion of the capital for his stock than was received by the other stockholders. In that

regard it should be stated that the option agreements themselves between Martin and the various stockholders recited the purchase by P. B. Cross of the property of the corporation, the transfer of this contract to W. M. Martin, together with all the other assets of the corporation, and recite that Martin is desirous of purchasing the shares of capital stock and making payment for the same from the fund and in the manner and at the time thereinafter provided, namely, when P. B. Cross shall have made full payment and out of said funds. Whatever may be the rights of the stockholders as against the directors, or as against Martin because of the unequal division, it is clear that they consented to the distribution of the assets in the form in which they were distributed, and consequently it must be held that the distribution was with the consent of the stockholders.

[2, 3] The next question is: Have all the debts and liabilities of the corporation been paid within the meaning of the statute? In this regard it appears that there are now no debts or outstanding obligations of any kind other than the contracts of sale wherein the plaintiff corporation agreed to make title upon payment for some of the lots sold. These contracts were transferred to P. B. Cross together with the land therein agreed to be sold. The purchasers of such lots would be entitled to maintain an action for specific performance against P. B. Cross, the purchaser of the land and assignee of the contract, but it is claimed that there is a liability on behalf of the corporation to pay any damages suffered by reason of the failure of Cross to comply with these contracts if he should fail to do so. Appellant's reply to this contention is that such obligations were not liabilities within the meaning of the statute. Without considering the respective arguments of counsel upon this proposition, it is clear that the purpose of the Legislature was to excuse directors only in the event that the affairs of the corporation had been wound up by the consent of all parties; in other words, only where the parties by agreement had arrived at a conclusion which they could have as well reached by a formal application to the court for dissolution after the payment of the debts and obligations of the corporation. We think that the outstanding obligations of the corporation to convey these lands, although assumed by another party, constituted a liability to creditors within the meaning of this law and prevented the application of the saving clause therein to the particular facts of this case. Balfour v. Garrette, 14 Cal. App. 261, 111 Pac. 615; Bouvier, Law Dict. 3 Rev. 726. It is unnecessary, therefore, to pass upon the constitutionality of the amendment to section 309, Civil Code, as the facts do not bring this case within its terms. It may be observed in passing, however, that the contention of the respondent that the law, in so far as it relates to previous transactions, is unconstitutional, is based upon the theory that the obligations of the directors is one on an implied contract, and that a law attempting to modify or destroy this obligation would violate the provisions of the federal Constitution against statutes impairing the obligations of contracts. That same contention is also involved in the construction of the law previous to the amendment, as to whether or not it should be strictly construed, and also with reference to the propriety of the order of the court granting the plaintiff his costs for levying the attachments. The matter will be considered in connection with those contentions.

Was section 309, Civil Code, violated by the directors?

[4, 5] As to the first point advanced by the appellant, that the directors could not offend against the statute with reference to distribution of the corporate assets unless they all joined in the common intent so to do, and that the corporate act of the directors arranging for such distribution was had in pursuance of that common intent: The penalty is imposed upon the directors during whose administration the wrong occurred, and the method by which they can exculpate themselves is by an affirmative entry upon the minutes of the corporation of their dissent from the act. The argument of the appellant is largely based upon the verdict of the jury whereby they exonerated two of the directors in pursuance of an instruction to the general effect that, if these directors acted in good faith, believing that the sale to Martin was what it purported on its face to be, they should be relieved from the statutory liability. The appellant, however, cannot take advantage of an error in favor of his codefendants. The liability is joint and several, and, if the defendant is liable, he cannot complain of the verdict in favor of his codefendants, who are equally liable. Assuming for the purpose of deciding this point, that there was a distribution of the capital of the corporation in violation of the law, we have no doubt that the appellant, who brought about the distribution and was a director at the time, was liable under the provisions of section 309, Civil Code, whether or not his codirectors shared in his unlawful intent.

[6] In considering the second proposition of the appellant that the transfer was not made to the stockholders, we will also consider the theory of the respondent. Respondent claims that the court should look at the substance of the transaction and thus determine its effect. Viewed in this light, the net result of the transaction was that the stockholders had distributed to them the entire assets of the corporation, and it is claimed that this is as far as the court needs

to go in analyzing the whole situation. Martin is characterized as "a dummy, a mere pipe or channel through which the corporate assets passed to the stockholders." All of the difficulties in this case arise from the fact that the stockholders, as a part of the plan of getting the assets of the corporation, gave up their stock, and that Martin, who had received the legal title thereof, subsequently transferred the same to others who transferred it to the present stockholders who have caused this proceeding to be instituted. It must be recognized that this resale of the stock of the corporation at once brings the case within the very mischief sought to be remedied by the law penalizing the directors. If we, for a moment, disregard the fact that in this particular case the stock was sold after a full disclosure of the previous transactions and wholly upon the value of new assets subsequently acquired, and for a moment assume that the new stockholders were wholly unadvised of the previous transactions, we would have the condition where one of the directors (M. T. Minnie) had secured the entire capital stock of the corporation by the method of selling the stockholders the assets in payment for their stock, and then, by reason of his possession of the stock certificates, proceeds to sell the same to the public at par. In such a case it is evident that no greater fraud would be possible than a fraud by which stock is sold by a director to new stockholders who purchase it on the faith that the corporation is a going concern with large assets and, in fact, only secure a pro rata interest in a note given by an insolvent. If, then, we regard the various transactions from the sale by the corporation to Cross to and including the transfer of the stock from Minnie to a new group of stockholders as one entire transaction, it cannot be doubted that such transaction comes within the purview of the law penalizing the directors for distributing the assets of a corporation to its stockholders. If, however, we pause at any point between these two limits to determine the rights of the parties at such intermediate point, we are met with various difficulties. For illustration, if we assume that the invalidity of the transaction results from the fact that the note of Martin was worthless and that he was insolvent, we would have the situation by which Martin as the sole stockholder could compel the directors to refund the entire capital stock on the theory that his note was worthless and thereby make note in fact worth par. He could thereupon dissolve the corporation, thus receiving back his unpaid note and at the same time the entire capital of the corporation for which he paid nothing. If we regard Minnie as the real mover in the transaction and Martin as his dummy, we would have a situation where Minnie, one of the alleged coconspirators and the owner of the entire capital stock of the corporation, can cause a suit such as this to be brought by the corporation against the directors, who are therein required to refund the entire capital stock to the corporation, and thus Minnie, who engineered the scheme, becomes entitled as the sole stockholder in the corporation to the benefit of a penalty imposed upon his fellow directors and coconspirators. If we regard the capital stock as belonging to Hershiser, the appellant, and consider Martin as his dummy or agent, then we have a case where, as the jury finds (as sole stockholder of the corporation), he is entitled to collect $122,750 of himself, and to the proceeds, less the attorney's fees necessary to obtain this judgment. If we regard the transfer from the stockholders to Martin as void and the original stockholders as still the owners of the stock, as the respondents claim the fact to be, we find that the corporation now in the control of those who have no title to its stock or its assets is seeking to enforce an obligation in its favor resulting from the contention that they never have gained title to the stock, but that it belongs to the former stockholders. On the other hand, if we look at the transaction as a whole, beginning with the time when Cross agreed to purchase the assets of the corporation and ending at the point where Minnie sold all the stock of the corporation, ignoring for the moment the transfer of assets from Minnie to the corporation, we see that the corporation has been denuded of all its real assets, its stock has been rendered worthless, and yet has been sold to the public for par. By these transactions the assets of the corporation have been distributed to the stockholders who were in control of the corporation through the defendant directors at the time the plan was formulated. If we consider the contention of the appellant that the distribution was not "to the stockholders" within the meaning of the statute, and for a moment leave out of consideration the subsequent assignment to the corporation through the agency of Minnie of other assets upon the supposed value of which the new stockholders purchased, we have a situation which was evidently intended to be remedied by section 309, Civil Code, before the amendment of 1917, namely, a situation where corporate stock has become valueless by the distribution of its entire assets and whose stock thereafter has been sold upon the market. The wrong sought to be remedied by the statute does not result from the distribution of the capital "to the stockholders as such," but in the depletion of the capital of the corporation; hence it seems clear that the distribution to those stockholders, who alone are represented by the directors, and who at the time of the distribution have the power, by appropriate court or corporate action, to prevent the distribution, and who, instead of preventing such action, receive their proportion of the assets, is clearly within the meaning of the law a distribution to the stockholders themselves, even if in the process of such distribution they transfer their stock to some agent of the corporation in the belief that they are selling the stock. We conclude that the jury were justified in finding that the transfer of the corporate assets came within the prohibition of the law.

[7] There remains another point advanced by appellant based upon the right to distribute the capital stock in certain cases. Before the amendment of 1917 to section 309 of the Civil Code was permissible under the terms of the section for corporations organized "for the purpose, among other things, of acquiring, holding, and selling real estate, water, and water rights, * * * with the consent of stockholders representing two-thirds of the capital stock thereof, given at a meeting called for that purpose," to "divide among the stockholders the land, water, or water rights so by such corporation held, in the proportions to which their holdings of such stock at the time of such division entitle them." Appellant claims that the plaintiff is a corporation organized for the purposes indicated, and that, as the division of the assets was with the consent of all the stockholders, this was at least equivalent to a called meeting at which two-thirds of the stock should consent to the distribution; that under this statute, the assets so distributed were necessarily subject to the debts and liabilities of the corporation, as no provision is made either requiring their payment or providing therefor in the event of such distribution; that, in any event, the distribution having conformed to this requirement of the Code, with the single exception that there was no called meeting of the stockholders, the consent of all the stockholders being sufficient under the amended law to authorize the distribution, the effect of this amendment was to waive the requirement for a meeting of the stockholders, and thus remit the liability of the directors where the corporation is of the type indicated in the statute for the subdivision of land, etc., although the debts and liabilities were not fully paid. The difficulty with the appellant's contention is that the facts do not bring the transaction within the exception in the law before or after the amendment, as the above provision concerning land and water corporations is omitted from the amendment. Before the amendment, section 309 of the Civil Code permitted the directors to divide among the stockholders "the land, water, or water rights so by such corporation held, in the proportions to which their holdings of such stock at the time of such division entitle them. All conveyances made by the corporation in pursuance of this section must be made and received subject to the debts of such corporation existing at the date of the conveyance thereof." Even if it be conceded that the consent of all the stockholders given to the division of the property of the corporation is equivalent to the consent of two-thirds of the stockholders at a called meeting, a point which we need not decide, it is clear that there is a marked distinction between the distribution of land and water rights among the stockholders of a corporation, subject to the debts thereof and the distribution of personal property. In the case of real property which remains subject to the debts of the creditors, they are thus fully protected by what is in effect a lien upon the real property in their possession, while in case of the personal property the stockholders could quickly dissipate the funds received and the creditors would be without adequate remedy. The reasonable conclusion from these provisions is that it is only where the corporation has land, or water, or water rights, which are mentioned in the section, that the stockholders may avail themselves of this exception. At the time of the transaction here in question the Talcott Land Company had sold all its land, with a few exceptions, and had received therefor the obligations of the vendee, and it was for the purpose of distributing the money and the obligation of the vendee that the transaction was consummated. The question involved here is not whether the Talcott Land Company could have distributed its land to its stockholders and thus come within the proviso mentioned, but whether, having converted its land into personal property, it could distribute this personal property to the stockholders. It is clear that such a division by such a corporation comes within neither the letter nor the spirit of the proviso. For this reason the transaction of the division of the property of the corporation is not covered by the exception in section 309, Civil Code, as it existed prior to the amendment of 1917, and the directors were liable for the penalty fixed in the law at the time of that amendment, and that liability was continued by the terms of the amendment, which remitted the liability only in the cases mentioned in the amendment where the debts and liabilities to creditors were paid. This view of the law makes it unnecessary to consider the contention of the respondent that the corporations referred to, in the exception in the law previous to the amendment, were only such corporations as dealt in both land and water.

[8] Does the fact that no one has been injured by the transaction exculpate the directors? It has been held that stockholders, even though they have benefited by the distribution of dividends, may force the directors to reimburse the corporation. Appleton v. American Malting Co., 65 N. J. Eq. 375, 54 Atl. 454; Loan Society of Philadelphia v. Eavenson, 248 Pa. 407, 94 Atl. 121; Kom v. Cody Detective Agency, 76 Wash. 540, 136

Pac. 1155, 50 L. R. A. (N. S.) 1073; Stoltz v. Scott, 23 Idaho, 104, 129 Pac. 340. The reasons which justify the recovery from the directors, whether or not any injury is suffered by the individual stockholders or creditors, would require a similar recovery by the corporation, notwithstanding some or all of the new stockholders were aware of the unlawful distribution. The rule must be either that the corporation itself has the right to compel the directors to restore its capital, regardless of whether or not any particular stockholder or creditor has been injured by the distribution, or, on the other hand, that the right to require the directors to replace the capital depends entirely upon whether or not stockholders or creditors have been injured. The cases all seem to hold that the right is in the corporation itself, without regard to the actual injury to stockholders. The statute expressly gives the right of action to the corporation without reference to the wrongs of stockholders or creditors; the latter having a separate right of action. Indeed, if the remedy is punitive, as we have heretofore held (Irvine v. McKeon, 23 Cal. 472; More v. Lent, 81 Cal. 506, 22 Pac. 875; Moss v. Smith, 171 Cal. 777, 785, 155 Pac. 90), and as was conceded in Freeman v. Glenn Co. Tel. Co., recently decided in 194 Pac. 705, it must be held that the right exists in the corporation, regardless of the rights and knowledge of the constantly changing stockholders thereof; otherwise it would be difficult to enforce the penalty, as the participating stockholders or their transferees with notice could not complain of the wrong. The right to compel the restoration of the capital is expressly excepted from the operation of the statute of limitations (Civ. Code, § 309), for the purpose, no doubt, of enabling future stockholders, after the lapse of years, to enforce the liability through the corporation, after it had passed from the control of the wrongdoers. To exculpate him, while in this particular case it would seem more just to relieve the defendant from the penalty, would open the door wide for fraud in other cases and would destroy the beneficial effects of the statute.

[9] The District Court of Appeal, First District, Second Division, in its decision of this case reached an opposite conclusion by several processes of reasoning not advanced by the parties. Their view was that upon the reviving of the corporation after its dissolution by operation of law, and the acquisition by that corporation of new assets and the transfer of the stock to new stockholders who were fully advised of the situation and purchased stock wholly in the faith of the new assets, the plaintiff corporation should be regarded as in substance and effect a different corporation, and therefore not entitled to enforce the statutory obligation of the old directors to replace its capital. Because we felt this view untenable, we transferred the case to this court for decision. Our view is that, the dissolution of the corporation having resulted as a penalty for nonpayment of the license tax, the revival of the corporation by the payment of the tax as authorized by law was intended to fully reinstate the corporation with all its powers, rights, duties, and obligations. The District Court of Appeal also adopted the view that the transfer by Minnie to the revived corporation of the two tracts of land, estimated to be worth more than the capital of the corporation, operated as a payment by Minnie, one of the wrongdoers, to the corporation, of an amount equivalent to the distributed capital, and that, as Minnie was jointly and severally liable as one of the directors for the unlawful distribution of the assets, his transfer of such land was to be regarded as a payment by him on behalf of the directors and thus to fully satisfy the obligation. This contention was not presented by the parties and was not pleaded by the defendant, who relied wholly upon the legality of the original transaction. The question of the value of the assets transferred was not litigated, and the only evidence thereof was the statement shown by Minnie to prospective purchasers of stock in which the assets so transferred were estimated to have a value of about twice the capital stock above the amount of the incumbrances thereon. Subsequently these assets were lost because of the incumbrances thereon. We need, therefore, not consider the effect of a bona fide payment, as no such question is here involved.

[10] The appeal of the defendant from the order taxing costs whereby the defendant was charged with the cost of levying attachment remains to be considered. Appellant's contention is that this is not an action upon a contract express or implied for the direct payment of money within the meaning of section 537 of the Code of Civil Procedure, authorizing attachments in such cases only. The argument that the liability is contractual is predicated upon the proposition that the director upon assuming office enters into a contract to perform the duties of his office in a lawful manner, and that his failure so to do is a breach of this implied contract, and for such breach an attachment will lie upon the implied obligation to restore to the corporation the full amount of the capital so diverted. We think it clear that the obligation is wholly statutory, if not penal, as we have heretofore pointed out, and is in no sense contractual within the meaning of the attachment law. The unlawful act of the directors is also punished as a misdemeanor by either fine or imprisonment, and it might be argued with equal force upon the same basis that the recovery of the fine would be based upon the contract between the director and the corporation implied by law. In Walker v. McCusker, 65 Cal. 360, 4 Pac.

206, it was held that an attachment would not lie under section 537, where the action was based upon a statutory liability merely. In that case the purchaser of mortgaged premises brought suit for rent against a tenant in possession for the value of the use and occupation of the land from the day of sale to the making of the deed. The attachment was held unauthorized by section 537 of the Code of Civil Procedure, for the reason that the contract was not express or implied within the meaning of that section. Notwithstanding the difference in facts, the language of the court in Mudge v. Steinhart, 78 Cal. 34, 39, 20 Pac. 147, 149, 12 Am. St. Rep. 17, is directly applicable here:

> "The existence of a contract, express or implied, is an essential basis without which no writ of attachment can properly issue, and as in this case the action was founded, not upon contract, but upon the fraud and wrongful acts of the defendant, we are of opinion the writ of attachment issued therein was absolutely void. * * *"

It follows that the allowance of these costs was improper.

The judgment is affirmed and order taxing costs reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; OLNEY, J.; SLOANE, J.; LAWLOR, J.

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183 Cal. 24

LITHERBURY v. KIMMET et al.
(L. A. 5279.)

(Supreme Court of California. May 21, 1920. On Rehearing in Bank, June 19, 1920.)

1. Municipal corporations 🔑706(5) — That overtaking driver did not notice defendant's vehicle held not to relieve defendant from failure to signal left turn.

Testimony by the driver of a motorbus in which plaintiff was riding that he did not notice defendant's truck, which turned to the left at a street intersection while the bus was passing it from behind, until just as he undertook to pass the truck, does not show that the driver would not have seen a signal for turning if defendant's employé had made such a signal, and does not prevent recovery for negligent failure to make such signal.

2. Trial 🔑296(11)—Erroneous instruction allowing jury discretion as to damages cured by correct instruction.

The giving of an instruction that the jury should allow as damages for personal injuries what in their discretion they think plaintiff is entitled to, which would be erroneous if standing alone, does not require reversal, where it immediately followed an instruction correctly stating that the measure of plaintiff's recovery is such sum as will compensate her for the injuries sustained.

3. Municipal corporations 🔑705(2)—Negligence to turn motor vehicle to left without signaling regardless of state law.

Regardless of the state law, requiring a vehicle driver to signify his intention to turn, the necessity for the driver of a motor vehicle to give such signal, particularly before turning to the left, is so great and the practice is so universal that the driver may be guilty of negligence who fails to signal without making certain that there is no one behind him.

4. Damages 🔑132(2)—$4,000 for painful and probably permanent injuries not excessive.

Where plaintiff's evidence showed great pain and suffering and injuries of a distressing and disabling character which would probably be permanent, the court cannot say that a verdict allowing $4,000 damages was excessive.

Department 1.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Nina J. Litherbury against Henry Kimmet, the Los Angeles Gas & Electric Company, and others. Judgment for the plaintiff against the Los Angeles Gas & Electric Company, and that defendant appeals. Affirmed.

Paul Overton, Wm. A. Cheney, J. H. Powell, S. W. Guthrie, and Herbert J. Goudge, all of Los Angeles, for appellant.

Ralph F. Graham, Russell Graham, and Minor Blythe, all of Los Angeles, for respondent.

OLNEY, J. This is an appeal from a judgment against the defendant, Los Angeles Gas & Electric Company, in the sum of $4,000, as damages for personal injuries alleged to have been suffered by the plaintiff because of the negligence of the defendant. It seems that the plaintiff was a passenger in a so-called jitney motorbus on East Seventh street in Los Angeles, when the bus collided with a small motortruck, owned and operated by the Gas & Electric Company, and the plaintiff was injured. Originally, the jitney driver, the jitney owner, and the latter's surety were all made parties defendant with the gas and electric company, but later the action was dismissed as to all except the last. The grounds upon which the defendant asks for a reversal are three: First, the insufficiency of the evidence to justify the verdict; second, certain alleged erroneous instructions; and, third, that the amount of the verdict is excessive.

[1] As to the first point the evidence for the plaintiff was to the effect that while the bus in which she was riding was close behind the defendant's truck going in the same direction and was endeavoring to pass it on the left, the truck suddenly and without warning turned to the left to go down an intersecting street with the result that the bus ran into it. The defendant concedes that, the jury having found for the plaintiff, this evidence must be taken to be true, but contends that it does not establish any causal connection between the failure of the truck driver to give any signal to those behind of his intention to turn to the left and the collision which immediately followed. This contention is based on the testimony of the jitney driver that he first observed the truck just as

he undertook to pass it, whence it is argued that, even if the truck driver had given the usual signal of intention to turn to the left, the jitney driver would not have seen it, the collision would have occurred anyhow, and ergo the failure of the truck driver to give the usual signal had nothing to do with the case.

This argument hardly needs discussion. It is based entirely on the assumption that the jitney driver would not have seen the truck driver's signal, if the latter had given one. But there is no foundation whatever for the assumption. It may be true that the jitney driver did not observe the truck until he undertook to pass it, but it does not follow that he would not have seen a signal by the truck driver in ample time to avoid a collision, if the latter had given one a reasonable time in advance of his turning.

[2] The erroneous instructions complained of are two. The first is as to the amount in which the jury might find for the plaintiff. It reads:

> "If from the evidence in the case and under the instructions given you by the court the jury shall find that the plaintiff has sustained damages by reason of any personal injuries as charged in the complaint, and that she is entitled to recover, then to enable the jury to estimate the amount of such damages it is not necessary that any witness should have expressed an opinion as to the amount thereof, but the jury should give her what in their discretion they think that she is entitled to under the proof in the case. The amount alleged in the complaint, however, is no criterion for you to go by, except that you cannot go beyond there—that is the limit—it is not even a guide to you in any other way. Anything within that amount you can find, if you find for the plaintiff."

If this were all, the instruction would be clearly erroneous as leaving the jury free to find any amount they might think for any reason the plaintiff was entitled to, provided only the amount prayed for in the complaint were not exceeded. It would come clearly within the rule of Fries v. American, etc., Co., 141 Cal. 610, 75 Pac. 164. But the instruction was immediately preceded by one which definitely and correctly informed the jury that if the plaintiff were entitled to recover, the measure of her recovery was such a sum as would reasonably compensate her for her pain and anxiety. This instruction reads:

> "If the plaintiff is entitled to recover, the measure of her recovery is what is denominated compensatory damages; that is, such sum as will compensate her for the injury she has sustained; and in this case it would be such reasonable sum as the jury shall award her on account of pain and anxiety she has suffered by reason of her injury, or is reasonably certain to suffer therefrom in the future."

Reading the two instructions together, and, as we have said, they were actually given immediately together, it is plain enough to a lawyer that the very general language of the second instruction given (the first quoted above) has reference to a recovery measured by the specific rule of the preceding instruction and is controlled by it. This, however, might well not be so plain to a body of men, such as a jury, not trained in the construction of instruments and who may hear the instructions only and not have the advantage of seeing them together on the written page. It would have been better if the danger of such misunderstanding of the true effect of the instructions had been avoided as could easily have been done. While the instructions are open, we believe, to criticism in this respect, still the danger or probability of their having been misconstrued is not so great as to justify us in this case in setting aside the verdict.

[3] The second instruction complained of is one whereby the jury were charged that the state law requires the driver of a vehicle about to turn to give a signal of his intention if there are other vehicles whose movement will be affected by his turning. The defendant's point in regard to this instruction is that Los Angeles being a chartered city, the general laws of the state do not operate within its limits. It is not necessary for the purpose of this case, however, to determine this question. The point of the instruction was that it was the duty of the truck driver before turning to signal to any vehicle close behind, and that if he failed to do so he was guilty of negligence. This is true whether the state law applies or not. The necessity for the driver of a motor vehicle to signal before turning, and particularly before turning to the left, is so great, and the practice of signaling in such a case is so universal and so relied upon, that there is no room for a reasonable difference of opinion as to the conduct of a driver who fails to signal without making certain that there is no one behind him. He is guilty of negligence, and the court is justified in so charging the jury.

[4] As to the point of excessive damages it is enough to say that the evidence of the plaintiff and that given on her behalf which must now be taken as true, showed great pain and suffering, and the receipt of injuries of a distressing and disabling character which would probably be permanent. It is impossible in the face of this testimony to consider the sum of $4,000 allowed by the jury as excessive.

Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J.

On Rehearing in Bank.

PER CURIAM. A rehearing is asked for in this case because of the claimed incorrectness of the following statement in the opinion:

> "The necessity for the driver of a motor vehicle to signal before turning, and particularly before turning to the left, is so great, and the practice of signaling in such a case is so universal, and so relied upon, that there is no room for a reasonable difference of opinion as to the conduct of a driver who fails to sig-

nal without making certain that there is no one behind him. He is guilty of negligence, and the court is justified in so charging the jury."

We are satisfied as to the correctness of this statement as applied to the facts of the particular case, where the motor truck, whose sudden turning from its course to the left caused the collision, was proceeding along a street of a large city, where the coming up of vehicles behind it was always to be anticipated, and therefore necessarily guarded against, and there was nothing to relieve the driver of his obligation to exercise care in this respect. The statement was, however, not intended as one of universal application, and it is not difficult to conceive of cases to which it would not be at all applicable.

Rehearing denied.

All concur, except WILBUR, J., not voting.

184 Cal. 802

VEYSEY v. MORIYAMA. (L. A. 6389.)

(Supreme Court of California. Feb. 1, 1921. Rehearing Denied March 3, 1921.)

1. Landlord and tenant 🔑171(3) — Surrender of premises necessary element of "constructive eviction."

Any disturbance of the tenant's possession by the landlord whereby the premises are rendered unfit or unsuitable for occupancy in whole or in substantial part for the purposes for which they were leased amounts to a constructive eviction, if the tenant so elects and surrenders his possession, but there can be no constructive eviction if the tenant continues in the possession of the whole, however much he may be disturbed in the beneficial enjoyment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Eviction.]

2. Landlord and tenant 🔑171(3) — Lessee could not avoid payment of rent where he continued in possession of entire premises.

Conceding that a failure of the water supply on 10 out of 460 shares of water stock, which lessor lost by reason of his failure to pay assessments, on a total acreage of 640 acres, is sufficient to constitute a constructive eviction, the lessee could not avoid his covenant to pay rent while he remained in possession of the entire premises and continued to cultivate the whole thereof and enjoyed the benefits of the remaining water supply, having an ample remedy in recouping the damages he might sustain in the accruing rentals.

Department 2.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Nettie B. Veysey against S. Moriyama. Judgment for plaintiff, and defendant appeals. Affirmed.

James L. Allen, of Brawley, for appellant.

Conkling & Brown, of El Centro, for respondent.

SLOANE, J. This is an action for unlawful detainer of land after default of defendant in payment of rent.

Defendant at the time the action was brought was in possession of the land in question consisting of 640 acres of farm land in the county of Imperial, under a three-year lease which by its terms had yet over two years to run. Two installments of rent aggregating the sum of $5,500 were delinquent at the time of filing suit.

The only defense offered is a plea of eviction from a substantial part of the land and a resultant release of defendant from liability to pay rent. This claim of eviction rests upon the following circumstances: The land covered by the lease was dependent for its use and value upon the necessary water for irrigation. There was appurtenant to this land for 60 shares of water stock in the Imperial Water Company No. 8, the water company furnishing water for irrigation to this part of the Imperial Valley. By the terms of the lease it is provided that the lessee "shall have the right to use the water on said land provided that he shall pay for all water ordered and used by him as it becomes due and payable," and that the lessor "agrees to pay all assessments levied against the water stock located on said land as the same becomes due and payable, in order that the party of the second part (the lessee) shall have unrestricted use of the proportion of water to which said stock is entitled." The lessor soon after the execution of the lease defaulted in the payment of an assessment on this water stock, and in consequence thereof the water company caused 10 shares of the stock to be sold under the assessment. It is alleged in the answer that from the date of such sale defendant "has been unable to procure any water on the shares so sold," and that the lessors have ever since failed to "replace said water stock on said land, so that defendant might have the free and unrestricted use of the proportion of the water to which such stock was entitled, or to place sufficient water stock on said land to irrigate same," and that defendant "has been deprived of the unrestricted use of the water to which such stock was entitled." It is further alleged that because of these conditions the defendant has been evicted from the portion of the land upon which said stock was located.

There is no allegation showing what part or how much of the land was affected by the sale of this water stock, or what was the extent or amount of damage resulting to defendant.

The defendant remained in the actual occupancy of the whole tract and planted and harvested a crop from the whole of it. The evidence discloses that there was a partial failure of the crop on a fraction of this land said to have been served by this withdrawn water stock. The evidence is conflicting as to whether or not there was an actual shortage of or insufficiency of water for the proper irrigation of the tract. The trial court found that this state of facts did not constitute an eviction.

Although not pleaded, it appears in evidence and is found by the court that defendant expended $391 in purchasing water stock to replace that sold under assessment against the lessors, and $220 of assessment on water stock appurtenant to the land, and that the water stock and water supply were thus restored by defendant himself prior to the commencement of these proceedings.

Defendant is relying in this case on a constructive eviction. It is not contended that he was at any time actually ousted from possession of any part of this land, or that he was not at all times from the beginning of the lease until some time after this suit was begun occupying and farming the whole of it. His interest under his lease in the water stock was not in the possession of the stock itself, but in the right to a supply of water incident to such stock, and while, if he was sufficiently deprived of his water supply to materially affect the purposes of his leasehold, he might be justified in treating such breach of the covenants of the lease as an eviction and thereupon terminating his occupancy of the part of the premises affected, or even all of them, yet he could not remain in the use and occupation of the whole of this property and claim exemption from paying rent on the ground of a constructive eviction.

There are cases in the decisions where a tenant who has been actually and forcibly ousted of possession of a part of the rented premises has been permitted to hold the remainder of the leasehold without paying rent, as where in a house consisting of several rooms the landlord had wrongfully taken possession of part of them, it has been held that the tenant could not be required while this partial eviction continued either to vacate the remainder of the house or pay rent for the part he occupied. Such is the application of Christopher v. Austin, 11 N. Y. 216, Colburn v. Morrill, 117 Mass. 262, 19 Am. Rep. 415, and other like decisions cited by appellant.

[1] The general rule, however, relating to a constructive eviction is that any disturbance of the tenant's possession by the landlord whereby the premises are rendered unfit or unsuitable for occupancy in whole or in substantial part for the purposes for which they were leased amounts to a constructive eviction, if the tenant so elects and surrenders his possession. 6 R. C. L. p. 686. There can be no constructive eviction if the tenant continue in the possession of the whole, however much he may be disturbed in the beneficial enjoyment. 16 R. C. L. pp. 686, 687; Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; De Witt v. Pierson, 112 Mass. 8, 17 Am. Rep. 58; Boreel v. Lawton, 90 N. Y. 293, 43 Am. Rep. 170. For instance, the failure of the landlord to heat a leased building as agreed under the lease may constitute an eviction, but the tenant must abandon the possession. He cannot remain in possession and enjoy without paying the rent such supply of heat as is furnished, although so inadequate as to have warranted an abandonment of the lease had the tenant so elected. 16 R. C. L. p. 692; note 37 L. R. A. (N. S.) 1218; Minneapolis Co-op. Co. v. Williamson, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473; Berlinger v. Macdonald, 149 App. Div. 5, 133 N. Y. Supp. 522; Koehler v. Scheider (Com. Pl.) 4 N. Y. Supp. 611; Siebold v. Heyman (Sup.) 120 N. Y. Supp. 105.

[2] So in this case, conceding that a failure of the water supply on 10 out of 460 shares of water stock on a total acreage of 640 acres is sufficient to constitute a constructive eviction the tenant cannot avoid his covenant to pay rent while he remains in possession of the entire premises and continues to cultivate the whole thereof and enjoy the benefits of the remaining water supply. He has ample remedy under such circumstances in recouping the damages he may sustain against the accruing rentals. New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 358; McCoy v. Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208.

The evidence discloses that defendant harvested $25,000 worth of produce from this tract of land during the one cropping season he was in possession. If he had lost the entire use of the proportion of the land served with water from the 10 shares of stock sold from the total 460 shares, his proportionate loss would have been less than $600.

The finding of the trial court that the failure of the lessors to protect these shares did not amount to an eviction was justified under the evidence.

Although there was no pleading to support a judgment for damages, the court allowed the sum of $611 to defendant as a set-off against the rent due, as compensation for the amount expended by defendant for replacing the forfeited shares and for payment of water assessments, giving judgment for the balance claimed on the unpaid installments of rent.

The defendant surrendered possession of the premises during the pendency of the action. This action was maintained by the assignee and grantee of the original lessors, but there is nothing in the issues presented making that circumstance material.

The judgment is affirmed.

I concur: LENNON, J.

WILBUR, J. I concur. The trial court found that there was no insufficiency or shortage of water for the proper irrigation of the tract, and, as the finding of the court is supported by sufficient evidence, it follows that there was no eviction from any substantial part of the premises. For that reason I concur in the judgment.

184 Cal. 797

GATES v. PENDLETON et al. (L. A. 5973.)

(Supreme Court of California. Feb. 1, 1921. Rehearing Denied March 3, 1921.)

1. Trial 🔑165—Evidence interpreted against defendant on motion for nonsuit.

On motion for nonsuit, the evidence must be interpreted most strongly against the defendant.

2. Appeal and error 🔑997(2) — Nonsuit reversed, unless plaintiff's evidence is incapable of sustaining a decision in his favor.

Judgment of nonsuit must be reversed, unless the evidence for plaintiff is so weak as not to be capable of sustaining a decision in his favor.

3. Master and servant 🔑301(4)—Automobile owner's driver held guest's employé.

Where an automobile owner, invited to carry his father and fellow guests to a place of entertainment, declined the invitation, and permitted his employé to drive the party to their destination, the inference that the father was in charge so as to be responsible for negligence of the driver was reasonable, and it was error to grant a nonsuit on the theory that the driver was a fellow guest.

4. Appeal and error 🔑996—Court's inferences from undisputed evidence sustained if reasonably supported.

Inference drawn by trial court from undisputed evidence must stand if upon a consideration of all the circumstances it is reasonably supported.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by W. W. Gates against C. W. Pendleton, Sr., and another. Judgment of nonsuit, and plaintiff appeals. Reversed.

Thomas K. Case, of Los Angeles, for appellant.

E. J. Emmons, of Bakersfield, C. W. Pendleton, Sr., and C. W. Pendleton, Jr., both of Los Angeles (C. C. Trott, of Los Angeles, of counsel), for respondents.

SLOANE, J. The only question on this appeal is in fixing the liability for damages to plaintiff for injuries suffered in an automobile accident. The plaintiff was run over and seriously injured by the reckless negligence of the driver of an automobile owned by the defendant C. W. Pendleton, Jr., and in which C. W. Pendleton, Sr., was a passenger. It is alleged that the driver at the time of the accident was in the employ of Pendleton, Jr., and under the direction and in the immediate service of Pendleton, Sr. At the conclusion of plaintiff's evidence the trial court granted a motion for nonsuit as to both defendants. It is claimed by appellant that no grounds for the nonsuit were specified in the motion, but it sufficiently appears that the motion was submitted on the insufficiency of the evidence. At any rate no prejudice can have resulted from any failure to more specifically state the grounds of the motion. Plaintiff had introduced all his evidence and submitted his case, and the only point at all in controversy was as to whether both or either of the respondents here were liable for the negligence of the driver of the automoile.

[1, 2] The trial court granted the motion for nonsuit. Upon such a motion the evidence must be interpreted most strongly against the defendant, and unless the evidence for plaintiff is so weak as not to be capable of sustaining a decision in his favor the judgment must be reversed. The uncontradicted evidence bearing upon this point was that the senior Pendleton, with a number of other gentlemen, had been invited to a dinner tendered them by a mutual friend. The place of entertainment was at some distance away, and the host had informed Pendleton, Sr., that if he had a friend with an automobile who would bring him and two or three of the guests who were to accompany him, he could invite the automobile provider along also as a guest. The testimony of Pendleton, Sr., in this particular was:

> "Why, Gen. Last [the host] suggested that if I knew of any one who had a car who could take a part of his party down to the place where we were going he would invite him along as a guest. * * * I told him that my son [C. W. Pendleton, Jr.] had a car, and, while he was away, he was expected home early in the morning, the day on which the excursion was fixed, and I would ask him to take me down."

In pursuance of this arrangement Pendleton, Sr., sent word to his son by one Clarence Toll, who afterwards was the driver at the time of the accident. Toll was a clerk in the law office of Pendleton, Jr., and sometimes drove members of the family, including Pendleton, Sr., in his employer's automobile. He was not, however, employed as a chauffeur; the younger Pendleton having a regularly employed chauffeur. On this occasion, however, young Toll was to meet Pendleton, Jr., with the car on his return from the trip on which he was then absent. In the words of the elder Pendleton:

> "I sent word to him by Toll, as he left me by the corner, to tell my son about the party, and ask him if he would not go along and take a number of people that were there. Clarence came back alone, and said that my son, having just come home, had told him that he had some things to attend to, and would not go, but would let him have the car. Q. Did you send Toll to your son for the car? A. No. I told Toll, as I stated to you, about the matter, to tell my son on the way up, ask him if he would not go down and take a number of the

party. That is the message that I give to Toll."

Pendleton, Jr., testified that he had no conversation with his father about the use of the machine. His statement of the matter is:

> "I had no conversation with my father about it; Toll told me what his connection was in a way. He wanted to know if I objected to the car being used for that purpose, and I said, No. I do not know of my own personal knowledge where they were going.
>
> "Question by the Court: I understand you to say, Mr. Pendleton, Mr. Toll came and said —asked if you had any objection to your father using your machine. A. Yes. Q. And you said, No? A. That is true. Q. You knew that from your foreman, the machine was for him. You knew nothing about the matter at all? A. That is a fact. I had no concern in the matter. Q. All you know is your man came to you to get the machine for your father, and you let him have it?
>
> "The Court: That has been gone over. He has told what happened."

This is all the evidence produced in the case as to the circumstances under which the use of the car and the services of Toll as its driver were procured.

The party, including Pendleton, Sr., and two or three others of the invited guests with Toll as driver, went in this automobile to the dinner which was given in the afternoon. It does not appear that Pendleton took any particular charge of the trip or gave any directions to Toll. After the dinner the party started on their return at Pendleton's suggestion about dusk in the evening, and in passing a street car ran into several persons about to board the car, among whom was the plaintiff.

It is quite clear that the defendant C. W. Pendleton, Jr., was not liable for the negligent driving of the automobile by Toll on this occasion. At most he had but loaned his machine to Toll or his father, or both of them, in a matter of which he had no particular knowledge and no personal concern.

The connection of the defendant C. W. Pendleton, Sr., with the transaction is that he wanted his son to join the party as a guest and drive them to their destination. He sent a message to this effect to his son by Toll. Toll returned with the automobile, reporting that the son had declined the invitation, but had let him (Toll) take the car. Pendleton, Sr., testifies that he did not ask Toll to get the car, but only to ask the son to come and take them in it to the dinner. Toll acted on his own initiative in procuring the use of the car and bringing it for the use of the party. The statement of the son that he loaned the car to Toll and his father cannot bind the latter, unless he had authorized or requested Toll to get the use of it for him, or unless, with knowledge that the auto with Toll as its driver, had been furnished to him by his son, he accepted the use and service so tendered.

The theory of the defendants, apparently adopted by the trial court and District Court of Appeal, is that Toll, having procured the use of the automobile on his own responsibility from his employer, offered himself as a substitute for the younger Pendleton, and, in the rôle of a fellow guest, invited the Pendleton party to ride with him to the dinner.

[3, 4] We do not think that this conclusion can be reasonably entertained from the evidence. There is no dispute as to the facts. It is merely a question as to the inferences to be drawn from the undisputed testimony, and we do not lose sight of the rule that the decision of the trial court must stand if upon a consideration of all the circumstances defendants' theory of the case is reasonably supported.

From the testimony of the younger Pendleton it seems entirely clear that he was offering his automobile with Toll as a driver for the use of his father. It does not seem to us credible that the elder Pendleton understood the situation in any different way. It is true he had not asked for the use of the machine, but had sent an invitation to his son to join him and his friends as a guest and take them to the place of meeting. But when young Toll returned and reported that the son had told him "he had something to attend to and could not go, but would let him (Toll) have the car," the father must have understood, what was the fact as shown by the son's testimony, that the car and driver were furnished for his use.

There is no direct testimony that Toll was a guest or considered as such and such a conclusion is not consistent with the circumstances. The only testimony is the statement of Pendleton, Sr., in answering the question: "Was you wanting him to go merely as a guest, or driver of the machine?" that "I didn't want him particularly to go myself, but he was invited as a guest." The invitation referred to was apparently the suggestion of Gen. Last that they could bring as a guest any one who would bring them to the dinner in his automobile. This was a dinner party given by Gen. Last to old friends who had been members of his staff "many years ago." Some of them apparently were military men. One Col. Houston was a member of the Pendleton party. Although there is no specific evidence on that point the fair inference is that they were middle-aged gentlemen. Clarence Toll was a youth of 22 or 23 years. He was a clerk and law student in the younger Pendleton's law office, "a general utility man in the office," who sometimes acted as his employer's chauffeur. There is no evidence that he sat at the dinner table with the guests. Pendleton, Sr., the only witness on the subject, says he did not see him. He did make some suggestion to Toll about starting for home. He says:

> "When they all got loaded, I believe I suggested to him that everybody was going; let us go."

We assume that the somewhat ambiguous and equivocal reference to getting "loaded" has the automobile and not the passengers as its objective. That the driver had been imbibing, however, is indicated by his reckless driving on the return trip and the testimony of a witness who saw the accident, that the driver appeared to be under the influence of liquor, and that he smelled it on his breath. He drove the car with Pendleton and his companions at a rate of between 30 and 40 miles an hour, according to the evidence, past a standing street car and into a group of passengers about to board the car. Five of them were injured, including the plaintiff, and two afterwards died. Toll was arrested, tried, and convicted of manslaughter. Probably the extent and degree of Toll's culpability for the accident does not throw any light on his relations to the other members of the party, but all the circumstances taken together make exceedingly incredible the suggestion that he was acting as a fellow guest of these gentlemen, and conveyed them to the party on his own initiative and responsibility.

We think the conclusion could reasonably be reached from the evidence that C. W. Pendleton, Sr., was in charge of the expedition.

The judgment is reversed.

We concur: OLNEY, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.

185 Cal. 26

MASONIC MINES ASS'N TRUSTEESHIP et al. v. PARKER, Judge of Superior Court. (Sac. 3220.)

(Supreme Court of California. Feb. 3, 1921.)

Exceptions, Bill of 🔑53(5)—Judge will not be compelled to settle bill of exceptions including matter not reviewable.

Where a new trial proceeding was never prosecuted beyond service and filing of notice of intention and other papers, it cannot be reviewed on appeal, never having been presented to the trial court, and should not be a part of the bill of exceptions, and the trial judge will not be required to include it by writ of mandate.

In Bank.

Petition by the Masonic Mines Association Trusteeship and others for a writ of mandate to Pat R. Parker, Judge of the Superior Court, to compel the latter to settle a bill of exceptions. Application denied.

Welles Whitmore, of Oakland, for petitioners.

PER CURIAM. Application for a writ of mandate to compel judge to settle bill of exceptions.

It appears from the letter of the trial judge set forth in the petition that he is willing and ready to settle the bill if there be eliminated therefrom all matter appertaining to the notice of intention to move for a new trial and all matter appertaining to a motion for new trial. This, so far as appears, is all that appellant is entitled to; the new trial proceeding never having been prosecuted beyond the service and filing of a notice of intention and other papers, and never having been presented to the trial court, and having been denied by operation of law because not brought to determination within three months after notice of entry of judgment. Under such circumstances the matter of the new trial proceeding cannot be reviewed on an appeal from the judgment, and bill of exceptions to be used on such appeal should not contain anything relative thereto.

The application for a writ of mandate is denied.

All concur.

185 Cal. 20

CHAVEZ v. TIMES-MIRROR CO. (L. A. 6020.)

(Supreme Court of California. Feb. 3, 1921.)

1. Libel and slander 🔑54—Truth a complete defense.

The truth of the charge is a complete defense in a civil action for damages for libel.

2. Libel and slander 🔑97—Demurrer to complaint alleging libel sustained if complaint shows truth of charge.

As the truth of the charge is a complete defense in a civil action for damages for libel, a demurrer to a complaint is properly sustained if the complaint itself shows the truth of the charge.

3. Pleading 🔑6 — Matters of judicial notice read into pleading.

In the consideration of a pleading the courts must read the same as if it contained a statement of all matters of which they are required to take judicial notice, even when it contains an express allegation to the contrary.

4. Libel and slander 🔑97—Court not at liberty to assume that attorney knew public defender was not a judge.

The court in considering a demurrer to a complaint in an action by an attorney for damages for libel is not at liberty to assume that plaintiff knew that the public defender was not a judge.

5. Evidence 🔑5(2) — Judicial notice has no application to persons.

The rule of judicial notice has no application to persons, and court cannot assume that a lawyer knew that a certain public defender was not a judge.

6. Libel and slander 🔑9(3)—Complaint held to state cause of action for libel.

A complaint by an attorney in an action for damages for libel, in that defendant newspaper stated the plaintiff had circulated postcards bearing his signature recommending certain judges for re-election, and that one of the judges so named was a public defender, and not a judge, and that the statement on the card was a deliberate lie, maliciously framed and deserved the bitterest condemnation, *held* to state a cause of action.

7. Libel and slander 🔑86(1)—Innuendoes cannot give meaning of which publication is not fairly susceptible.

One cannot by innuendoes ascribe to an alleged libel a meaning of which it is not fairly susceptible in the light of such extrinsic facts as are alleged.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by E. V. Chavez against the Times-Mirror Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

E. V. Chavez and J. W. Satterwhite, both of Los Angeles, for appellant.

Samuel Poorman, Jr., Otis H. Castle, Hunsaker & Britt and Le Roy M. Edwards, all of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an appeal by plaintiff from a judgment in favor of the defendant in an action for libel, given on sustaining a demurrer to his complaint without leave to amend. The action was founded on a publication in the Los Angeles Times. The demurrer was both general and special.

[1, 2] Counsel have devoted themselves almost exclusively to the general demurrer for want of facts sufficient to constitute a cause of action, the claim of respondent in this regard being in brief that, in view of certain matters of which it is said the court must take judicial notice, the complaint shows that the published article was in all substantial respects true. As the truth of the charge is a complete defense in a civil action for damages for libel, it is plain that, if the complaint itself shows the truth of the charge, the demurrer was properly sustained. Whether or not it does so show is the principal question on this appeal. The complaint alleges that plaintiff is, and has been for more than 11 years, an attorney at law, engaged in the practice of his profession principally in the county of Los Angeles, and that he always, prior to the publication complained of, enjoyed a good name and reputation as an attorney. It further alleges that defendant is the owner and publisher of the daily newspaper known as the "Los Angeles Times," a paper of wide circulation in Los Angeles county and elsewhere. It then alleges:

> That on September 29, 1918, said defendant wrongfully and maliciously, and with intent to injure plaintiff, published in said newspaper "of and concerning him, in his said capacity and profession and as a man, the following false, libelous, malicious, and defamatory article, to wit:
>
> " 'It has been said that everything is fair in war, but even that statement is open to criticism. For instance, nobody but a Fritz would ever excuse the Kaiser for his atrocities in Belgium or for other innumerable fiendish acts. With this prelude, I want to say that neither is everything fair in politics. During the past few weeks post cards have been circulated within the city and county bearing the signature of one E. V. Chavez. The card is addressed to "Dear Friend" and says:
>
> " ' "As a member of the local bar and a practitioner before the superior courts of this county, I take great pleasure in recommending the following judges for re-election to the positions which they are now so creditably occupying, to wit: Judge James C. Rives, Judge Frederick Houser, Judge Charles Wellborn, Judge John M. York, Judge Paul McCormick, Judge L. H. Valentine, Judge Walton J. Wood."
>
> " 'Obviously this card was written and mailed for the purpose of helping the candidacy of Walton J. Wood. The statement on the card is a deliberate lie, maliciously framed, and deserves the bitterest condemnation. The incumbent judges named (without their permission) have reason to be sore and no doubt are. It seems to me that this instance furnishes good material for the investigating committee of the Bar Association. Walton J. Wood is the public defender. He is not a judge, and if all of his supporters are of the kind that evidently sent out this reprehensible document I pity him. As a public defender he has made a clear record, and he should be the first one to expose this sort of fake advertising.' "

This is followed in paragraph V by the innuendoes, being certain allegations as to the meaning intended by defendant as to four portions of the article, comprising all thereof except the statement on the card, and the understanding of the meaning of those portions on the part of the persons who read the article. Then comes paragraph VI, alleging "that said publication was false and defamatory," and that by means thereof plaintiff has been and is greatly injured and prejudiced in his reputation and business, and has suffered great humiliation and anguish of mind. He alleged his actual damage as being $5,000, and also asked for $20,000 exemplary or punitive damage.

[3] The statement on the card alleged in the article to have been circulated necessarily implied that "Judge Walton J. Wood" was, with the other judges named, an incumbent

judge of the superior court of Los Angeles county, and, with such others, a candidate for re-election to the position which he and such others then occupied "so creditably." There is apparently no dissent from the proposition that in the consideration of a pleading the courts must read the same as if it contained a statement of all matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary. See People v. Oakland Water Front Co., 118 Cal. 234, 244–246, 50 Pac. 305; French v. Senate, 146 Cal. 604, 607, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756; 12 Ency. Pl. & Pr. 1; 1 Abb. Trial Brief (2d Ed.) p. 107. In view of this rule it must be conceded that the superior court in considering the demurrer was required to take into consideration the fact that Walton J. Wood was not a judge of the superior court, and that one J. Perry Wood was such a judge (subdivision 5, § 1875, Code Civ. Proc.; 15 Ruling Case Law, 1105; San Joaquin Co. v. Budd, 96 Cal. 47, 30 Pac. 967; People v. Knoblock, 11 Cal. App. 333, 335, 104 Pac. 1012), that said Walton J. Wood was therefore not a candidate for "re-election," and that the statement on the card was, in this respect, untrue. It is upon this fact that learned counsel for the defendant base their claim that the published article contained nothing but the truth, and fair comment thereon.

But the published article goes further, declaring that "obviously this card was written and mailed for the purpose of helping the candidacy of Walton J. Wood," and that "the statement on the card is a deliberate lie, maliciously framed," deserving the bitterest condemnation. If the statement as to Walton J. Wood was intentionally and deliberately made by plaintiff with knowledge of its falsity, as this necessarily implies, the remainder of the published article would, in our opinion, be fully justified as fair and legitimate comment on a most reprehensible act, fully meriting all that is said in the article about it and about the person guilty thereof. In such event it could have been made only for the purpose of helping the candidacy of Walton J. Wood by misleading the electors as to the facts.

[4, 5] The real sting of the published article lies in the statement that the plaintiff had thus circulated "a deliberate lie, maliciously framed," necessarily implying full knowledge on the part of the plaintiff of the untruth of the statement on the card as to Walton J. Wood, and a deliberate expression thereof with such knowledge. The complaint, however, does not show any such knowledge on the part of plaintiff, and courts are not at liberty in considering the sufficiency of a pleading to assume that he had such knowledge, even though he was an attorney at law practicing in Los Angeles county. The rule of judicial notice has no application to persons. It is a rule of evidence for the government of courts (Raggio v. Southern Pacific Co. et al., 185 Pac. 171), and a person cannot be held to have knowledge of all those things of which a court may take judicial notice, in many cases by resort to appropriate books or documents of reference, simply because they are matters of which courts take judicial notice. While it seems extremely probable that plaintiff in fact did know that Walton J. Wood was not a judge, and not a candidate for re-election, it is possible that he did not, and in the face of the allegation in the complaint "that said publication was false and defamatory," which must be taken as meaning that the whole article was false and defamatory (Leonard v. McPherson, 146 Cal. 616, 620, 80 Pac. 1084), a court cannot on demurrer assume that he knew, and that the statement on the card was "a deliberate lie, maliciously framed." The difference in effect between a charge of uttering and circulating a mere untruth, perhaps in entire ignorance of the fact that the statement is untrue, or because of inadvertence, etc., and a charge of uttering and circulating "a deliberate lie, maliciously framed," for an improper purpose, is too obvious to merit discussion. In this respect the complaint does not show the truth of the published article, and it does sufficiently state a cause of action.

Whatever may be said as to a certain statement in one of the innuendoes constituting an admission that plaintiff sent out and circulated the postal cards, the same cannot by any possibility be construed as an admission that the statement thereon with reference to Walton J. Wood was "a deliberate lie, maliciously framed."

[6] Nor is the allegation of falsity of the published article in any way limited in its effect by anything contained in the innuendoes. The allegation of falsity goes to the whole article. In view of what we have said, the words actually used in the article are actionable entirely regardless of the innuendoes, by which it was sought to enlarge and extend the sense of those words.

[7] In view of possible future proceedings, we deem it proper to say, in so far as the innuendoes are concerned, that for the most part the meaning ascribed thereby to the words used in the article is one of which the words are incapable, and that for the remaining part the words used are only fair comment upon the matter discussed. It is a well-settled rule that one cannot by such an allegation ascribe to an alleged libel a meaning of which it is not fairly susceptible in the light of such extrinsic facts as are alleged. See Mellen v. Times-Mirror Co., 167 Cal. 587, 140 Pac. 277, Ann. Cas. 1915C, 766. In this case the allegations to the effect that the defendant by the introductory part of the article meant to say and was understood to mean that plaintiff was as cruel, treacherous, dishonorable, double-dealing, despicable, and inhuman as the Kaiser, etc., finds no support in the language of the article, alone or when considered in the light of the extrinsic facts. The language used is utterly incapable of any such meaning. The same is true as to the allegation that by other language used defendant meant to say and was understood as meaning that plaintiff had entered into a conspiracy or agreement with Walton J. Wood to help elect him by unlawful and corrupt means. So with the allegation that by the words, "It seems to me that this instance furnishes good material for the investigating committee of the Bar Association," defendant meant to say and was understood as meaning "that plaintiff is so unworthy, unprofessional, and corrupt * * * that he should be humiliated and disgraced by having the Bar Association of the state of California * * * suspend him * * * from practicing his said profession." It may properly be added that the language actually used would seem to be only fair comment on such conduct as was attributed to plaintiff by the article. The portion sought to be construed in the fourth innuendo is clear and explicit in meaning and constitutes nothing but fair comment, as also does the statement that "the incumbent judges named (without their permission) have reason to be sore and no doubt are." In short, the innuendoes alleged do not assist the pleading, and if without them the language of the article was not actionable, in view of the allegations of special damage, the complaint would not state facts sufficient to constitute a cause of action. But, as we have seen, the complaint is sufficient without them.

The judgment is reversed, with direction to the superior court to overrule the demurrer, with leave to defendant to answer.

We concur: SHAW, J.; WILBUR, J.; SLOANE, J.; OLNEY, J.; LAWLOR, J.; LENNON, J.

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185 Cal. 47

NOURSE v. AZVEDO et al. (L. A. 6447.)

(Supreme Court of California. Feb. 4, 1921.)

1. Vendor and purchaser ⟹335—Seller entitled to retain money paid on purchaser's default.

Where the buyer of land not only defaulted in the payment of future installments, but attempted to rescind because she had changed her mind, and did not desire to purchase, and the seller notified the buyer that by reason of her failure to pay installments due the contract was terminated, and her rights under the contract forfeited, and that by the terms thereof he was entitled to and would not return the purchase money paid, the seller was entitled to retain the money paid by the purchaser, and her rights terminated.

2. Evidence ⟹63—Presumption of sanity of agreed purchaser.

There is a presumption of sanity, as of the competency of one who contracted to purchase land.

Department 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Charles O. Nourse against Katie A. Azvedo and John Doe Azvedo. From judgment for plaintiff, defendants appeal. Affirmed, with damages for frivolous appeal.

H. H. Heath, of Los Angeles, for appellants.

Paul Nourse, of Los Angeles, for respondent.

WILBUR, J. This is an action to quiet title to certain real estate against the claims of the defendant growing out of a contract to purchase wherein the plaintiff was vendor and the defendant Katie A. Azvedo, vendee, who, by cross-complaint, seeks to recover $200, the initial payment upon the purchase price. Plaintiff recovered judgment quieting his title, and the defendant, having been defeated upon her cross-complaint, appeals from the judgment against her on the cross-complaint only.

[1] By the terms of the contract time was the essence thereof. The defendant not only defaulted in the payment of future installments, but attempted to rescind the contract by reason of the fact that she had changed her mind and did not desire to purchase. Respondent notified appellant that by reason of her failure to pay the future installments due the contract was terminated and her rights under the contract forfeited, and that by the terms thereof he was entitled to and would retain the purchase money so far paid. Under these circumstances the vendor was entitled to retain the money paid by the purchaser, and her rights in the property terminated. Newell v. E. B. & A. L. Stone Co., 184 Pac. 659, 9 A. L. R. 993; Lemle v. Barry, 183 Pac. 150; Hymen v. Harbor View Land Co., 188 Pac. 828; Darter v. Schuyler, 190 Pac. 827.

[2] The appellant also seeks to rescind the contract on the ground that she was incompetent at the time she executed the same. The finding of the trial court is that she was competent. It is enough in that regard to say that the testimony of the appellant is not sufficient to overcome the presumption of sanity which is supported by respondent's evidence and by the circumstances attending the execution of the contract.

Judgment affirmed, with $25 damages for frivolous appeal.

We concur: SLOANE, J.; LENNON, J.

185 Cal. 37

McCREERY v. CHARLTON et al.
(L. A. 5729.)

(Supreme Court of California. Feb. 4, 1921. Rehearing Denied March 3, 1921.)

1. Mortgages 🔑159 — Presumed from recital in trust deed that execution of mortgage preceded deed.

Where mortgage and trust deed bear the same date and were filed for record on the same day, it will be presumed, from a recital in the trust deed that it was made "subject to a mortgage for $6,000 filed concurrently herewith," that the execution of the mortgage preceded that of the trust deed.

2. Mortgages 🔑257—Assignee entitled to recover on mortgage executed without consideration in absence of knowledge.

An assignee of a note and mortgage executed without consideration is entitled to recover thereon where he had no knowledge of the lack of consideration.

3. Mortgages 🔑270 — Evidence held not to support finding that assignee had knowledge of lack of consideration.

In an action by assignee to foreclose a mortgage, evidence *held* not to support a finding that plaintiff had knowledge that the note and mortgage were without consideration.

4. Estoppel 🔑72 — Innocent vendor, permitting mortgage to fall into hands of innocent purchaser, must suffer loss.

Where vendors of real estate took trust deed reciting that it was subject to a mortgage of even date, permitting the vendee to mortgage premises for the purpose of making improvements, but such improvements never being made, and the mortgage fell into the hands of an innocent purchaser, the vendors could not claim that their trust deed was prior to the mortgage, and that the mortgage was executed and delivered without consideration, since where one of two innocent persons must suffer by the acts of a third he by whose negligence it happened must be the sufferer, under Civ. Code, § 3543.

5. Mortgages 🔑257 — Assignee had right to rely upon abstract company.

Assignee of mortgage, represented to him to be first mortgage, was entitled to the benefit of a recital in a trust deed of even date that the trust deed was subject to such mortgage, although he did not personally know of or rely upon such recital, having employed an abstract company to search the title, and such abstract company having relied upon such recital in passing the title.

6. Appeal and error 🔑837(10) — Certificate of title held to be considered as part of evidence.

A certificate of title, used on the trial of a case and appearing in the bill of exceptions as part of the evidence submitted on the trial, must be considered for all purposes to which it is relevant, although appellees object that it was not admitted in evidence.

7. Estoppel 🔑22(2)—Person permitting recital in trust deed estopped thereby.

Where beneficiaries of a trust deed permitted a recital in such trust deed acknowledging the priority of a note and mortgage of even date, they were estopped to set up as a defense in foreclosure by an innocent assignee of the note and mortgage that such note and mortgage lacked consideration to support them, in view of Code Civ. Proc. § 1962, subd. 3.

8. Estoppel 🔑34 — Unnecessary to plead in complaint where arising from defense.

In a foreclosure proceeding, where assignee of note and mortgage brought action to foreclose, it was not necessary that he plead in the complaint that beneficiaries in a trust deed of even date were estopped to deny the priority of the note and mortgage by reason of a recital in the trust deed; the question of estoppel not arising until such beneficiaries set up the defense that the trust deed was a superior lien.

9. Pledges 🔑24 — Pledgee of mortgage can only claim to the extent of the mortgage loan and costs.

An assignee of a note and mortgage to secure a loan made to the mortgagee can only claim under the note and mortgage to the extent of the loan to the mortgagee, and the costs incident thereto, which it secures, and his priority of right by reason of his being an innocent holder only extends to the protection of such claim as against the lien of a trust deed of even date, which was in fact a superior lien.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Samuel R. McCreery against H. W. Charlton and others. From an adverse judgment, plaintiff appeals. Reversed.

Lloyd W. Moultrie, of Los Angeles, for appellant.

Behymer & Craig and Elliot Craig, all of Los Angeles, for respondents.

SLOANE, J. The plaintiff brought this action to foreclose a mortgage securing a note for $6,000, which note and mortgage was assigned to him as collateral security for a cash loan of $1,250 made by him to the mortgagee. There was no defense by the mortgagors, but the defendants, respondents here, interposed the claim of a trust deed on the same property, which was alleged to create a lien superior to the mortgage. The trial court found in accordance with the claim of the respondents, and this appeal is taken from the judgment subordinating the mortgage to this deed.

[1] The uncontroverted facts in the case appear to be that respondents, Marie Otto and Charles E. Otto, sold the land in question to defendant Charlton, receiving therefor $600 in cash and four notes for $500 each. To secure these notes Charlton and wife executed the trust deed mentioned to

the defendant and respondent Guaranty & Trust Company for the benefit of the Ottos, payees of the notes. This trust deed contains a recital that it is made "subject to a mortgage for $6,000, filed concurrently herewith." The mortgage thus referred to is the one sought to be foreclosed in this action. The mortgage and trust deed bear the same date and were filed for record on the same day; there being nothing other than the above recital to show which, if either, had priority of recordation. In the absence of evidence to the contrary, it would be presumed from this recital in the trust deed of the existence of a mortgage that its execution preceded that of the trust deed. The mortgage and note secured thereby were executed to one Anna L. Giles. No immediate consideration passed therefor. The purpose of the note and security was to enable Charlton, the purchaser, to obtain money for the erection of a house on the land which he agreed to build at a cost of $7,500; the note and security having been executed to raise money for that purpose. This was never done, and as between Charlton and Mrs. Giles and the Ottos the note and mortgage are without consideration. Instead of raising money for such building purposes Mrs. Giles hypothecated the securities for a personal loan of $1,250 with one A. L. Bank, and later secured the money from the plaintiff to repay Bank, and had Bank reassign the note and mortgage to plaintiff as security for the $1,250 thus advanced by him. Both Mrs. Giles and Bank knew the purpose for which the note and mortgage had been executed, but they did not impart that information to the plaintiff. No part of the unpaid purchase-price notes, nor of the $6,000 note, has been paid. The $6,000 note, however, at the time of its assignment to plaintiff, had indorsed upon it the payment of accrued interest in the amount of $210. It appears that this interest had never been paid, but the payment was apparently indorsed for the purpose of indicating to the plaintiff that the interest payments were being met.

The findings of the trial court are an elaboration upon this state of facts, with the further finding that the plaintiff, in accepting an assignment of the note and mortgage, did so with knowledge that the note was originally made without consideration, and that he did not in entering upon the transaction know or rely upon the recital in the trust deed making it subordinate to the mortgage. The language of the finding in the last-mentioned particulars is as follows:

> "That plaintiff accepted said assignment of said note and mortgage and said note and mortgage, and each of them, with full knowledge on his part that there was no consideration for the execution of said $6,000 note and mortgage, or either of them, and with full knowledge and belief on his part, after personal inspection and investigation by him, that the real property described in said mortgage was of the value of about $2,500, and no more,"

—and, further, that:

> "Said plaintiff knew that there was a trust deed of $2,000 upon said real property, but plaintiff did not know or have any information or belief of the fact that said $2,000 deed of trust contained the said recital, to wit, 'Subject to a mortgage for $6,000 filed concurrently herewith,' and the court finds that in making said loan and taking said assignment plaintiff did not in any way or manner whatsoever rely upon said recital in said deed of trust."

[2] It is only on these findings, that plaintiff had knowledge of the failure of consideration for his note and mortgage, and did not receive his assignment in reliance upon the recital of this priority in the trust deed, that the judgment can be upheld. The contention of the appellant is that these findings are unsupported by the evidence.

[3] We have examined the evidence in this case, with the result that we fail to find any substantial support for the findings in either of these particulars. Not only is there nothing in the record to indicate that the plaintiff had any knowledge or information which would lead him to question the sufficiency of or consideration for the security offered him, but, on the contrary, his own testimony and the circumstances of his part in the transaction indicate perfect good faith on his part in the validity of the security; and, while it is true that he testified that he did not know, at the time of making the loan, of the recital in the deed subordinating it to the mortgage, or rely upon such recital, the evidence does show that it was represented to him, and he relied upon the fact that the mortgage was a first lien on the property, and the abstract company to which he had intrusted the search of title, as his agent, must have known of and relied upon such recital in passing the title. The certificate of title thus furnished at the request of the plaintiff contains a notation of this trust deed, and of the recital making it subject to the mortgage. The collateral note executed to plaintiff by Mrs. Giles on this loan recites that the collateral security is a note for $6,000, secured by first mortgage on this property. The Los Angeles Title Insurance Company, which was handling the escrow in the matter of this loan for plaintiff, took the precaution of calling upon the original parties to the note to state if there were any outstanding equities against the note. To these inquiries Charlton, the maker of the note, replied that he had "received the consideration for the full face value of the note," and that there were no legal defenses to it. Plaintiff's assignor answered that no additional advances had been made upon the note in addition to the original amount, and that "the interest on said note is paid to October 25, 1916," the date of assignment to

plaintiff. Our attention is called to an alleged erasure of the word "no" in the statement of the mortgagor, Charlton, that "there are no legal defenses to the note," but the record is so unintelligible as to whether such erasure was actually made, or, if so, why or when or by whom, that we cannot give it any consideration here, though it might have some weight as notice to put the plaintiff on inquiry of possible equities, if the erasure existed when the information was received.

The fact that the trial court pointed out in its findings that the plaintiff personally inspected the property covered by the mortgage and estimated its value at not to exceed $2,500 may indicate that it attached some significance to the fact that property of so small a value had been accepted as security for a $6,000 indebtedness. The note might have been accepted without any security at all without being open to suspicion. There might be other collateral security. At any rate, there is nothing in the circumstance to suggest that the transaction was in any way invalid or in bad faith between the original parties.

[4] It is very apparent that the original vendors of this real property were victimized in consenting to deferring their purchase money security to this mortgage, but it was in pursuance of a legitimate business arrangement which was only weak in its fulfillment and not in its purpose. The very object of respondents in inserting in their trust deed the recital of the priority of the mortgage was to enable their vendee to so negotiate the security as to obtain money for the proposed improvements. They could easily have safeguarded themselves by including in the recital a statement of the purpose for which the mortgage security was to be used. As it was, they made a record title which was an invitation to any one without actual notice of the facts to deal with this mortgage in good faith as an unlimited and assignable security. It is not necessary to cite further authorities to the rule that "where one of two innocent persons must suffer by the acts of a third, he by whose negligence it happened, must be the sufferer," than the enactment of this rule into the Codes. Civ. Code, § 3543.

[5, 6] Even if it be true, as the trial court found, that the plaintiff did not in making his loan personally know of or rely upon the recital in the trust deed, as it was probably justified in finding, although the plaintiff attempted to correct his testimony in this respect, it does not follow that, having entered into the transaction in the belief that he was getting a first mortgage, he might not rely upon the fact as it existed, even though he may have based his faith upon something else.

But, as has already been pointed out, the abstract company which he had employed to search the title knew of and relied upon this recital, and he, as he had a right to do, relied upon the abstract company. Respondents object that the certificate of title was not admitted in evidence. It was used on the trial of the case, and appears in the bill of exceptions as part of the evidence submitted on the trial, and must be considered for all purposes to which it is relevant.

[7, 8] Under our view of the conclusive effect of the evidence in this case it is clear that the respondents were estopped, by the recital permitted by them in the trust deed acknowledging the priority of the $6,000 note and mortgage from now attempting to subordinate such security to their claim.

The law covering this case is very aptly set forth in the decision of this court in National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881, and in the decision of the first District Court of Appeal, Division 1, in Burrows v. Durflinger (Cal. App.) 187 Pac. 752, in which latter case a petition for hearing in this court was denied. The facts under which both of these decisions were made are very closely in point with the case before us. While it is recognized in both of these opinions that the notes in question were nonnegotiable, and open to the defense of a failure of consideration in the hands of assignees, yet it is held that such defense was not available to other lien claimants who had expressly and by matter of record acknowledged the priority of the disputed security over their own. This rule is sufficiently fortified by the provisions of section 1962, subdivision 3, of the Code of Civil Procedure, that—

> "Whenever a party has by his declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

As this question of estoppel arose upon respondents' defense to plaintiff's foreclosure, it was not necessary that it should have been pleaded in the complaint.

We cannot imagine what further precautions plaintiff could have been expected to take in protecting himself from defenses to his security than were resorted to in this case. The response made to the inquiries of the abstract company by the maker of the note and mortgage were such as would estop him from any defense, even if it were shown that the erasure claimed had appeared in his response as originally received. The trustee and beneficiaries under the trust deed had already waived, by the very terms of the instrument on which they rely, any preferential right as against this note and mortgage, and there surely was no occasion to verify this solemn declaration.

[9] The plaintiff here is only claiming under this note and mortgage to the extent of the loan and costs incident thereto which it

secures, and his priority of right, of course, only extends to the protection of such claim.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.

185 Cal. 43

CUTHBERT et al. v. WOODMAN, Mayor, et al. (L. A. 6359.)

(Supreme Court of California. Feb. 4, 1921.)

1. Municipal corporations 🔑122(2)—Presumption indulged in favor of validity of ordinance.

Every presumption is indulged in favor of the validity of a city ordinance, and it must be very clearly obnoxious to objections made before it will be declared invalid by the courts.

2. Constitutional law 🔑48—Construction of statute adopted which upholds validity.

A court, between two permissible constructions of a statute, will always give the construction which upholds its validity.

3. Statutes 🔑184—Construction adopted which will give effect to legislative purpose.

If there is room for two constructions of a statute, both equally reasonable, the court must, in deference to the legislative act, adopt the construction which will give effect to the obvious legislative purpose.

4. Licenses 🔑7(2)—Ordinance relating to licensing of collection agencies construed.

An ordinance of Los Angeles, imposing license tax as follows: "For every person, firm or corporation conducting, managing or carrying on the business of collecting debts, claims or demands and known as a collection agency, $100 per year, payable quarterly"—intended payment of license by all persons and firms engaged in the collection business, and there was no intent to distinguish between persons known as a collection agency and those in the same line of business and not known as a collection agency.

5. Licenses 🔑7(1)—Ordinance held not void for not specifying proportion of license payable each quarter.

A section of a city ordinance of Los Angeles imposing a license tax for every person, firm, or corporation carrying on the business of collecting debts, and known as a collection agency, $100 per year payable quarterly," is not void by reason of its failure to specify what proportion of the $100 per annum shall be payable each quarter, since no intelligent person would question that the quarterly payments called for were equal quarterly payments.

Department 2.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by W. R. Cuthbert and others against F. T. Woodman, Mayor of the City of Los Angeles, and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Charles S. Burnell, City Atty., and Wm. P. Mealey, Asst. City Atty., both of Los Angeles, for appellants.

Haas & Dunnigan, of Los Angeles, for respondents.

SLOANE, J. The city of Los Angeles has appealed from a judgment of the superior court of the county of Los Angeles, enjoining the mayor, chief of police, and members of the council of said city from enforcing section 54, and the penalties pertaining thereto, of an ordinance of the city providing for licensing and regulating certain trades, professions, and occupations.

The section in question imposes a license tax as follows:

> "Sec. 54. For every person, firm or corporation conducting, managing or carrying on the business of collecting debts, claims or demands and known as a collection agency, $100 per year, payable quarterly."

The judgment of the court is based upon a finding that this section of the ordinance is "unjust, unreasonable, unconstitutional, discriminating and void," for the reason that it singles out for the imposition of the tax those "known as a collection agency," without stating by whom they shall be so known, and that it attempts to distinguish between persons known as a collection agency and those in the same line of business who are not known as a collection agency, and that said ordinance fixes a license tax for engaging in such business, of $100 per annum payable quarterly, without specifying what proportion of said $100 per annum shall be payable each quarter.

In order not to reflect too severely upon the perspicuity of Los Angeles business men, it may be conceded that the section complained of is not as free from ambiguity in its literal and grammatical construction as it might be, but in behalf of the legal acumen of Los Angeles lawmakers, we are constrained to hold that the natural and obvious meaning of the provision is not so obscure as to render it unjust, discriminating, unconstitutional, or void.

[1-3] The matter at issue here is not the construction of a penal indictment or information, but the interpretation of a statute, and the law in such a case indulges every presumption in favor of the validity of the enactment. A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and a court, between two permissible constructions of a statute, will always give the construction which upholds its validity.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

If there is room for two constructions, both equally reasonable, the court must, in deference to the legislative act, adopt the construction which will give effect to the obvious legislative purpose. Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527; Ex parte Anixter, 166 Cal. 762, 138 Pac. 353; Grenada, etc., Supervisors v. Brogden, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. Ed. 704; Golden & Co. v. Justice Court, 23 Cal. App. 788, 140 Pac. 49.

Now it is quite clear that what the city council was attempting to do in framing this section, and the thing they legitimately could do, was to impose a license tax upon persons engaged in the business of conducting a collection agency, as contradistinguished from those who might as an incident of their business casually make collections, as, for instance, lawyers or bankers, who might be subject to taxation under some other classification; and it would be a reflection upon the legislative intelligence of the council to presume that they were attempting to limit the application of this law to persons in the collection agency business, but only to those so engaged who were known either to their intimate friends or to the general public as conducting that line of business.

[4] With these conditions in view, is it not very reasonable and logical to construe this section as though it read: "For every person, firm or corporation managing or carrying on the business known as a collection agency, and consisting of the collection of debts, claims or demands?" There is nothing much more common in the English language than the qualification of some more or less technical or even general name or descriptive term by reference to the common designation by which it is known. The word "known" is used in this connection as synonymous with "called" or "designated." Indeed, in this instance, the words "known as a collection agency" might be rejected as surplusage, as the designation of those subject to the tax as "persons conducting the business of collecting debts, claims and demands" would sufficiently identify the particular class of business intended.

[5] The same rule of construction applies to the part of the ordinance fixing the license rate at $100 per annum "payable quarterly." The requirement as to quarterly payments is indefinite and incomplete as a matter of literal accuracy, but no intelligent person, in view of common usage, would question for a moment that the quarterly payments called for were equal quarterly payments. In any event, it is difficult to see how the complainants could be made to suffer by the ambiguity. If all they are called upon to do is to pay the $100 tax in four separate payments without the proportionate amounts of each payment being fixed, it certainly would be optional with them to divide them up into installments most convenient to them, aggregating $100 per annum.

The judgment is reversed.

We concur: WILBUR, J.; LENNON, J.

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185 Cal. 8

In re ROSS' ESTATE. (L. A. 6604.)

(Supreme Court of California. Feb. 3, 1921. Rehearing Denied March 3, 1921.)

1. Descent and distribution 🔑14—Separate property of husband descends to his heirs on surviving wife's death.

Separate property of husband, on subsequent death of wife, who inherited such property, descended to husband's surviving brother and to the descendants of husband's deceased brothers and sisters, under Civ. Code, § 1386, subd. 8.

2. Executors and administrators 🔑314(12)—Judgment reversing order directing final distribution held not to preclude filing of new claim.

Supreme Court's judgment reversing order of distribution and remanding the case for hearing on the administrator's petition for final distribution, without directing the manner of distribution, and without prohibiting a claimant from appearing on the new hearing and setting up a claim, did not preclude a claimant who had not filed claim at the previous hearing from filing claim prior to the new hearing.

3. Executors and administrators 🔑314(7)—Claimant failing to object to petition for distribution prior to hearing not absolutely barred.

Under Code Civ. Proc. § 1668, requiring objections to petition for distribution to be filed at the time fixed for the hearing, or to which the hearing may be postponed, does not absolutely bar the right of a claimant who has failed to file his written objections prior to the actual commencement of a hearing, but merely empowers the court, in the exercise of a sound discretion, to refuse to allow the filing of such objection after the commencement and during the course of the actual hearing.

4. Executors and administrators 🔑314(12)—Objections to petition for distribution filed prior to new hearing following remand are in time.

Under Code Civ. Proc. § 1668, providing that any person interested in the estate may appear and contest the petition for decree of distribution "at the time fixed for the hearing or to which the hearing may be postponed" by filing written objections thereto, heirs had a right to file objections to administrator's petition prior to the commencement of the new hearing held pursuant to Supreme Court's judgment remanding the matter, notwithstanding failure to file objections prior to original hearing; the effect of the Supreme Court's judgment being to postpone the hearing.

5. Executors and administrators 🔑314(12)—Laches inapplicable to filing of objections to petition for distribution after remand by appellate court.

Delay in filing objections to petition for final distribution until the order for distribution has been reversed by the Supreme Court and a new hearing ordered did not preclude heirs from asserting their claims at such new hearing; the doctrine of laches being inapplicable in such case.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

In the matter of the Estate of Elizabeth B. Ross, deceased. From an order and decree of final distribution, Mary E. Ross and others appeal. Reversed.

See, also, 179 Cal. 358, 182 Pac. 303; 180 Cal. 651, 182 Pac. 752.

Louis P. Boardman and Philip C. Boardman, both of San Francisco, and Kemp & Clewett, of Los Angeles, for appellants.

J. H. Merriam, of Pasadena, and Robert B. Murphy, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an appeal by a large number of claimants from an order and decree of final distribution. The petition of these claimants, who alleged a right of inheritance under subdivision 8 of section 1386, Civil Code, was stricken from the files by the superior court, and whether or not the court erred in doing this is the only question necessary to be considered on this appeal.

The material facts down to a certain point were stated in the opinion filed July 1, 1919, in Estate of Ross (L. A. 5864) 180 Cal. 643, 182 Pac. 755, as follows:

"On May 9, 1917, this court affirmed the judgment in favor of plaintiff in the action of said Maggie G. Steinberger against said administrator, one Scanlan, and various persons found to be the only heirs of deceased, decreeing that subject to the debts, charges, and expenses of administration of said estate, said Maggie G. Steinberger was entitled to all the property of the estate by virtue of a contract between herself and her stepfather and deceased, under which she was to be the sole heir of deceased. See Steinberger v. Young, 175 Cal. 81, 165 Pac. 432. After the affirmance of this judgment, viz., on June 23, 1917, the administrator presented his final account, together with his petition for final distribution of the estate, as is authorized by the law. Code Civ. Proc. §§ 1634, 1665; Estate of Sheid, 122 Cal. 528, 531, 55 Pac. 328. The estate proceeding had then been pending for over seven years, and the estate was in condition for final settlement and distribution. By the petition distribution was sought in favor of said Maggie G. Steinberger, according to the judgment in Steinberger v. Young, supra, all of the next of kin of deceased, alleged to constitute her only heirs, having been parties defendant in that action and their rights as heirs at law being barred by the judgment therein. Notice of the time fixed for settlement of the account and hearing of the petition for distribution was duly given. When the matter came on for hearing the only appearance in opposition was that of Maggie G. Steinberger, who, claiming to be entitled to all of the distributable assets, as alleged by the administrator, objected to various items of his account. The matter was heard by the court, evidence being received both as to the account and as to the petition for distribution; the evidence on distribution being to the effect that the only heirs at law were the next of kin of deceased who were parties defendant in Steinberger v. Young, supra. On February 18, 1918, the court made an order settling the final account, allowing certain credits which had been objected to by Maggie Steinberger.

"Two days later, February 20, 1918, one Scanlan appeared, opposing distribution pending payment to him of a claim of $8,000, alleged to be due under a compromise with the administrator, approved by the probate court, and seeking payment of this claim. A hearing was had on this and on March 15, 1918, an order was made overruling Scanlan's opposition and denying his petition. On the same day Maggie Steinberger appealed from the portions of the order of settlement of the account disallowing her objections to certain specified items thereof. The hearing on the petition for distribution having been regularly continued from time to time and finally to March 16, 1918, and there being apparently no further bar to final distribution to Maggie Steinberger, except possibly her own appeal from portions of the order settling the administrator's final account, a new claimant made her first appearance on the field of action, viz., Mary E. Ross, the surviving widow of one Albert E. Ross, deceased, who was alleged to have been a brother of R. E. Ross, the deceased husband of deceased, and to have survived such deceased husband of deceased. On March 16, 1918, more than eight years after the institution of the proceeding for the settlement of the estate of deceased, and nearly nine months after the filing of the final account and petition for distribution, and after the hearing on such settlement and petition for distribution was practically completed, she appeared at the hearing on distribution, and opposing distribution to Maggie G. Steinberger, instituted the proceeding provided for by section 1664 of the Code of Civil Procedure, by filing a petition praying the court to ascertain and declare in the manner provided by that section the rights of all persons to the estate and all interests therein, and to whom distribution should be made. The theory of her claim to heirship was substantially that all of the property of deceased was the same property, 'or the proceeds or avails thereof,' which she, the deceased, had received under a decree of final distribution made in the year 1885 in the matter of the estate of her deceased husband, R. E. Ross; that all property received by her under such decree was separate property of said R. E. Ross at the time of his death; that deceased having died intestate, leaving no issue, the property of deceased should go to next of kin of her deceased husband, R. E. Ross, who also left no issue, as provided in subdivision 8 of section 1386 of the Civil Code; that claimant Mary E. Ross, the surviving wife of Albert E. Ross, who was a surviving brother of R. E. Ross, and various other unnamed persons who were heirs at law of R. E. Ross, none of whom has appeared herein, were entitled to share in this estate as heirs, by virtue of the provisions of subdivision 8 of section 1386. Neither said Mary E. Ross nor any of the next of kin of the deceased husband of deceased, R. E. Ross, if any there were surviving, were parties to the action of Steinberger v. Young, and it is conceded that their rights, if any they had, were not concluded by the judgment in such action.

"Upon the filing of this petition, the hearing on final distribution was continued to April 2, 1918, at which time Maggie G. Steinberger made a motion for an order dismissing the petition of Mary E. Ross, or such other order as might be proper, on the ground substantially that the estate was then in condition for distribution and would be unreasonably and unnecessarily delayed if deferred pending the proceeding provided by section 1664 of the Code of Civil Procedure, and that the question of the heirship of Mary E. Ross and all other persons should be heard and determined on the hearing on the pending petition for distribution. The court having heard the motion, made an order on May 24, 1918, denying the motion to dismiss the petition of Mary E. Ross, and also denying the petition for final distribution, without prejudice, however, to the rights of Maggie G. Steinberger. This is the order appealed from by the latter. At the same time the court made an order on the petition of Mary E. Ross directing the notice required by section 1664 of the Code of Civil Procedure. In the meantime, viz., on May 3, 1918, Robert E. R. Scanlan had taken an appeal from the order denying his claim. This is the appeal entitled Estate of Ross, post, p. 651, 182 Pac. 752; the order appealed from being affirmed. It may also be noted that the appeal of Maggie G. Steinberger from parts of the order settling the account was decided December 5, 1918 (Estate of Ross, 179 Cal. 359, 182 Pac. 303, 56 Cal. Dec. 521), and that all questions in regard to such account are now finally settled."

In that opinion it was further shown that the petition of Mary E. Ross stated no right of inheritance in her, under subdivision 8 of section 1386, Civil Code, she being simply the widow of a deceased brother of the deceased spouse of Elizabeth B. Ross, and therefore not within the terms of said subdivision 8 of section 1386, Civil Code. Nor was any sufficient showing made as to the rights of the unnamed claimants, who, she alleged, were also entitled to inherit under said subdivision.

Upon that appeal, the order was reversed and the cause remanded for proceedings not inconsistent with the views expressed in the opinion.

Immediately upon the going down of the remittitur on that appeal, there was filed, without leave of court, a document styled "Answer and objections to petition of Milton K. Young, as administrator for decedent," on behalf of said Mary E. Ross, not as widow of Albert E. Ross, a deceased brother of the deceased spouse of Elizabeth B. Ross (her former position), but as assignee of two children of said deceased brother; and also on behalf of a brother of said R. E. Ross, the deceased spouse, and various children of deceased brothers and sisters of said R. E. Ross. These persons were alleged to be the heirs of the deceased Elizabeth B. Ross under subdivision 8 of section 1386, Civil Code, on the theory that all of her property was the separate property of her deceased spouse at the time of his death, and came to her from him under the decree of distribution in his estate. The allegation of facts in this behalf was as follows:

> "That these contestants are informed and believe, and upon such information and belief so state and represent to the court, that all the property, both real and personal, which comprised the estate of said R. E. Ross, deceased, and which was distributed under and by said decree of final distribution of his estate, as aforesaid, was his separate property, and that all the property, both real and personal, which was distributed to said Elizabeth B. Ross, deceased, as the surviving widow of said R. E. Ross, deceased, under said decree of final distribution of his estate, was likewise the separate property of said R. E. Ross, deceased, and that all the property, both real and personal, which now comprises and is designated and described in said petition of said administrator as the estate of the above-named Elizabeth B. Ross, deceased, was and is the same property, or the proceeds or avails thereof, which was distributed to said Elizabeth B. Ross, deceased, as the surviving widow of said R. E. Ross, deceased, and received by her under and by said decree of final distribution of his estate."

[1] If the facts were as alleged herein, all of the property of the estate of Elizabeth B. Ross, deceased, was succeeded to under subdivision 8 of section 1386, Civil Code, by the surviving brother of said R. E. Ross and the descendants of his deceased brothers and sisters.

Motion was thereupon made in behalf of Maggie G. Steinberger that the document so filed be stricken from the files on the grounds that the same was not filed within the time prescribed by section 1668, Code of Civil Procedure, nor within the time allowed by law for the appearance of persons claiming to be heirs or entitled to distribution; that the document was filed more than 24 months after the time fixed for the hearing on the administrator's petition for distribution and more than 14 months after the time to which hearing was last postponed and the hearing completed; that the document was filed without any leave of court; and that the filing and permitting the same to remain on file is not in conformity with and is inconsistent with the judgment of the Supreme Court, rendered on the appeal in Estate of Ross (L. A. 5864) supra. The motion was argued and submitted to the court upon the affidavit of one of the attorneys as to the prior proceedings in the matter, the records and files in the matter of the estate of deceased, and the decision of this court on the appeal in the matter of the estate. The motion was thereupon granted, and distribution ordered to Maggie G. Steinberger.

[2] We see no force in the claim that consideration of the objections to distribution to Maggie G. Steinberger filed on behalf of Mary E. Ross et al. would have been inconsistent with the judgment of this court rendered on the appeal in Estate of Ross (L. A. 5864) supra, or with the views expressed in the opinion filed in rendering such judgment. In that matter the lower court had denied the administrator's petition for distribution because of the initiation by Mrs. Ross of the proceeding provided by section 1664, Code of Civil Procedure, for the determination of heirship, and was about to go ahead with the heirship proceeding. We held that under the circumstances the superior court should not have entertained the petition of Mrs. Ross as one under section 1664, Code of Civil Procedure, and that the utmost effect to be given to it was to treat it as a claim to be determined in the pending proceeding for distribution; and, further, that the trial court erred in terminating the pending proceeding for distribution by denying the application of the administrator for distribution. We therefore reversed the order and remanded the matter for proceedings not inconsistent with our expression of views. There was no direction as to the manner of distribution or that the same must be determined on the issues theretofore made or the evidence theretofore received. The effect of this was to send the matter back for hearing on the administrator's petition for final distribution, which, naturally, would have to be from the very beginning and regardless of the evidence that had been introduced on the former hearing. That hearing had been concluded and an improper order made therein, which was reversed, and in substance and effect a new hearing ordered. The opinion contains nothing precluding any possible claimant on distribution from appearing on the new hearing and setting up his or her claims. Whether or not upon the record then before us we might properly have ordered the lower court to make distribution to Maggie G. Steinberger upon the evidence adduced on the former hearing, we did not do so.

[3, 4] As to the claim that Mrs. Ross' objections and petition were not filed within the time prescribed by section 1668, Code of Civil Procedure, nor within the time allowed by law for the appearance of persons claiming to be heirs or entitled to distribution, the only provision of statute which can be claimed to bear on the matter of limiting the time for such appearance is one contained in section 1668, Code of Civil Procedure. That section, after providing that the decree of distribution may be made on the petition of the executor or administrator or any person interested in the estate, that when such a petition is filed the clerk must set the same for hearing and give notice by posting, and that on the hearing the judge may order further notice to be given, provides:

> "At the time fixed for the hearing, or to which the hearing may be postponed, any person interested in the estate may appear and contest the petition by filing written objections thereto."

This sentence was incorporated in the section by amendment in 1907 (St. 1907, p. 993), there being prior to this time no express statutory provision for written objections or the time of filing thereof, and it is claimed that thereby the time within which written objections to a petition for final distribution may be filed is definitely prescribed, and that unless presented within such time they must be ignored. It is further urged that the language used requires the filing to be before the actual commencement of the hearing. We are of the opinion that the provision is not to be construed as absolutely barring the right of a claimant to be heard on written objections if he fails to file the same prior to the actual commencement of a hearing on a petition for distribution. It is to be observed that there is no provision for the entry of a default of all not appearing, as in the proceeding under section 1664, Code of Civil Procedure, to determine heirship, and no express provision which may fairly be construed as effectuating a forfeiture or barring of the claim of one whose claim has not been presented prior to the actual commencement of the hearing on such a petition. The plain object of the amendment was to provide a statutory method by which issues as to conflicting claims of right on distribution might be made, and, of course, in the nature of things the issues should be made prior to the actual commencement of the hearing. But there is nothing in the statute to preclude the trial court from allowing such objections to be filed at any time during the course of the hearing when it is made to appear that the proper protection of the rights of apparently bona fide claimants so demand. It seems to us that the utmost effect that can be given to the provision in line with respondent's contention is that the trial court may, in the exercise of a sound discretion, refuse to allow the filing of such objection, or the remaining of the same on file, when attempted to be filed after the commencement and during the course of the actual hearing. What would constitute an abuse of this discretion we are not called upon here to consider, for we think the objections were filed within the time prescribed by the statute, i. e., prior to the time to which "the hearing" was postponed. Satisfied as we are that the provision as to time was simply in the interest of an orderly procedure to enable the issues to be tried on the hearing to be clearly defined when the hearing commences, and not in the nature of a statute of limitations, the fact that there was a partial hearing on the administrator's petition before the objections were filed is immaterial under the circumstances of this case. That hearing was ineffective for any purpose, in so far as distribution was concerned; the trial court concluding that in view of the initiation of a proceeding to determine heirship under section 1664, Code of Civil Procedure, the distribution proceeding could not be further heard, and therefore denying the administrator's petition and terminating the proceeding. If this order had been affirmed, undoubtedly the statute could not be held to bar these claimants from appearing upon any subsequent petition for distribution that might be filed. The effect of our reversal of this action of the trial court was to require a new hearing to be had upon that petition, just as though no hearing had been had, and prior to the commencement of such hearing the objections were filed. In the meantime the hearing upon the administrator's petition had been as effectually postponed as it would have been under an express order of postponement. We are satisfied that in so far as the statutory provision invoked is concerned, a reasonable construction requires us to hold that the objections filed prior to the commencement of the hearing ordered by this court were filed in time.

From what we have said it follows that the objection that the objections were filed without leave of court is without force. No such permission was essential.

In the formal decree of distribution made after the making of the order striking out the answer and objections the lower court in its recitals stated that "said answer and objections was not filed within the time allowed by law, and that said contestants are guilty of laches in failing so to do," although laches was not one of the grounds upon which the motion to strike was based. It is urged that we have here a finding of laches on the part of the appellants in presenting their claim, and that this finding is sufficiently sustained by the proofs and sufficiently justifies the action of the court in refusing to give them a hearing. As we have noted, this recital was inserted in the formal decree after the order granting the motions to strike had been made. The laches found is declared to be in failing to file the answer and objections "within the time allowed by law." Certainly no other laches was found by the trial court, and in view of our conclusion that they were filed within the time allowed by law, the finding of laches furnishes no support to the decree of distribution.

[5] But, regardless of this, we see no foundation in the facts for a conclusion that appellants were guilty of laches in presenting their claims for adjudication. As we have seen, the answer and objections were filed by appellants within the time allowed by law, and alleged matters which, if true, made them the successors of the deceased as to all the property at the moment of the death of the deceased. It is conceded that they are not bound by the decree in the action brought by Maggie G. Steinberger against the administrator and the relatives of deceased under which she claims to be entitled to have distributed to her all the property of the estate. If their allegations be true they are the sole "heirs" of deceased, in view of the provisions of subdivision 8 of section 1386, Civil Code. On the other hand, respondent claims to be entitled to have all the property distributed to her on the theory that the next of kin of deceased against whom she recovered judgment in her action in equity constituted all of the legal heirs of deceased and succeeded to the property at her death. We thus have a contest, on distribution, as to who are the heirs of deceased with relation to the property left by her, under our statutes of succession, and the claims as to the respective rights were presented and filed within the time allowed by law, for determination by the court in the proceeding provided by statute for that very purpose. We do not see how the equitable doctrine of laches can have any application under such circumstances. A proceeding on distribution is not in the nature of a suit between party and party in which one seeks to recover something alleged to be withheld by another, but is in the nature of a proceeding in rem, provided for the purpose of judicially decreeing the succession to the property of a deceased person. A procedure is provided under which any person claiming a right of succession may appear and present his claim of succession, and upon the hearing the court must determine in whom the property of the deceased has vested. The claimants in such a proceeding occupy no such relation one to the other as may fairly be held to impose upon one in favor of another any obligation of diligence in the matter of presenting his claim. All claimants are upon an equal footing in this regard, required only to present their claims at the time and in the manner required by law. We are speaking, of course, of cases of mere delay, and without regard to a possible situation in which it might be held that one was estopped to urge his claim as against another. The doctrine of laches has been held applicable in certain proceedings in probate in this state, but always, so far as we have found, where the proceeding was in its nature one against parties, and where it might fairly be held that the obligation rested on the claimant in favor of such parties to diligently assert his claim. On principle we see

no room for its application in any other case. The cases in this state, such as Estate of Crosby, 55 Cal. 574, 586, hold it applicable in proceedings for the sale of real property of a decedent for the payment of debts of the deceased, and this conclusion is reached upon the theory, as stated in Estate of Hume, 179 Cal. 341, 176 Pac. 681, 682, that—

> "An application to sell real estate of a decedent is a proceeding against the heirs in whom the property vested at the death of the ancestor."

See, also, Estate of Freud, 131 Cal. 673, 63 Pac. 1080, 82 Am. St. Rep. 407.

Much as we deplore the protracted and varied litigation in the matter of this estate, we see no good answer to the contention that the appellants were entitled to have their claims of heirship considered on the hearing of the petition for distribution.

The order and decree appealed from is reversed.

We concur: OLNEY, J.; SHAW, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

185 Cal. 1

VAN CALBERGH v. EASTON et al.
(L. A. 6066.)

(Supreme Court of California. Feb. 2, 1921. Rehearing Denied March 3, 1921.)

Adverse possession ⚷57—Evidence held insufficient to prove continuous possession for five years preceding action.

In action to quiet title in which plaintiff claimed to have acquired title by adverse possession, evidence *held* to warrant assumption by Supreme Court on plaintiff's appeal from judgment for defendants that trial court found that plaintiff did not continually use, improve, or cultivate the land during the five years preceding the commencement of the action.

Department 1.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by E. Van Calbergh against Alice A. Easton and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank C. Prescott and Prescott & Prescott, all of Los Angeles, for appellant.

Charles Lantz, Howard F. Shepherd, and Samuel M. Garroway, all of Los Angeles, for respondents.

LAWLOR, J. Plaintiff brought this action against Alice A. Easton, and several others under fictitious names, to quiet title to lot 22 in block 3 of the subdivision of the south half of lot 5 in block F of Hancock's survey in the city of Los Angeles.

It was alleged that for five years immediately preceding the commencement of this action plaintiff has been the owner, in possession, and has paid the taxes on the property, that defendants claim and assert interests adverse to plaintiff, and that they are without any right whatever, "and that the said defendants have not * * * any estate, right, title or interest * * * in said land." The defendants—Alice A. Easton, appearing by J. M. Moyer, her successor in interest, and said J. M. Moyer, one of those sued under a fictitious name—for answer, and by way of cross-complaint deny that plaintiff is the owner or that he "has been in possession of said property, accompanied by payment of taxes thereon for any period of five years, admit that * * * J. M. Moyer claims an estate and interest in said property adversely to the plaintiff," and allege that J. M. Moyer is the owner in fee simple of said lot of land, and that neither the plaintiff nor the said other defendants own any estate or interest whatever therein. The allegations of the cross-complaint were denied.

In support of his claim of title to lot 22 plaintiff offered and there were received in evidence certain deeds and tax receipts for the years 1908, 1909, 1910, and 1911, and produced a number of witnesses. Among the deeds admitted in evidence was one from W. B. Judson and others to one C. D. Warden, dated and recorded September 30, 1907; a quitclaim deed from C. D. Warden to A. Lunnim, dated November 1, 1907, and recorded November 19, 1907; and a deed from C. D. Warden and his wife to the plaintiff, dated November 6, 1907, which was recorded on April 27, 1908. On November 25, 1907, the Southern California Title & Abstract Company, of which C. D. Warden was manager, issued to plaintiff a certificate of title to lot 22.

It was stipulated that on April 22, 1889, the fee simple to lot 22 vested in Alice A. Easton. It was shown that on December 30, 1909, W. J. Davis conveyed the property to J. M. Moyer, the deed being recorded May 20, 1911. The wife of the grantor joined in the deed. A decree quieting J. M. Moyer's title as against Alice A. Easton and others was entered on July 8, 1910.

J. M. Moyer produced certain tax receipts, which were admitted in evidence, showing payments made by W. J. Davis on January 27, 1908, and April 27, 1908, and for the second installment of the year 1911, paid by J. M. Moyer on February 7, 1912.

The cause was tried by the court, a jury having been waived. The court made findings of fact and conclusions of law. It was found that J. M. Moyer, as successor in interest of Alice A. Easton, was the owner in fee simple and entitled to the possession of the lot, and that "plaintiff has no estate, right, title, or interest in or lien upon the property or any portion of said property." The court made and entered a decree accordingly. A motion for a new trial was interposed and denied. The plaintiff appeals.

The court made no findings on the deed from C. D. Warden to plaintiff, and the latter makes no point on this, nor does he assert on appeal that he has title to lot 22 by virtue of such conveyance. He does, however, claim that he has acquired title to such property by adverse possession.

This is the second trial of the action. On the former trial judgment went for the plaintiff. The defendant appealed to the District Court of Appeal for the Second Appellate District, and the judgment was reversed on the grounds that plaintiff had failed to prove possession for the time required to establish title by prescription, and that he had failed to prove payment of all the taxes levied and assessed against the property during the period in which he claimed to have held possession thereof. A petition for hearing was filed in this court and denied, without, however, "approving the portion of the opinion relative to the matter of the payment of the second installment of taxes for the year 1911." Van Calbergh v. Easton, 32 Cal. App. 796, 800, 164 Pac. 1113, 1115.

The plaintiff claims that continuously for five years next preceding the filing of the complaint he had occupied and used the property, and that he "has proved an undisputed adverse possession and payment of all taxes for five years." No specific finding was made as to when plaintiff first entered upon lot 22, and we shall first consider whether it is to be implied the court found plaintiff was not in possession of the lot for five years next preceding the bringing of the action.

The complaint was filed on November 12, 1912. Plaintiff testified:

> That he went to the abstract company, met Warden there, and purchased lot 22 from him, having been told by a stranger that Warden was the owner thereof. "He told me he had the lot for sale. I paid Mr. Warden for the deed in cash money. I did not draw it from the bank. I had it on hand at the time. I did not keep any account or records of business transactions at that time. Q. Have you any record of when the fund came into your hands, or when you paid it out? A. No; nothing like that. Q. How long after you paid the money to Mr. Warden did you get the deed? A. I think I got it right after. Q. What do you mean right after? A. I don't quite recollect if it was the next day; I think it was the next day. Q. Did you get the certificate or abstract of title with the deed? A. No, sir. * * * I received the deed * * * about November; it must have been about the 6th or 7th, 1907, that I received it."

On the former trial, plaintiff stated that he received the deed in the "latter part of November." We quote from the decision on the former appeal:

> "The deed from Warden to the plaintiff was introduced in evidence. It bore date of November 6, 1907, but the plaintiff testified he did not receive the deed until the latter part of November, 1907. By that testimony we take it to mean that the transaction was completed, and the deed delivered in the latter part of 1907. Plaintiff testified that he immediately took possession of the lot after receiving the deed, built a fence around it, and had used it continuously up to the date of the trial which occurred in March, 1914."

When plaintiff's attention was called to the variance in his testimony as to when he received the deed, he made several indefinite statements, but finally said it was delivered on the date it bears. When asked why he was so positive after a lapse of 4 or 5 years between the trials, and more than 10 years after the transaction, he replied he did not refresh his "memory at that time in court when I happened to say that."

It also appeared that plaintiff bought lot 22 and paid the purchase price without any examination of title; that he did not get a certificate thereof until November 25th, 19 days after he claimed he received the deed and took possession, and that the conveyance was not recorded until April 27th of the following year. There is nothing in the testimony of the other witnesses for plaintiff to indicate that any of them had any knowledge as to when he first took possession of the land, and, in view of the variant statements of plaintiff himself before he finally declared he made the entry on November 6th, we think it clear the court found he did not assume possession before "the latter part of November"—the time fixed by him on the former trial—or at least not prior to November 12th.

It was said in Breeze v. Brooks, 97 Cal. 72, 77, 31 Pac. 742, 744 (22 L. R. A. 257):

> "The findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering such judgment. The trial court in this case had before it the opinion of this court on the former appeal, and must be deemed to have made its findings of fact from the evidence before it in the light of what was then held to be essential to a recovery by the plaintiffs."

See, also, Warren v. Hopkins, 110 Cal. 506, 512, 42 Pac. 986, and Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 Pac. 57.

And in the absence of a finding to the contrary it must be assumed the court found plaintiff did not inclose, improve, or cultivate lot 22 for the period of five years next succeeding November 12, 1907. He testified that he first saw the lot when he went into that neighborhood in June, 1905. At that time he bought lot 21 adjoining lot 22 on the east. He built a house on lot 21 in 1906 and has been living there with his wife and some relatives of hers ever since. It is also suggested in plaintiff's brief that he acquired lot 20 to the east of lots 21 and 22, but when he did so does not appear. He also testified:

> That after receiving the deed he, with the aid of his brother-in-law and one of the help, leveled up some knolls and filled in some holes on the lot, and cut off some heavy brush. "I began to do that from the 6th of November." He used to stake out his horses on the lot. Besides leveling off the lot he made some chicken coops and raised vegetables for the kitchen. He continued using the lot for chickens right along; "I should judge five years." After he entered upon the lot he constructed a fence; "I guess it must have been six or seven or eight months—something like that."

George W. Barr testified:

> That he had lived in the same neighborhood as plaintiff since 1909; that the lots on each side of plaintiff's house had been inclosed all of the time he had lived in the neighborhood; that plaintiff has been using the lot for pasturing his horse and chickens; that he had no house on lot 22. "He has kept poultry there since disposing of his horse. There is no chicken house on that lot. The chickens just ranged over it. There was no wire fence that I know of. I believe there was nothing to keep the chickens on that particular lot."

Mrs. C. F. Stein testified:

> "I have known plaintiff since 1909, since we moved over there. * * * He has a vacant lot on each side of his residence. The home place of Mr. Calbergh, where he lives, is occupied by a house and inclosed by a fence. The lot west of that between his house and the river, as far as I remember it, has been inclosed on the side and the back."

She also testified that horses were pastured on the lot.

Mrs. M. Bretz testified:

> That she was living in the neighborhood with her family when plaintiff first came there. "We built first, and he came about two years afterwards. That would be in 1906 is my recollection. I know he has made use of the lots on east side of him. He had horses and chickens, and he built a fence around on each side. * * * He has had an inclosure on the lot to the west. * * * He had a wooden fence around the lot on the west side. That fence was put in about two years after he moved into his own house, nearly as I can remember. * * * He had his horses and chickens there on the west side of his house."

John A. W. Sterlzriede testified he had known the plaintiff about 11 years, and that the plaintiff occupied and made use of and has had horses on lot 22. This witness, like the others, was not definite as to when the plaintiff first entered on lot 22.

It appears then that, while these witnesses testified to a partial enclosure of lot 22, and that plaintiff had possession and improved, used, and cultivated the land at specified times during the statutory period of five years, no one of them testified, nor is there in the entire testimony considered together any foundation for an inference, that before November 12, 1907, he took possession and for five years thereafter continuously used, improved or cultivated lot 22. The determination of this issue, therefore, must rest alone on the testimony of plaintiff himself that he began work on lot 22 on "November 6, 1907," and in the face of what we had said as to when he first entered upon the property it must be held that the court resolved such testimony against him.

Having disposed of plaintiff's contentions as to the first two elements of his asserted adverse possession, it becomes unnecessary to consider the remaining question whether the taxes were paid by plaintiff for five years next preceding the commencement of the action, or to pass upon the assignments of error in rulings on evidence.

The defendants moved to dismiss the appeal, but as we have reached the conclusion that the judgment should be affirmed on the merits, it is not necessary to consider the motion.

The judgment is affirmed.

I concur: SHAW, J.

OLNEY, J. I concur in the conclusion reached by Justice LAWLOR for the following reasons:

It was conceded at the trial that the defendant was the owner of the record title and the plaintiff's claim was solely one of title by adverse possession. The action was commenced November 12, 1912, but the defendant was not made a party by name nor was summons served upon her so far as appears. So far as appears, she did not become a party until July 25, 1913, when she voluntarily made herself one by filing a so-called answer and cross-complaint. I am not at all certain but that under these circumstances the action was not commenced, so far as the defendant is concerned, until the later date, so that the plaintiff would have been entitled to judgment against her if he had shown adverse possession for the five years preceding that date, even if he failed to show it for the five years preceding the earlier date of the original commencement of the action.

But the finding of the court was a general one against the plaintiff, and implies a finding against the character of the plaintiff's possession as sufficient to give a title by prescription, even if maintained for the statutory period. Even if we assume, therefore, that the plaintiff could depend upon a possession commencing five years before the defendant's appearance in the action, that is, a possession which commenced on or before July 25, 1908, instead of upon one commencing on or before November 12, 1907, the finding cannot be overturned unless the evidence shows unmistakably a possession by the plaintiff after July 25, 1908, of such a character as would ripen into a title by prescription. While perhaps it may be that the evidence was sufficient to have sustained a finding that plaintiff's possession was of that character, yet it did not, I think, show that fact so unmistakably as to preclude a contrary conclusion. This being the situation, the finding of the trial court is final.

184 Cal. 783

SALISBURY v. YAWGER et al. (L. A. 4983.)

(Supreme Court of California. Jan. 31, 1921.)

1. Brokers 🔑31—If broker for seller purchased for himself, no contract of sale resulted.

If the purchaser of a ranch was not acting as the agent for the seller to effect a sale to his uncle, but in his own behalf, there was no meeting of minds, the seller believing to the contrary, and hence no contract of sale.

2. Brokers 🔑31—That broker directed deeds to be executed to himself not notice validating purchase by him.

The mere circumstance that an agent to sell a ranch directed deeds to be executed to himself and wife, and that the seller acquiesced therein, was not such full notice to the seller of the circumstance that the agent was to buy for himself as would validate such purchase.

3. Specific performance 🔑17—Agent to sell not entitled to enforce contract for self.

An agent to sell a ranch who effected sale for the owner was entitled to the agreed commission, but not entitled to enforce the contract of sale in his own behalf.

4. Specific performance 🔑117—Evidence held to amount to variance.

Where the agent to sell land suing for specific performance of the contract effected by him alleged that the contract of sale was between himself and two sellers, defendants, he did not sustain such allegation by proving the contract was between one of such sellers and plaintiff's uncle, or between such seller and plaintiff agent.

5. Specific performance 🔑97(1) — Buyer in default who failed to pay price or secure release of deposit from lien of execution cannot prosecute action.

Where the buyer of land defaulted because of failure to comply with the sellers' demand either for the purchase money due or for the return of the deeds, and no subsequent tender was made by the buyer, who also failed to release the purchase money from lien of an execution, he cannot prosecute action for specific performance.

6. Pleading 🔑8(3)—Allegation of buyer's complaint that contract was just and reasonable insufficient without facts.

In an action for specific performance of contract to sell and convey land under Civ. Code, § 3391, the facts showing the contract was just and reasonable should have been alleged in the buyer's complaint; mere allegation that the contract was just and reasonable being insufficient.

7. Appeal and error 🔑799—Admissions of respondent's attorney as to service of notice sufficient to sustain appeal on motion to dismiss.

Admissions by respondent's attorney in a letter to appellants' attorney before time for appeal had expired that notice of appeal had been served on him by appellants are evidence the appeal was properly taken and sufficient to sustain it on motion to dismiss.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Frank M. Salisbury against Edwin Yawger and others. From judgment for plaintiff, defendants appeal. Reversed.

Allen E. Rogers, Ward, Ward & Ward, and R. C. Springer, all of San Diego, for appellants.

R. D. McPherrin and McPherrin & Nichols, all of Imperial, and Conkling & Brown, of El Centro, for respondent.

PER CURIAM. Plaintiff brought this action to obtain the specific performance of a contract for the sale of 160 acres of land, 80 acres of which stands of record in the name of Edwin Yawger and 80 acres in the name of Altie S. Yawger, the defendants and appellants, and to compel the delivery of deeds, mortgages, and stock certificates held in escrow by the defendant Southern Trust & Savings Bank of San Diego. The record on appeal is prepared under section 953a, Code of Civil Procedure. For sake of brevity Edwin Yawger will be referred to as the "appellant" and the Southern Trust & Savings Bank of San Diego as the "trust company" or the "escrow holder."

On October 19, 1914, appellant signed a written contract of employment wherein he appointed respondent, doing business under the name of the Salisbury Realty Company, as sole agent for 60 days from date for the sale of the 160 acres above referred to and agreed to pay a regular commission of 5 per cent. on the price. The terms of payment therein stated were $1,000 cash, balance $5,500 in five years, and $5,500 in eight years, at 7 per cent. interest, payable semiannually; possession to be given July, 1915. December 2, 1914, the respondent mailed to appellant a check for $50 deposit on the 160 acres, stating that—

> "The $450 is ready for you as soon as your final certificate comes, at which time we will close the deal and draw up the notes, mortgage, and transfer the water stock, etc. The balance of the $1,000 we will fix up the first of March if that is satisfactory with you * * * regarding possession of the ranch we can talk that over at some future date."

On December 5, 1914, appellant wrote two letters to the respondent, in the first of which he states:

> "I am inclosing herewith my formal acceptance of your deposit. I have only the preliminary receipts from the land office. * * * The numbers of these entries are Altie S. Yawger 018689—Edwin Yawger 01126 (E Y's former number 0778). I will be glad to learn more of the particulars of the sale. * * * Hoping to hear from you further and congratulating you on your success, I am, etc."

The formal acceptance above referred to is, in part, as follows:

> "Your favor of the 2d inst. inclosing check for $50.00 is at hand. I am accepting this deposit on the understanding that you have contracted for the sale of the described property for not less than $12,000.00, $500 to be paid on execution of the transfer, $500 to be paid on March 1, 1915, $5,500 to be paid in not less than five years after date of transfer, $5,500 to be paid in not less than eight years after date of transfer. Interest on deferred payments to be paid semiannually at the rate of 7 per cent. per annum. While I cannot at this writing, guarantee the date of purchasers possession earlier than July 1, 1915, I will use my good offices in meeting his desires in this particular."

In view of the contention of the appellant that the relation between appellant and respondent at all times was that of agent and principal, it will be observed that up to this point in the correspondence the appellant is apparently accepting a proposal made to his agent, the plaintiff. In the reply of December 14th the respondent restates the terms of sale in accordance with the letter of appellant, and discloses the fact that respondent's uncle in Oklahoma was the purchaser of the ranch. The language is a follows:

> "Among others who I put the proposition up to in the past month or so, I wrote to my uncle in Oklahoma, who I have been trying to get interested in the valley for several years. I gave him full particulars and told him he had better buy a ranch before he arrived here. If he didn't feel like handling it all I told him I would go in with him on it. He has a large income every month and I have been trying to get him to invest part of it here. A few days before I wrote you I received a letter from him to go ahead on it. * * * I will probably hear further from my uncle in a few days regarding his ideas of handling the place."

It will be observed that this is the first intimation in the correspondence that the agent might become or was interested in the proposition. And the extent of this information is that he had informed his uncle that he would go in with him on it if the uncle did not feel like handling the whole thing. There is no statement, however, that the uncle was unable or unwilling to carry out the contract which the nephew was executing on his behalf. The next letter is January 15, 1915, in which respondent notifies appellant as follows:

> "Have had a couple of telegrams from my uncle and he will be unable to reach here before the last of the month, so I will not keep you waiting on his arrival. Shall I make the notes and mortgage here, or will you have them drawn up and sent over to be signed? * * * If you want to draw them up there make them read Frank M. Salisbury and Mary E. Salisbury, and send them over and we will get the deal closed up."

On January 21st appellant notified respondent that the letter had been mislaid and requesting for a copy. In reply the respondent notified the appellant as follows:

> "You can make the papers out to Frank M. and Mary E. Salisbury. If you will have the Mtg. & notes made out the way you want them & send them over we will send them with the money to the Southern Trust & Savings Bank. The deed you can turn into the bank there. We can close it up at any time. If you would rather wait until my uncle gets here and see if he will make a larger cash payment it will be all right with me. Has the water stock been transferred yet?"

It will be observed that this proposition, in the light of the former correspondence, amounted to the proposal of an arrangement by which the respondent would take the title in himself and his wife for and on behalf of the uncle, hence the proposal that if the appellant desired he could wait until the uncle gets here. On January 29th the appellant wrote the respondent that he had placed in escrow with the trust company the deeds, water stock, notes, and mortgages, and stated, among other things as follows:

> "I understand the customary commission in this state is 5 per cent. on the first $5,000 and 2½ per cent on the balance. This would figure $400. * * * As it is now nearing the 1st of March I think it would simplify matters if you would complete the 1st payment of $1,000 between now and Mar. 1st at which time the bank would turn over to you the deeds, the water stock, the title guarantee and the note for $400 without interest. Receiving from you the notes, the mortgage and your check for $950.-00."

This proposition of the appellant was, in effect, to allow a commission of $400, which was to be paid by surrendering the note of the respondent for $400, which, apparently, had resulted from some previous dealings between the parties. On February 1st appellant wrote respondent stating that the stock should be handled a little differently, owing to the small amount of the first payment.

> "We will assign the stock to you and instruct the bank to hold the same in escrow in your name until payment is made on the first note [$5,000] when the stock is to be delivered to you or your assign."

It will be observed that this proposal called upon the respondent to wait five years before he received possession of the stock certificates. On February 9, 1915, appellant writes respondent that he wishes to know "whether we are in agreement on the details of the transfer of the No. 5 highline property," and asks:

> "Can you not write me at once giving me your decision on the points outlined in my letters of Jan. 29 and Feb. 1?"

On February 12th a letter was written on behalf of the respondent by Elta B. Turbett containing the following statement:

> "The way he understood the deal was $12,000 for the ranch. The regular commission for selling land in Imperial Valley is 5 per cent. straight, and the contract you signed on it you agreed to pay 5 per cent. That would make $600 commission or a balance due on the first payment of $350.00. But Mr. Salisbury thought you would probably want a little more cash, as the first payment was small, so made the proposition to pay $500 cash and then deduct the $100 balance of commission when the horse note was paid."

It will be observed that this answer does not meet the proposal of the appellant, who is asking for $950 cash by March 1st. The counter proposal is to pay $500 cash and no more, the $600 commission taking care of the other $500 and extra $100 thus paid by plaintiff was to be deducted from the "horse note," which, apparently, was the $400 note. On February 25th respondent sent the trust company notes and mortgages executed by himself and wife for $11,000 and a check for $450 "balance of first payment on said land," with instructions to turn over the mortgages on the receipt from him of a "deed to me for said property, also a certificate for 150 shares of Imperial Water Company No. 5 stock either made out in my name or endorsed to me." On February 27th appellant sent a second letter to the trust company, stating that notes and mortgages were inclosed, and adding, "If there is anything else necessary on my part to close the deal, please let me know." On March 5th appellant wrote respondent, stating that he did not understand how he intended to handle the settlement of "our account."

> "When you forwarded $450 as first payment I supposed you would pay the note in the regular way, leaving a balance of $500 as your commission. I did not remember the wording of the commission clause in my original agreement with you, but supposed it would be in line with the rates charged in San Diego. However, if the agreement calls for 5 per cent. on the whole amount I will stand by it and you can either pay the note in full ($410) and I will hand you back check for $100, or you can have the note returned to the Southern Trust & Savings Bank together with your check for $310 and I will surrender the note along with the other papers. I understand that it is usual to surrender the water stock when same is used for collateral, and have a proper notation on same made by the water company."

It appears from this proposition that the appellant was willing to accept a cash payment of $500, to concede a commission of $600, and to accept $310 in payment for a $410 note heretofore referred to, and expected to retain the certificates of stock as pledgee. The letter of appellant the next day urged respondent to complete the deal, and added, "I think as my agent you had better get 'Mr. Salisbury' to come across." On March 9th appellant again wrote respondent:

> "I regret that you did not grant me the courtesy of notifying me beforehand of your intentions in regard to the payment of your note. I gather from your letter and from your telephone conversation that part of your hesitation is due to alleged defects in the horses, and on this assumption I feel warranted in taking whatever measures are in my power for my protection."

On March 26, 1915, appellant notified the trust company that they had possession of the two deeds in question; that "150 shares of water stock is in the hands of 'Imperial Title Guaranty and Bonded Abstract Company,' which they will have transferred to Mr. Salisbury with myself as pledgee, as soon as the March 10, 1915, water assessment is paid." The assessment amounted to $90.71.

> "I understand you now have from Mr. Salisbury the sum of $450 in cash; one promissory note for 5 years at 7 per cent. payable semiannually; one promissory note for 8 years with interest at 7 per cent. payable semiannually; notes secured by mortgage on the property, all dated Jan. 1st, 1915. * * * I therefore request that you turn over to me the cash and papers above referred to, reserving an amount sufficient to cover the back taxes, which in my opinion will not exceed $100.00."

This was not done. On April 14th respondent wrote the trust company directing them to close the deal in accordance with the letter of February 25th. This letter, as above stated, requires "a certificate for 150 shares of Imperial Water Company No. 5 stock either made out in my name or endorsed to me to be delivered to the escrow holder." But the letter of April 14th contained the following modification:

> "You can take an order from Mr. Yawger, also from Altie S. Yawger if it seems necessary to the Abstract Company or the parties holding the stock, instructing them to transfer the stock to me as soon as I have paid the assessment, so that the stock is transferable on the companies' books. Please also get from Mr. Yawger an agreement whereby he will agree to pay all taxes which may be assessed to said property covering the period up to January 1st, 1915, when due."

It will be observed that according to respondent's letter of April 14th the water stock was to be assigned to him and left with the abstract company until he had paid an assessment on the stock, which, it appears, amounted to $90.71, and that therefore it was to be transferred to him, while the proposals of the appellant were that the stock should be issued to appellant as pledgee of respondent and that the certificates should remain with the bank for five years. At this point it will be seen that up to April 14, 1915, there had never been a complete meeting of minds between the appellant and the respondent for the following reasons:

First, the respondent had never informed the appellant that he was purchasing for himself and not for his uncle.

Second, appellant was insisting that his $400 note be paid as a part of the transaction, which increased the amount of the cash payment $310.

Third, the proposition of the appellant that the stock should be reissued in the name of the appellant, as pledgee, and retained in the possession of the escrow holder, was never accepted, and counter proposals were made and pending on April 14, 1915.

Fourth, the parties had agreed on the payment of $90 water assessment by respondent, but the appellant had not consented to a postponement of the transfer of the stock, due to respondent's delay in paying the assessment, if any.

Fifth, the date fixed in the proposals of the appellant for the payment of the $310 had expired on March 1, 1915, and no other arrangement had been made for such payment.

[1, 2] If we assume, as respondent contends, that he was not acting as agent but in his own behalf, there was no meeting of minds, for the reasons stated, and hence no contract. But the correspondence makes it clear, not only that the respondent was appellant's agent for the sale of the land, but also that he claimed to have effected a sale as such agent and was claiming full commission therefor. The mere circumstance that respondent directed the deeds to be executed to himself and wife and that appellant acquiesced therein is not such full notice of the circumstances as would validate a purchase by the agent himself. Burke v. Bours, 92 Cal. 108, 28 Pac. 57; s. c. 98 Cal. 171, 32 Pac. 980. Moreover, appellant in the letter of March 6, 1915, had informed respondent that he had received a better offer for the ranch which would make him "come out $1400 ahead," thus indicating that at that date he was only continuing negotiations because of his belief that a sale had been made to the uncle. It remains to consider whether the subsequent dealings between the parties constituted a contract. On April 19, 1915, the first symptoms of trouble appeared. On that date appellant notified Salisbury as follows:

> "In view of the fact that C. P. Vandenberg who I understand to be the purchaser for my ranch has defaulted in one of the two payments of $500 due respectively on date of execution of the transfer and on March 1, 1915, I feel that I have the right to cancel the negotiation and shall be obliged to do so unless you deposit for escrow within five days the additional sum of $500 in the Southern Trust & Savings Bank of San Diego notifying me at Brawley of your action."

On April 24th plaintiff wired $500 to the trust company and telegraphed appellant as follows:

> "Have deposited five hundred dollars with Southern Trust & Savings Bank, San Diego, as per your letter of nineteenth, and paid assessment on stock."

On the same date plaintiff wired the trust company that he had made the deposit in response to a demand of Yawger and stated:

> "This in direct violation of his oral agreement here, but I am complying to protect escrow. Please be advised I will require you protect my interests in this escrow as no default made by me."

On the same date appellant wrote the trust company as follows:

> "I presume the deed, etc., will have to be made out to another party, and until this is determined I suggest you hold my part of the escrow subject to my order."

We will pause in the statement of facts to say that the trial court found that the contract for sale of the land and water stock was entered into December 5, 1914, between respondent and Edwin Yawger and Altie S. Yawger, in accordance with the allegation of the complaint to that effect, although this allegation was amended by stipulation at the time of the trial as to substitute the date October 19, 1914, as the date of the contract, which is the date of the contract of employment above mentioned. The court further found that the escrow was fully completed on April 24, 1915, and that thereupon the title of the land and water stock passed to respondent, and the right to the money vested in Edwin Yawger and Altie S. Yawger. The court found as a fact and decreed in accordance with the finding that the plaintiff was the owner of the land in fee, and in the same decree directed the delivery of the above-mentioned conveyance by the escrow holder wherein the respondent and Mary E. Salisbury were grantees. The significance of these conclusions will appear from the fact that on May 7, 1915, while the money was still in the possession of the escrow holder, a writ of execution issued upon a judgment in favor of W. W. Wilkins and against the plaintiff was levied upon all the money ($950) and stock of respondent in the hands of the escrow holder. Thereafter on the same day appellant demanded of the escrow holder the return to him of the deeds and certificate of title, owing to the fact that by reason of the levy of the execution the deal could not be carried out. On May 11th respondent telegraphed to the escrow holder that the money in its hands was not subject to attachment. On May 22d appellant made another demand on the trust company for the delivery of the money deposited by F. M. Salisbury, "or the return of my papers to me," and stated:

> "I shall have to insist that one or the other be done within three days from the date of the receipt of this letter by you, as I cannot allow the matter to drag on indefinitely, believing it has already been allowed to drag beyond all reasonable time."

On May 29th appellant notified respondent that he had demanded that the escrow holder return all papers belonging to him and cancel proposed deal, and added:

> "I still hold your note for $400.00 and interest which is past due, and in addition my claim against you for conversion of my property. I also reserve the right to put forward a reasonable claim for damages in connection with your proposed purchase of my ranch in the event it appears such damages have been occasioned by your default."

This letter was answered on June 7, 1915, by the respondent's attorneys, who stated that the last $500 payment had been made under their advice and that thereupon "it was the duty of the bank and yourself to make and accept delivery of the funds and papers under the terms of the escrow instructions." After stating that the appellant had caused the attachment to be levied, the following is added:

> "While it is true that you hold Mr. Salisbury's note which is past due in the sum of $400.00, it is also true that you owe him $600.00 for commission for the sale of the property involved in the escrow; you also have a claim for damages or compensation for his mistaken use of your personal property. These latter matters, while not involved in the escrow transaction, we will be willing to discuss and adjust with you at any time and place."

[3] From the foregoing it will be observed that the nearest approach to an agreement was reached on the 24th of April, at which time the respondent acceded to the demand of the appellant that the sum of $500 in addition be paid to the escrow holder. Up to that time the parties had been dealing on the theory that a commission was to be allowed and arranged in the deal itself and while, as already stated, the details thereof had not been fully arranged, the new demand of appellant for the deposit of $500 was based upon the assertion of appellant that the transaction was one between appellant and C. P. Vandenberg. The immediate compliance with this demand was an acknowledgment by plaintiff that Vandenberg was the purchaser and that the contract was one between appellant and C. P. Vandenberg. So that if it can be said, as the trial court holds, that the minds of the parties met on April 24th and the deal was then fully consummated, the agreement was between the appellant and Vandenberg for the sale of the property. On such an agreement the plaintiff as the selling agent was entitled to the agreed commission, but, of course, was not entitled to enforce the contract, on his own behalf. Burke v. Bours, supra. In passing it should be noted that the plaintiff alleged and the court found as a fact that the levy of the execution of May 7th was made at the instance of the appellant. It is claimed by the appellant in his brief that there was absolutely no evidence to support this finding and the respondent does not print any such evidence in his brief, and we may therefore conclude that no such evidence is contained in the record. However that may be, the fact of this levy under judgment against the plaintiff is an apt illustration of the difference between the contract the appellant made and the one which is sought to be enforced here. If the transaction was one between appellant and Vandenberg, an execution against Salisbury would have no effect. Furthermore, the sale was made largely on credit, and the responsibility of the purchaser was of vital moment. After deducting commissions, only $400 was to be received by the owner for the transfer of land and water stock valued at $12,000. Possession of the premises were to be delivered and the deferred payments were to be made in five and eight years.

[4] The respondent did not prove the contract he alleged. He alleged that the contract was between himself and the two appellants Edwin and Altie Yawger, while the contract proved was one between Edwin Yawger and C. P. Vandenberg, or, accepting plaintiff's view, between Edwin Yawger and the plaintiff. Altie Yawger was not a party to the contract. The deposit of her deed merely placed Edwin Yawger in a position where he could carry out his agreement to convey the entire 160 acres. The court found the fact in accordance with the allegation of the complaint.

[5] Appellant contends that the wife, Mary Salisbury, should have been a party plaintiff, and that the judgment creditor, Wilkins, and the sheriff should also be made parties. It is

clear that Mary Salisbury should have been a party because the effect of the judgment is not only to direct a conveyance to her, but also the delivery of a mortgage executed by her for $11,000. The respondent claims it is unnecessary to bring in the judgment creditor for the reason that the levy of the execution was ineffectual and invalid because the title to the money had passed to appellant at the time of the levy of the execution, and for the further reason that the stock, although assigned to the respondent, was held in pledge and the rights of the appellant as pledgee had already attached and no tender of the amount of the pledge was made. It is clear that the judgment creditor should have been made a party. It does not appear, however, that any request of any kind was made of the court that such parties be brought in, and their absence does not invalidate the judgment. We may therefore consider the effect of the levy as between the parties before the court. The plaintiff's theory that the title to the money had passed to the defendant is erroneous, for the contract was never consummated. It follows that the plaintiff was in default because of a failure to comply with appellant's demand of May 22d for either the money or for a return of his deeds. No subsequent tender was made by plaintiff, and, having also failed to release the money from the lien of the execution, plaintiff cannot prosecute this action. Appellant has not made his points clearly in his opening brief, but it sufficiently appears that he is claiming that there could be no contract between respondent, who was acting as agent, and the appellant, his principal, "without full knowledge of his principal, and such purchase will always be set aside at the option of the principal," citing Burke v. Bours, supra, and similar cases. In his reply brief appellant, instead of flatly claiming that there was no contract of sale between appellant and respondent, analyzes the correspondence for the purpose of showing that there was no contract on October 19th or December 5th, and no ratification. However, the general drift of the claim is that there was never a time when it could be said that the minds of the parties had met, particularly in view of the respondent's position as agent. We make these observations to forestall the usual claim in a petition for rehearing that the case is decided on points not raised.

[6] In the appellant's brief filed in this court after transfer from the District Court of Appeal the point is made that the complaint is insufficient for the reason that it "does not contain facts showing that the contract is as to the defendants just and reasonable; that their assent was not obtained by misrepresentation, concealment, circumvention or unfair practices of the respondent, or by any promise of the respondent which has not been specifically fulfilled; and that the assent of respondent was not given under the influence of mistake, misapprehension or surprise. Appellants also contend that no proof was offered nor any finding made to the effect that the defendants received an adequate consideration for the contract, if any contract there was." This claim is based upon the provisions of section 3391 of the Civil Code. The complaint contains an allegation that the contract is just and reasonable; but there is no allegation as to the actual value of the land and no other circumstances alleged showing that it was just and reasonable or that the consideration was adequate. This is clearly insufficient under the authorities cited by the appellant. The facts showing that it was just and reasonable should have been alleged. White v. Sage, 149 Cal. 613, 87 Pac. 193; Herzog v. Atchison, Topeka & Santa Fé Ry. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Young v. Matthew Turner Co., 168 Cal. 675, 143 Pac. 1029. There is no finding and no proof offered on the question of the adequacy of the consideration.

This cause was transferred to the district court of appeal of the second district for decision. The court, of its own motion, made an order dismissing the appeal on the ground that no valid notice of appeal had been filed. The respondent had not made or presented any motion to dismiss and the matter had not been suggested by either of the parties. The merits of the case had not been considered. The order of dismissal was set aside by the supreme court and the cause transferred to this court for further consideration.

[7] Within sixty days after the judgment in the superior court was entered the defendants filed in the office of the clerk of that court a notice which they intended as a notice of appeal. The only notice appearing in the record before us relating to an appeal is a notice appearing to have been drawn as a notice under section 953a of the Code of Civil Procedure. It was filed within sixty days after the judgment, but as a notice of appeal it was slightly defective in form. The record does not affirmatively show that no other notice purporting to be a notice of appeal was filed. Nor is there any proof that no such notice was filed. The papers filed in this court in opposition to the dismissal of the appeal show that the respondent's attorney, in a letter to the appellants' attorney before the time for appeal had expired, admitted that a notice of appeal had been served on him by the appellants. His conduct throughout the case prior to the decision by the district court of appeal dismissing the case indicates that he fully understood and believed that an appeal had been duly taken, and that if there was any defect in the form of the notice, he had waived it. Such admissions are evidence that the appeal was properly taken and are

sufficient to sustain the appeal on a motion to dismiss. Merritt v. Los Angeles, 162 Cal. 48, 120 Pac. 1064; Burnett v. Piercy, 149 Cal. 184, 86 Pac. 603. Where, as in this case, the parties originally submitted the case without raising the point and the question arises solely because of a suggestion from the appellate court, we are not disposed to be critical of the evidence produced in support of the appeal. We think the showing that the appeal was properly taken is sufficient.

The judgment is reversed.

ANGELLOTTI, C. J., and WILBUR, OLNEY, SHAW, SLOANE, LAWLOR, JJ., concur.

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50 Cal. App. 476

DUNLAP v. COMMERCIAL NAT. BANK OF LOS ANGELES.

DUNN v. SAME.

(Civ. 3466.)

(District Court of Appeal, First District, Division 2, California. Dec. 21, 1920. Hearing Denied by Supreme Court Feb. 17, 1921.)

1. Appeal and error 🔑1050(1)—Admission of conclusion as to purpose of check not reversible error, where witness also detailed what was said and done.

In an action on a check brought after the death of the drawer on the theory that it was an assignment of the deposit, the admission of plaintiff's answer to a question as to the purpose for which the check was signed, over the objection that the question called for a conclusion, was not reversible error, where the witness also testified at length as to what was said and done when the check was drawn and delivered.

2. Appeal and error 🔑1010(1)—Finding as to giving of check by a decedent for services held conclusive.

In an action on a check brought after the death of the drawer, in which plaintiff testified to facts showing that the check was given for services and as an assignment of the deposit, the general unsatisfactory character of evidence of beneficiaries of such transactions after the death of the other party was a matter for the trial judge's consideration, and not the appellate court.

3. Assignments 🔑137—Evidence held to support findings that check was for valuable consideration, and was intended as assignment of deposit.

In an action on a check brought after the death of the drawer, evidence *held* sufficient to support findings that the check was given in consideration of valuable services, and was intended as a complete assignment to plaintiff of the drawer's title and interest in the deposit.

4. Gifts 🔑54—Delivery of check for services intended as assignment of deposit not gift causa mortis.

Where a check drawn and delivered shortly before the depositor's death was given for valuable services, and was intended as a complete assignment of the deposit, the transaction was not a gift causa mortis.

5. Assignments 🔑49—Check is assignment of debt if so intended by parties notwithstanding statute.

Though Civ. Code, § 3265e, as added by St. 1917, p. 1559, provides that a check does not operate as an assignment of any part of the funds, and that the bank is not liable to the holder, if it was the intention of the parties to a check to pass title to the chose in action, then as between them there was an assignment of the debt of the bank to the payee of the check.

6. Executors and administrators 🔑56—Bank deposit is not part of estate if check thereon was intended as assignment.

If a check given shortly before the drawer's death was intended as an assignment of the deposit to the payee, the debt due from the bank never became a part of the estate, and the drawer's administrator had no right to it, or any part of it.

7. Assignments 🔑121—Executors and administrators 🔑224—Holder of check operating as assignment not required to present claim or make administrator party to suit against bank.

Where a check, delivered shortly before the drawer's death, was intended as an assignment to the payee, in payment of her debt against the drawer, she had no claim against the drawer's estate, and it was not necessary for her to present a claim against the estate, or make the administrator a party to her suit against the bank.

8. Executors and administrators 🔑61—Title to deposit assigned by decedent before death is held in trust.

Where a depositor shortly before his death signed and delivered a check intended as an assignment of the deposit to the payee in payment of a debt, if the apparent title to the deposit was in the drawer's estate, it was held by the estate as trust property.

9. Taxation 🔑866—Check, constituting assignment of deposit in payment of debt, not subject to inheritance tax.

Where, in satisfaction of a debt, a depositor shortly before his death drew a check, intending it as an assignment of the deposit, the inheritance tax law did not apply to the transfer.

10. Appeal and error 🔑883—Consent order consolidating actions, being within court's jurisdiction, cannot be attacked for error.

It was within the jurisdiction of the trial court to consolidate actions pending therein by different plaintiffs against the same defendant; and the order of consolidation, having been made by consent of the parties, could not be attacked as erroneous.

11. Appeal and error 🔑199—Claim of surprise by order requiring complaint to be treated as cross-complaint in consolidated action held too late.

Where, by consent, the trial court consolidated actions by the payee of a check and by the drawer's administrator against a bank for the amount of a deposit a considerable time before the trial, and at the trial ordered that the administrator's complaint be considered as a cross-complaint in the payee's suit, the administrator's claim of surprise by such order came too late when not presented to the lower court.

12. Action 🔑59—In actions consolidated by consent, evidence in favor of party held admissible against another party.

Where actions against a bank by the payee of a check and the administrator of the drawer of the check were consolidated by consent, there was no error in admitting evidence in favor of the payee as against the administrator.

13. Action 🔑59—In consolidated actions for the same debt, determination for one plaintiff necessarily required judgment against the other.

Where actions against a bank for the amount of a deposit brought by the payee of a check and by the drawer's administrator were consolidated, the determination that the payee was entitled to the deposit on the theory that the check was an assignment thereof necessarily required a judgment against the administrator.

14. Costs 🔑31—In consolidated actions for same debt, judgment against one plaintiff for costs in favor of other parties held proper.

Where the payee of a check and the drawer's administrator brought separate actions against the bank for the amount of the deposit, and the court, instead of making a formal order of interpleader, consolidated the actions and ordered the administrator's complaint to be considered as a cross-complaint, a judgment against the administrator for costs in favor of the bank and the payee was proper.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Consolidated actions by Frank E. Dunlap, as administrator of John W. Kenton, deceased, and by Bettie B. Dunn, against the Commercial National Bank of Los Angeles. From an adverse judgment, Dunlap appeals. Affirmed.

Stewart & Stewart and L. B. Stanton, both of Los Angeles, for appellant.

Geo. M. Harker and S. M. Bernard, both of Los Angeles, for respondent Dunn.

James, Smith & McCarthy, of Los Angeles, for respondent Commercial Nat. Bank of Los Angeles.

BRITTAIN, J. From a single judgment and on a single transcript the administrator of the estate of John W. Kenton appeals in these consolidated cases. The record shows that the respondent Dunn sued the respondent bank, claiming that Kenton in his lifetime had made an equitable assignment of the entire balance to his credit with the bank, and had given her a check for the entire balance, payment of which was refused by the bank when it was presented after his death. After the Dunn suit was commenced Dunlap, as administrator of Kenton's estate, sued the bank on another check drawn by him as administrator for a portion of the amount on deposit.

The bank answered in each case, setting up the facts, and sought by motion to be permitted to pay the amount for which it admitted it was liable into court, and to have the two claimants interplead. Under the circumstances, this would seem to have been the proper course, but for some reason which does not appear the motion was denied. The bank does not appeal, and the appellant does not attack this order. Its only importance at this time is as an explanation of the subsequent proceedings which are attacked.

When the motion for interpleader came on the parties in both suits were present in court, and in each case an order was then made, reciting that it was made by consent of the parties and by the consent of the plaintiff in the corresponding case. Each order directed that the case in which it was made should be consolidated with the other, and the two cases tried together. Such trial was had, and the trial court in construing the consent order of consolidation, which had been made by another judge of the same court ruled that the complaint of the administrator should be considered as a cross-complaint in the Dunn case. The court found the fact of assignment as alleged in the Dunn complaint. Judgment was accordingly entered for Miss Dunn for the amount of the fund in dispute. It ordered the bank to pay the money into court and the bank's dismissal when this should be done. Costs were awarded to both the bank and Miss Dunn, to be paid from the estate in due course of administration. So far as the bank was concerned, the judgment required it to do exactly what it sought to do in the first instance. At the trial the administrator on the one side and the respondent Dunn on the other introduced and were offered an opportunity to introduce the same evidence which would have been pertinent and material had they formally interpleaded.

The appellant attacks the judgment on the merits and also because of the procedure adopted, which he claims inextricably tangled the rights of the parties. In his brief, no doubt because of his reliance upon the second ground of attack, he has mingled his argument on both grounds. There is no difficulty in disposing separately of the questions presented, and the second ground of attack may be better understood by considering first the case on its merits.

The trial court found that Kenton, for valuable services rendered to him by the respondent Dunn, made and delivered to her the check which the bank refused to pay after the drawer's death; that as between Miss

Dunn and Kenton the transaction was complete at the time of his delivering the check to her, and that the delivery was made, and by them was intended to be a complete assignment to her by Denton of all his right, title, and interest in and to the whole amount of the deposit. There is evidence to support these findings, and they are conclusive of the facts upon this appeal, unless the appellant's attack upon them is to be sustained. The attack on the ground of error in admitting any evidence on behalf of the claim of the respondent Dunn as against the appellant will be considered with the second phase of the case. For the present it may be passed as without substance.

[1-4] While Miss Dunn, who was the niece of Kenton, was on the witness stand, and after the check given her had been identified, she was asked: "For what purpose, if you know, did he sign it?" An objection on the ground that the question called for her conclusion was overruled, and this is assigned as reversible error. In view of the fact that she immediately afterwards testified at length concerning what was said and done when the check was drawn, signed, and delivered to her, it does not appear that the appellant was injured by the ruling. She testified that her uncle said:

> "I am here sick. I don't know how long I will be sick or how sick I will be. When I asked you to take care of me little did I think you would have to go through what you have. I never can pay you enough for what you have done for me. Fill the check out for the full amount in the bank."

It is contended that this evidence is insufficient to sustain the findings, which have been summarized, and authorities have been quoted upon the general unsatisfactory character of the evidence of beneficiaries of such transactions after the death of the other party to them. These matters were for the consideration of the trial judge. The appellant did not cross-examine Miss Dunn, no evidence of any kind was offered to contradict or discredit her, and the evidence supports the findings. The argument that the transaction constituted a gift causa mortis rather than a payment is but the same attack in another form on the evidence and the findings. It is without force.

[5-9] A lengthy argument is made on the effect of that provision of the Uniform Negotiable Instruments Law embodied in section 3265e of the Civil Code as added by St. 1917, p. 1559, which provides that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer, and the bank is not liable to the holder unless and until it accepts or certifies the check. The provisions of the section are in accord with the law of this state prior to the adoption of the present Negotiable Instruments Law. Donohoe-Kelly Banking Co. v. S. P. Co., 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28. These rules concerning negotiable instruments, standing alone, do not militate against the doctrine of equitable assignments of specific property accompanied either by the delivery of a check or evidenced in whole or in part by other means. All parties to this appeal agree that the relationship of the bank to the drawer of the check was that of debtor and creditor. Despite the effect of the Code section on the rights of the bank, if from the entire transaction between Kenton and Miss Dunn it clearly appeared that it was their intention to pass title to the chose in action, then as between Miss Dunn and Kenton there was an assignment of the debt of the bank. Goldman v. Murray, 164 Cal. 419, 129 Pac. 462. From the evidence submitted the court found there was such an assignment, and that as between Kenton and Miss Dunn the transaction was entirely closed when the check was delivered. If she became the owner of the debt, it never became a part of Kenton's estate and his administrator had no right to it nor to any part of it. Her suit against the bank was not merely on the check but on the assigned debt of the bank to Kenton. Kenton's debt to her had been satisfied by the assignment. She therefore, had no claim against Kenton's estate, and it was not necessary for her either to present a claim against the estate or to make the administrator a party to her suit against the bank. After Kenton's death the administrator of his estate claimed the chose in action which the trial court found had been assigned to Miss Dunn by Kenton in his lifetime. The bank admitted its liability on the debt, and the only real dispute was between Miss Dunn and the administrator. It is argued that under the probate laws Miss Dunn might have presented a claim to the estate, and sued on the debt which by the assignment Kenton had satisfied. It was not necessary that she should do so. She had no claim against the estate, and it is well settled that one who claims as his own adversely to an estate specific property held and claimed by the estate cannot be called a creditor of the estate within the meaning of the probate law. If there was an assignment by Kenton, regardless of anything which the books of the bank may have shown, the property was the property of Miss Dunn. If the apparent title was in the estate, it was held by the estate as trust property. Either under the claim of ownership or of trust she might have sued the administrator without presenting any claim against the estate. Estate of Dutard, 147 Cal. 253, 256, 81 Pac. 519. The argument based upon the provisions of the inheritance tax law has no bearing on the case. If Kenton in satisfaction of his debt transferred the property in his lifetime, and the trial court so determined, the inheritance tax law did not reach that prop-

erty. On the merits, the judgment following the conclusions of law based on the findings, and they in turn being supported by the evidence, the appellant's attack upon the first ground must fail.

[10] On the matters of procedure, the appellant contends that the trial court had no power to make the order of consolidation because the Code section concerning consolidation of actions provides, in substance, that whenever several actions are pending between the same parties in the same court upon causes of action which might have been joined, the court may order the actions to be consolidated into one, and that the suit of Dunn and the suit of Dunlap, as administrator, each being against the bank, were not between the same parties. The question is not one of jurisdiction. Until the consolidation the trial court had jurisdiction of both actions, and any order it may have made in either regarding its trial would have presented a question of error and not of power. The record shows that the order made in each case was made by consent of the parties to that case and of the plaintiff in the corresponding one. If the order was erroneous, the appellant cannot attack for error an order made with his consent.

[11, 12] Despite the consent order of consolidation, in his briefs the appellant has insisted on considering the two cases separately, and not as a single case. If the formal order for interpleader had been made instead of the consent order for consolidation, the appellant administrator and the respondent Dunn would have tried the single issue of whether or not there was an assignment. At the opening of the trial, all the facts being pleaded but no formal order having been made designating Dunlap, as administrator, defendant in the Dunn suit or Dunn as defendant in the Dunlap suit, the court ordered the Dunlap complaint to be considered as a cross-complaint in the Dunn suit. It is argued that by reason of this order the appellant Dunlap was taken by surprise, and was not prepared to meet the issue of assignment. That contention was not presented to the lower court, but only the technical contention that no formal pleading had been filed tendering the only issue in the case directly to the administrator. The consent order of consolidation was made a considerable time before the trial, and the appellant could not have been misled. The claim of surprise made in this court in the first instance comes too late. There was no error in the court admitting evidence in the consolidated action binding on the appellant as on other parties to the consolidated action concerning the assignment. Under the evidence and findings respondent Dunn was entitled to judgment.

[13] The contention that the judgment should be reversed because the court concluded that Dunlap, as administrator, should take nothing is entirely without merit. It is based on the contention that, because an employé of the bank made a transfer on its books of the single debt for which it was liable, Dunlap, as administrator, should have had judgment against the bank regardless of whether or not the bank paid its single debt to Miss Dunn as Kenton's assignee. In the single consolidated case the determination that Kenton had transferred to Miss Dunn all his rights against the bank necessarily led to the correlative conclusion that his estate had no claim against the bank.

[14] Lastly, it is contended that the judgment for costs was erroneous. In effect the same end was accomplished by the consent order of consolidation as would have been accomplished by the formal order of interpleader. If the formal order of interpleader had been made, the bank, as purseholder, would have been relieved of costs, and the respondent Dunn, being entitled to the fund, would have been awarded costs against the administrator to be paid in due course of administration. An examination of the entire record fails to show any failure of substantial justice under any contention of the appellant.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

50 Cal. App. 670

FRANCISCO et al. v. SCHLEISCHER.
(Civ. 3628.)

(District Court of Appeal, First District, Division 1, California. Dec. 28, 1920.)

1. Contracts 🔑346(7)—Mistake or fraud in written contract must be pleaded.

In an action on a written contract, defendant could not, without any affirmative allegations in his pleading to that effect, attack the written agreement upon the ground of mistake or fraud in its procurement.

2. Appeal and error 🔑1058(1)—Exclusion of evidence harmless.

Party cannot complain of exclusion of evidence where he was subsequently permitted to introduce it.

3. Trial 🔑396(1)—Finding not open to attack by reason of allegation of technical conversion.

In an action to recover value of hay for defendant's failure to turn it over to the plaintiff, which he was unable to pay for and agreed to return, a finding that defendant had failed and refused to deliver it in accordance with his agreement was not open to attack on the ground that a technical conversion was alleged and not proven.

4. Sales ⚷92—Promise to return property purchased sustained by consideration.

Where personal property was sold, to be paid for in installments, and purchaser defaulted in his payments, release of the purchaser by the seller from all further obligation under his contract, with right given purchaser to retain possession and use of the property for a specified time, was a sufficient consideration for the purchaser's agreement to return the same.

5. Contracts ⚷155—Courts do not by forced construction relieve from unreasonable agreements.

Since many persons enter into unreasonable contracts, it is no function of the courts, merely because the contract was unreasonable, to relieve persons from obligations by giving words used in the contract a meaning which they do not ordinarily possess.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Herbert Francisco and another against George Schleischer. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hogan & Carlson, of Bishop, for appellant.
A. H. Swallow, of Bishop, for respondents.

RICHARDS, J. This is an appeal by the defendant from a judgment in favor of the plaintiffs for the sum of $3,008.15.

The controversy between the parties grows out of a contract entered into by them on September 21, 1917, by which the plaintiffs agreed to sell to the defendant a large quantity of personal property, constituting a teaming and grading outfit, and including approximately 200 head of horses and mules, wagons, scrapers, plows, a grading machine, and many other articles, and also approximately 200 tons of hay. The contract was in writing, and the payments were to be made at stated intervals; title to all of said property being retained in the vendors (plaintiffs) until its terms had been complied with. The defendant being in default in his payments, the plaintiffs threatened legal proceedings for the recovery of the property. All parties being desirous of avoiding such proceedings, and the defendant being unable to comply with the plaintiffs' demand for a further payment in accordance with the terms of the contract, the latter on September 2, 1918, signed and delivered to the plaintiffs the following writing:

> "I hereby agree to turn over to H. Francisco on the 15th day of September all real and personal property bought of H. Francisco and Katherine Francisco on the 21st day of September, 1917, and forfeit all payments made on said property."

The defendant having also failed to comply with the terms of this agreement, the present action was brought.

The plaintiffs in an amended complaint, upon which the action was tried, after setting up the execution of the contract of September 21, 1917, alleged that in consideration of their releasing the defendant from the further performance thereof he executed the writing of September 2, 1918, above recited, but that he had failed and refused to return a large portion of the personal property referred to therein (the details of which are set out in paragraph 3 of the amended complaint), and converted the same to his own use. The reasonable value of said articles of personal property is alleged to be $3,203, for which sum judgment was demanded. In a separate cause of action the plaintiffs alleged that they also, about the time of entering into the contract of September 21, 1917, made a lease of certain real property to the defendant, upon which the sum of $400 was due and unpaid, and this amount is also included in their prayer for judgment. The recovery of the plaintiffs included this unpaid rent, but no controversy arises with respect to it.

The answer of the defendant denied the material averments of the amended complaint and set up various counterclaims, including one for the value of growing crops on said leased land when he surrendered it to the plaintiffs, and another claim for the sum of $500 claimed to be due for labor performed for the plaintiffs.

The cause went to trial upon the issues as thus made up, but at the conclusion of the first day of said trial the defendant requested, and was granted, leave to amend his answer. The following is the amendment thus made:

> "(Defendant) admits that he did on the 2d day of September, 1918, agree in writing to return to the plaintiffs on the 15th day of September, 1918, all property sold to him by them on the 21st day of September, 1917, and to forfeit all payments made on the same; but alleges that said agreement was and is unsupported by any consideration whatsoever, that he made the said agreement under a misunderstanding of the facts therein contained, and that he was induced to make said agreement by fraudulent acts and misrepresentations as to the meaning and purpose of the same done and made by the plaintiff Herbert Francisco."

The trial of the cause was resumed and concluded on the following day. Thereafter the court made and filed its findings, these being in favor of the plaintiffs and against the defendant, except upon certain of his counterclaims, the amount of which was deducted from the sum otherwise due to the plaintiffs, and judgment in their favor was entered for the balance. On the counterclaim of the defendant for the sum of $500 for work and labor performed for the plaintiffs the court found that at the request of the defendant the plaintiff H. Francisco had invested this sum for him in a mining property, and negatived the contention of the defendant that said plaintiff had failed and refused to deliver to him the certificates of stock therefor.

[1, 2] The defendant in support of his appeal first urges that the trial court erred in sustaining objections to a number of questions put by him to the plaintiff Herbert Francisco upon his cross-examination as a witness. It is not necessary to detail these questions, but is sufficient to say that they were all asked upon the theory that the defendant, without any affirmative allegations in his pleading to that effect, could attack his written agreement of September 2, 1918, upon the ground of mistake and fraud in its procurement, or such questions were incompetent for other reasons. Later, after the defendant had been permitted to amend his answer in the respect heretofore mentioned, he was allowed full latitude to examine and cross-examine said plaintiff, and to testify in his own behalf, so that even if the questions to which objections were sustained had been proper, he was not finally precluded from showing what he thereby sought to elicit, and did in fact take the stand and testify to such matters without objection.

The next contention of the appellant is that there was no evidence to sustain the finding of the trial court to the effect that the plaintiffs had originally delivered to the defendant the articles of personal property described in paragraph 3 of the amended complaint and for the value of which they were awarded judgment. This contention is not tenable, for the reason that the record does in fact contain such testimony, and the appendix to the defendant's own brief also sets it up.

In connection with these articles of personal property the point is made by the appellant that the complaint charges that they were converted by him, whereas the evidence shows that the main item in value of this property was 105 tons of hay, and that this hay had come rightfully into the possession of the defendant under the terms of the contract of September 21, 1917, and had by him been fed to the stock acquired by him from the plaintiffs at the same time, and which use of hay was contemplated by said contract; that the defendant therefore had been guilty of no wrongful act in regard to it such as is essential to the proof of a conversion.

[3] It is true that the complaint, in charging the defendant with his failure and refusal to deliver this hay, also alleges that he converted it, but the trial court made no finding against the defendant upon the allegation of conversion, but found merely that he had failed and refused to deliver it in accordance with his agreement of September 2, 1918. As this finding is amply supported by the evidence, it is not open to attack upon the ground that a technical conversion had not been proven.

The appellant also attacks as unsupported by the evidence a finding of the court that a certain quantity of hay left by the defendant upon the premises of the plaintiffs, when redelivered to them in accordance with the terms of the agreement of September 2, 1918, was delivered to the plaintiffs as part of the 200 tons of hay that he was obligated thereby to return; it being the contention of the appellant that he had no intention of parting with his title to said hay in thus abandoning it to the plaintiffs. We discern no merit in this contention. The court, having found that the defendant had undertaken to deliver to the plaintiffs 200 tons, was justified in construing the defendant's act of surrendering the quantity of hay in question to the plaintiffs at the time of his redelivery of the real property as a performance pro tanto of his obligation to deliver 200 tons of said commodity, notwithstanding his subsequent demand upon the plaintiffs for said hay. He was given credit for its value, and the amount of the judgment which the plaintiffs would otherwise have recovered was diminished thereby.

[4] It is next contended by the appellant that there is no evidence of any consideration moving to him for his agreement of September 2, 1918, to return to the plaintiffs the personal property in question. This contention is based to some extent upon the fact that at the time of negotiating and signing it the plaintiff Herbert Francisco and the defendant did not use the term "consideration" or speak of it. As to this, it may be said that it would be very unusual to find two laymen, in negotiations with each other, using legal terms, and conducting them upon the hypothesis that they were later going to have a lawsuit over them. The facts developed at the trial showed quite clearly that the consideration moving to the appellant for his undertaking of September 2, 1918, was his release by the plaintiffs from all further obligation under his contract of September 21, 1917; in other words, the rescission of said contract by mutual agreement. The evidence also shows that the defendant, being in default, was expressly, by said later agreement, granted the right to retain the possession and use of the property for a specified time after such default, with the right to receive the income therefrom. This alone was a sufficient consideration.

[5] It is also urged by the appellant that the trial court erred in construing his agreement of September 2, 1918, as an undertaking to return all of the personal property received by him under the former agreement; but, as to this, the appellant had ample opportunity, under his amended pleading setting up mistake and fraud, to offer evidence that the

contract did not mean what it said. Having failed to substantiate the allegations of his amended answer, the trial court was left with no option but to give to the words of the contract their ordinary meaning. It is urged that such construction makes the undertaking of the defendant quite unreasonable, but it ought not to be necessary to observe that many persons enter into unreasonable contracts, and it is no function of the courts to relieve them from the effects of their foolishness.

Finally the point is made that the finding of the trial court to the effect that the defendant had authorized the plaintiff Herbert Francisco to invest for him the sum of $500 in certain mining stocks, which stocks said plaintiff had not refused or failed to deliver to the defendant, is unsupported by the evidence. The record, however, shows that said plaintiff testified directly to the facts as found by the court, and such evidence, being accepted as true by the court, is amply sufficient to support its finding in that regard.

We find no error in the record; consequently the judgment must be affirmed. It is so ordered.

We concur: SEAWELL, Presiding Justice pro tem.; KERRIGAN, J.

50 Cal. App. 522

CALIFORNIA ORANGE CO. v. RIVERSIDE PORTLAND CEMENT CO.

(Civ. 3233.)

(District Court of Appeal, Second District, Division 2, California. Dec. 22, 1920.)

1. Nuisance 🔑9—Owners of cement mills discharging dust not joint tort-feasors.

Separate companies who wrongfully operated their cement plants so that deposits of cement dust were incrusted on the leaves of plaintiff's orange trees were not joint tortfeasors merely on account of the commingling of the dust from their plants; each being liable only for its particular proportion of the damage resulting from the dust emitted into the atmosphere from the plants of both.

2. Damages 🔑6—Amount of damages by commingled dust from cement works may be estimated.

In determining the amount of damages assessable against a cement works for coating the leaves of plaintiff's orange trees with cement dust, the trial court was at liberty to estimate as best it could from the evidence how much of the damage caused by the operations of defendant's plant and that of another company was occasioned by defendant's plant, and in so doing might measure with a liberal hand the amount of damage caused by defendant's mill.

3. Appeal and error 🔑931(1), 1010(1)—Appellate court cannot disturb findings supported by substantial evidence.

All presumptions are in favor of the findings of the trial court, and the appellate court cannot disturb them if supported by any substantial evidence.

4. Damages 🔑6—Estimate of damages proper when actionable injury is indistinguishable from other injury.

If it is impossible to distinguish the damage to land arising from defendant's actionable injury from cement dust and damage having another origin, the jury, or the trial judge, if the cause be tried without a jury, should be left to make from the evidence the best possible estimate and to award plaintiff compensatory damages for the actionable injury.

5. Nuisance 🔑49(5)—Evidence held to show orchard suffered damage attributable to cement dust.

Evidence *held* to show that plaintiff's orange orchard suffered substantial damage directly attributable to defendant's wrongful operation of its cement plant whereby cement dust in quantities sufficient to cause material injury was precipitated on plaintiff's citrus trees.

6. Nuisance 🔑50(1) — Measure of orange grower's damages by cement dust stated.

Under Civ. Code, § 3333, the measure of plaintiff orange grower's damage from defendant cement company's wrong in permitting dust from its plant to settle on plaintiff's trees is the amount that will compensate it for all detriment proximately caused by defendant's wrongful operation of its plant from the time it commenced operations until it installed treaters preventing the escape of dust.

7. Nuisance 🔑50(4)—Orange grower entitled to recover from cement works for continuing injuries.

An orange grower, in addition to other damages against defendant cement works, which caused dust to settle on his trees, was entitled to compensation for the continuing injury to the trees due to dust from defendant's plant settling on them in two years, at the end of which dust-confining treaters were installed, the effects of which would manifest themselves in the crops for two subsequent years, making it necessary to give the trees an increased amount of fertilizer and care.

Appeal from Superior Court, Riverside County; M. T. Farmer, Judge.

Action by the California Orange Company against the Riverside Portland Cement Company. From judgment for plaintiff, defendant appeals. Affirmed.

H. L. Carnahan, of Los Angeles, and W. G. Irving and McFarland & Irving, all of Riverside, and Pillsbury, Madison & Sutro, of San Francisco, for appellant.

Rohe, Jeffers & Devin, of Los Angeles, and Purington & Adair, of Riverside, for respondent.

FINLAYSON, P. J. This is an action at law to recover damages for injuries to plaintiff's orange orchard, caused by the deposit on the trees of cement dust from defendant's cement mill. Plaintiff recovered judgment for a total of $6,300, of which $3,500 was for loss and injury to the crops for the years 1910, 1911, and 1912, $300 was for the increased labor and cost in the care of the trees, and the balance, $2.500, was for injury to the trees. From that judgment defendant appeals.

The orange orchard is located on a piece of high bench land situated on the northerly bank of the Santa Ana river in Riverside county. It lies about midway between defendant's cement mill and the cement mills of the California Portland Cement Company. Defendant's mill is about one and a half miles southwesterly of plaintiff's grove. The two mills of the California Portland Cement Company are northwesterly of the grove and distant therefrom about 1½ miles. There is no question but that cement in considerable quantities from the mills of the California Portland Cement Company, as well as from defendant's mill, settled upon plaintiff's orange trees, coating the leaves with a white, ashen dust, which, incrusting from the action of dew and moisture, so that it can be neither washed off by the rains nor blown off by the winds, remained on the leaves for the period of their life—that is, from two to three years. There is an abundance of evidence in the record tending to show that cement dust that thus is incrusted upon the orange leaf seriously interferes with the leaf's respiration and the formation of the starch foods upon which the tree lives. As a result, the tree becomes greatly weakened, the leaves stunted, and the internodes shortened, so that the tree, in its weakened condition, blossoms more profusely, and the fruit falls off before maturing, thus greatly decreasing the yield of every tree the leaves of which are thus coated with the cement dust.

Dust-catching apparatus, commonly known as "treaters," designed to prevent, so far as possible, the escape of cement dust into the atmosphere, were installed in defendant's plant in January, 1913. The action was commenced August 14, 1913, and was tried in May, 1917.

[1, 2] The California Portland Cement Company and defendant were not joint tortfeasors. Their respective torts—wrongfully operating their respective cement plants in such manner that deposits of cement dust, blown from the plants toward plaintiff's orange grove, were incrusted upon the leaves of plaintiff's trees—were several when committed, and did not become joint merely because of a commingling of the dust from the respective plants and a union of the consequences proceeding from the several and independent tortious acts. Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; Wm. Tackaberry Co. v. Sioux City, etc., Co., 154 Iowa, 358, 132 N. W. 945, 134 N. W. 1064, 40 L. R. A. (N. S.) 102, Ann. Cas. 1914A, 1276; Sutherland on Damages (4th Ed.) § 1059. Defendant is liable for only such proportion of the total damage resulting from the commingled dust emitted into the atmosphere from the plants of the two cement companies as was caused by its own plant. Miller v. Highland Ditch Co., supra. In determining the amount of damage that should be assessed against this defendant, the trial court was at liberty to estimate as best it could, from the evidence before it, how much of the total damage caused by the operations of the two cement companies was occasioned by defendant's plant, and in doing so might measure with a liberal hand the amount of damage caused by defendant's mill. Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Jenkins v. Pennsylvania R. Co., 67 N. J. Law, 331, 51 Atl. 704, 57 L. R. A. 309; City of Mansfield v. Bristor, 76 Ohio St. 270, 285, 81 N. E. 631, 10 L. R. A. (N. S.) 806, 118 Am. St. Rep. 860, 10 Ann. Cas. 767. Though in cases of this sort entire accuracy is impossible, and the difficulty of accurately proportioning and assessing the damage done by defendant's mill is great, still that difficulty would have been avoided had defendant but taken care that no occasion should arise requiring such proportioning and assessing of the whole damages. In Ogden v. Lucas, 48 Ill. 492, which was an action to recover damages for the destruction of corn by trespassing cattle, where it appeared that a part of the cattle was the property of others than the defendant, the court said:

> "In cases of this sort, entire accuracy is impossible. The jury had a right to consider from the evidence how much corn had been destroyed, and what proportion of the cattle in the field were turned in by the defendant, and thus arrive at as near an estimate of the damages as the nature of the case would permit."

To the same effect is Harrison v. Adamson, 86 Iowa, 693, 53 N. W. 334. Washburn v. Gilman, 64 Me. 163, 18 Am. Rep. 246, was an action upon the case for a nuisance occasioned by casting refuse material out of the defendant's sawmill into a natural stream, whence it was carried by a spring freshet upon plaintiff's land. The court held the defendant liable for the damages arising from his own wrongful or negligent act, but not for those arising from the negligent acts of others, saying:

> "The difficulty may be great of accurately proportioning and assessing the damages done by the defendant, but that difficulty the defendant could have avoided had he taken due care that no occasion should arise requiring such assessment of damages."

To the same effect is City of Mansfield v. Bristor, supra, where the court said:

> "True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury of each with a liberal hand."

Appellant does not contend that the lower court charged it with more than its proportion of the total damages caused by the plants of the two companies. That point is not raised in the briefs. Appellant's contention is stated in its opening brief as follows:

> "The evidence is insufficient to show that any material discharged from the cement mill of appellant was precipitated upon the lands of the plaintiff in any appreciable amount."

The trial court found that from about the early part of the year 1910 until the installation of the "treaters" in January, 1913, defendant maintained and operated its cement mill in such a manner that "large quantities of noxious and filthy dust, smoke, gases, vapors, and cement continuously escaped from said manufactory and were continuously discharged therefrom into the atmosphere and thence upon the land of this plaintiff"; also that, after defendant commenced to operate its mill, it operated it in such a manner that "a large amount of dust and matter arising from the various stages of the manufacture of cement therein were discharged therefrom into the atmosphere and were thence discharged and precipitated upon said land and premises of plaintiff in quantities aggregating many tons per annum," and, further, that "throughout said period said dust and matter settled upon plaintiff's said land, and upon the trees and crops growing theron, and coated the leaves, foliage, and fruit thereof with an ash-colored deposit of dust and matter, and damaged the trees growing upon said land, thereby retarding and weakening their growth and rendering them less vigorous and less productive, and damaging the fruit and other crops above mentioned growing upon said land, both by lessening the quantity and by impairing the quality and value of such fruit crops."

[3] Defendant claims that these findings are not supported by the evidence. All presumptions are in favor of the findings, and under the well-settled rule we cannot disturb them if there is any substantial evidence to support them.

The gravamen of appellant's contention seems to be that the evidence is insufficient to show that cement dust from its mill settled upon respondent's orange grove in "large" quantities. It seems to be conceded that some dust from appellant's mill was precipitated upon respondent's orange grove. If, as we believe, enough dust from appellant's plant was deposited upon respondent's trees to cause them some damage, then, since appellant does not claim that it has been charged with more than its proportion of the damages caused by the dust from the plants operated by the two companies, the judgment, in so far as it rests upon the above-mentioned findings, must be affirmed, regardless of the quantum of dust from appellant's mill.

A number of witnesses testified that they frequently saw clouds of cement dust from appellant's plant float over and settle upon respondent's grove. One witness, L. V. W. Brown, describing his observations, said:

> "I observed the operation of the cement plant [defendant's cement plant] since it started in 1910. I observed the smoke and emissions from it. Of course, there was a great deal of dirt emitted previous to the time the treaters were put on, and that followed the direction of the wind. At other times, when there was no wind, there would seem to be a great pall of dirt that would be thrown into the air, and would hang more or less continuously over that district until the wind took it away. This pall of dirt or dust or smoke in the air seemed to extend three miles, in every direction."

Another witness, Prof. Babcock, who made a number of measurements of the cement dust carried into the air from the mills of these two cement companies, testified that, as a result of his experiments and measurements, he calculated that in the years 1909, 1910, 1911, and 1912 there fell per year at least 150 tons of cement dust on plaintiff's 163 acres. He further testified that his calculations showed that, of the amount so falling annually on plaintiff's property, about one-fourth came from the mills of the California Portland Cement Company, and the balance from "some other source." Defendant's plant was the only other possible source whence the dust could have come. This and much other evidence that could be referred to if necessary is sufficient to justify the finding that cement dust "in large quantities" was discharged into the atmosphere from defendant's plant, and thence precipitated on the trees in plaintiff's orange orchard.

To cause injury to plaintiff's trees, for which he would be entitled to recover damages, it was not necessary that great quantities of the cement dust from defendant's mill should have settled upon the trees. A slight coating of the dust on the leaves of an orange tree will cause serious injury and consequent damage. Prof. Peirce, of Stanford University, testified that the hard opaque crust that forms on the leaf when the cement dust is affected by moisture in the atmosphere interferes with the action of sunlight on the plant. Sunlight, he said, is the one thing that the plant requires to produce the necessary starch and sugar, which is the plant food upon which the trees thrive. This plant food, he testified, is stored up in the daytime when the leaf is at work, and consumed during the night. From an experiment conducted by Prof. Peirce in the courtroom during the trial, it appeared that, if a leaf were only partially covered with the opaque crust formed by the ash-colored deposit of cement dust, so that a part only was shaded thereby, more starch would be found in the unshaded than in the shaded part of the leaf.

[4] Appellant calls our attention to the fact that during the operations of its plant throughout the period complained of by respondent the orange grove was subject to other and natural causes of injury and deterioration, such, for instance, as lack of vitality due to want of proper care in the early stages of the orchard's growth, killing frosts, and high winds blowing directly from the north through the Cajon pass—referred to by the witnesses as "northers." Prof. Peirce's expert testimony, if accepted as true, justified the lower court in inferring that any discernible amount of cement dust, incrusted on the leaves of the orange trees, by its inevitable interference with the free action of sunlight, will cause appreciable damage to the trees. In cases of this sort, the law is that, if it be impossible to distinguish between the damage arising from the defendant's actionable injury and damage which has another origin, the jury, or the trial judge if the cause be tried without a jury, should be left to make from the evidence the best possible estimate, and to award the plaintiff compensatory damages for the actionable injury. In Jenkins v. Pennsylvania R. Co., supra, the rule was stated as follows:

> "It many times happens that the damage arising from an actionable injury, chargeable to the defendant, is, in the nature of things or from the circumstances of the case, indistinguishable from other damage occurring at the same time, attributable to the acts of an independent tort-feasor or to natural causes. In such cases, since the injured party cannot supply the materials necessary to enable the jury to make an exact computation of the damages in suit, the approved practice is to leave it the good sense of the jury, as reasonable men, to form from the evidence the best estimate that can be made under the circumstances, as a basis of compensatory damages for the actionable injury."

The evidence here shows that plaintiff's grove, though not subject to any greater damage from the elements than other groves situated outside the zone of falling cement dust, did not produce as did the groves similarly situated outside the dust zone. W. B. Gregor, who had a grove about a mile and a half north of defendant's property, testified that there was no deposit of grayish substance on the trees in his grove, and that the blossoms on his trees did not fall off as they did from the trees in defendant's grove.

[5] From the foregoing we think it clear that the evidence shows that plaintiff's orchard suffered substantial damage, directly attributable to defendant's wrongful operation of its cement plant, whereby cement dust, in quantities sufficient to cause material injury, was precipitated upon plaintiff's citrus trees, and that therefore the evidence is sufficient to support the findings of which appellant complains.

There was ample evidence to justify the finding (appearing in the conclusions of law) to the effect that plaintiff was damaged in the sum of $300 for increased labor and cost in the care of its orange orchard. Teams were used in the cultivation of the grove. The ranch foreman testified that the cement dust got on the horses' shoulders, under the harness, from brushing against the trees while dragging the cultivator, thereby causing their shoulders to become sore and necessitating extra care, whereby an hour a day was lost—a daily loss of about 45 cents for each team that was in use during the season in each of the years 1910, 1911, and 1912, and totaling more than $300.

Finally, it is contended that plaintiff is not entitled to damage for injury to the trees in addition to damage for loss of crops and increased labor. It will be recalled that the lower court found that plaintiff is entitled to recover: (1) The sum of $3,500 for loss of and injury to the orange crops during the years 1910, 1911, and 1912; (2) the sum of $300 for increased labor in the care of the land; and (3) the sum of $2,500 for injury to the trees. Appellant claims that, if respondent be allowed compensation for loss of and injury to the 1910, 1911, and 1912 crops, together with compensation for the increased labor and cost in caring for the grove while those crops were growing and maturing, it is not entitled, in addition to those items, to compensation for injury to the trees. Appellant, to quote from its brief, bases this contention "on the fact that the trees in plaintiff's grove are in as good condition now as they would have been had no dust ever been precipitated thereon."

[6] A number of witnesses testified that, subsequent to the installation of the dust "treaters" in defendant's plant in January, 1913, and prior to the trial in May, 1917, plaintiff's trees had completely recovered. But it does not therefore follow that plaintiff's injury was confined to deterioration in the crops that matured in 1910, 1911, and 1912, and the increased cost of bringing those crops to maturity. The measure of plaintiff's damage is the amount that will compensate it for all the detriment proximately caused by defendant's wrongful operation of its plant from the time when it commenced operations in January, 1910, until it installed the "treaters" in January, 1913. The measure of damages in cases of this character is found in section 3333 of the Civil Code, reading:

> "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for

all the detriment proximately caused thereby, whether it could have been anticipated or not."

[7] The 1912 crop was the last crop picked and packed prior to the commencement of the action in August, 1913. Since early in 1913 defendant, by the installation of dust treaters, has collected about 95 per cent. of the dust that otherwise would have escaped into the atmosphere from its cement plant and settled on plaintiff's trees. But the dust that incrusted on the leaves that were newly put forth by plaintiff's trees in the year 1912 would remain on those leaves for the period of their life, which is between two and three years, meanwhile seriously interfering with plant respiration and the formation of starch and sugar, thereby tending to tree starvation. The injury caused by the dust that settled on the trees in the years 1911 and 1912 would therefore naturally tend to decrease the 1913 and 1914 crops. And though the trees may have "come back" when observed by the witnesses who testified that they saw them shortly before the trial in May, 1917, still it can readily be seen that there would be some continuing injury to the trees, and some loss due thereto, after the picking and packing of the 1910, 1911, and 1912 crops. For these reasons we conclude that, in addition to compensatory damages for loss due to diminution of and deterioration in the crops for the years 1910, 1911, and 1912, and in addition, also, to the increased cost in the care of the land due to the dust galling the shoulders of the animals used in cultivating the grove during those three years, plaintiff was entitled to compensation for the continuing injury to the trees due to the dust from defendant's plant that settled on them in the years 1911 and 1912, by reason of defendant's wrongful operation of its plant in those two years—tortious conduct, the effects of which would manifest themselves in the 1913 and 1914 crops, thus making it necessary to give the trees an increased amount of fertilizer and care in order to mature as much of the 1913 and 1914 crops as possible.

There was ample evidence to sustain the court's finding that $2,500 is the amount necessary to compensate plaintiff for this continuing injury to the trees. It may be inferred from the testimony of several witnesses whose experience qualified them to testify as experts that the care and fertilization necessary to bring the trees back to a normal condition in the years 1913 and 1914 would be about double the amount that it would have been necessary to expend on the grove if the trees had suffered no injury continuing after the harvesting of the 1912 crop. The amount actually expended for the care, cultivation, and fertilization of the trees for the years 1913 and 1914 averaged $55.39 per acre. It is a reasonable inference from the testimony of the witnesses that one-half of this sum, $27.69 per acre, is the additional amount made necessary by the continuing injurious effects of the dust that settled on the trees in the years 1911 and 1912—injurious effects that would naturally continue to manifest themselves in the 1913 and 1914 crops, and, possibly, in the 1915 crop also. This additional amount necessary to be expended for increased care and fertilization totals considerably more than the sum of $2,500 allowed by the court, besides which this sum does not take into consideration another element of loss for which plaintiff was entitled to compensation—the inevitable deterioration of and diminution in the 1913 and 1914 crops. This continuing injury, and the damages resulting therefrom must inevitably have decreased by the amount of such damages, the vendible value of plaintiff's grove. There is no reason to believe that the $2,500 allowed for injury to the trees included any of the damage covered by the two other items of injury allowed by the court—$3,500 for injury to the 1910, 1911, and 1912 crops, and $300 for increased labor in maturing those crops. Every intendment is in favor of the action of the court a quo; and, unless appellant specifically calls our attention to something in the record overcoming this presumption, we are bound to assume that the award to plaintiff of $2,500 for injury to the trees included only such injury as might affect one or more of the crops subsequent to the 1912 crop—the last crop for injury to which plaintiff was specifically awarded a recovery. This conclusion is further fortified by the following excerpt from the opinion of the learned judge who tried the case, printed in appellant's closing brief:

> "Had it not been for this freeze [the freeze of 1913], with the elimination of the cement dust nuisance which took place in December, 1912, when the treaters were installed, the plaintiff's grove would have required no more care and attention than a 50 per cent. increase of fertilization and some added cultivation. Such a percentage, based upon the expenditures made by the plaintiff on these items during the years both before and subsequent to the commencement of this action, would not exceed $2,500, which figure I consider a just proportion of the injury to the grove suffered by reason of the total cement dust emitted from both plants."

Appellant has failed to point out any reversible error, and the judgment therefore is affirmed.

We concur: THOMAS, J.; WELLER, J.

50 Cal. App. 637

NILES SAND & ROCK CO. v. MUIR et al. (Civ. 3604.)

(District Court of Appeal, First District, Division 1, California. Dec. 27, 1920, as Modified in Order of Jan. 26, 1921, Denying Rehearing. Hearing Denied by Supreme Court Feb. 24, 1921.)

1. Sales ⚷77(1)—Contract held not to require payment by measure but by weight.

A contract for the sale of sand and gravel which stated that 2,400 pounds was accepted as the average weight per cubic yard for all materials, and that bills would be paid for on that basis at the rate of 75 cents per ton of 2,000 pounds, was a contract for purchase and sale by weight, and not by measure, especially where the parties had so construed it by keeping an accurate record of the weight of materials furnished, but not of the measure.

2. Appeal and error ⚷907(2)—Evidence not in record presumed not to support finding denied to appellant.

On assignment of error to the refusal to sign findings proposed by appellants, where none of the evidence taken at the trial was before the court, but the record merely stated that each party introduced evidence on each and all of the allegations, it must be presumed in support of the court's ruling that the evidence introduced by appellant to support its allegations referred to in the proposed findings was insufficient.

3. Sales ⚷353(6)—Complaint held to show compliance with condition as to weight of sand.

In a complaint for balance of purchase price of sand and gravel, sold by weight, the contract providing that a cubic yard of material should be of a specified weight, an allegation that plaintiff fully complied with every condition of the contract is sufficient allegation of compliance with the condition as to weight.

4. Appeal and error ⚷1170(3)—Failure to allege performance of condition of contract held harmless.

The failure of a complaint to allege performance of a condition of the contract does not require reversal under Code Civ. Proc. § 475, prohibiting reversal unless the defect was prejudicial where the denial of performance of that condition raised the principal issue to be determined at the trial which lasted 27 days, and the evidence was not in the record, so that it would be presumed it fully established performance of the condition as found by the trial court.

5. Appeal and error ⚷932(1)—No presumption indulged to avoid excessive recovery that findings embraced charge on both sides of account.

In an action for breach of contract for the sale of sand and gravel, where the court found the quantity of material delivered as established by the evidence, but computed the price thereof at an amount in excess of the correct figures, it cannot be presumed that the finding of amount due embraced a charge entered on both sides of the account, though the court also found a payment by defendant exceeding the amount claimed by him by substantially the same sum as the value of the sand exceeded the correct value.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Niles Sand & Rock Company against Robert B. Muir and another, doing business under the firm name and style of R. C. Storrie & Co. Judgment for the plaintiff, and the defendants appeal. Modified and affirmed.

R. H. Countryman, of San Francisco, for appellants.

John L. McNab and Byron Coleman, both of San Francisco, for respondent.

WOOD, Justice pro tem. The plaintiff obtained a judgment against the defendants for $15,195.51 and interest thereon, and they have appealed upon the judgment roll.

The court found that the contract between the parties was made in two letters, marked respectively A and B; that A was written by Mr. Ford, the president of the plaintiff company, following a discussion of the terms of the proposed contract held at the office of defendants; that B was written following a telephone conversation between Mr. Ford and Mr. Robert B. Muir, acting for the copartnership defendants, in which Mr. Muir rejected the letter as a proposal for a contract because, he asserted, it did not express all of the terms; that on the same day, December 14, 1914, the two letters were signed by Mr. Ford for the plaintiff corporation, marked "Accepted," and presented to Mr. Muir, who signed for the defendants below the word "Accepted." The bodies of these letters are as follows:

"A.

"We herewith submit our proposal to supply all of the concrete gravel and crushed gravel and sand for use in the construction of the Twin Peaks tunnel, San Francisco, at 75 cents per ton of 2,000 pounds f. o. b. cars San Francisco; railway weights to govern as shown on freight bills. This price includes all freight charges to San Francisco, but does not include switching charges or trackage charges, if there be any."

"B.

"Confirming conversation of even date in reference to our contract with you for supplying all of the sand, gravel, and crushed gravel for concrete in constructing the San Francisco Twin Peaks tunnel, we hereby mutually agree that, when estimating the amount due us on each shipment made, the weights of materials as shown on freight bills of Southern Pacific Company will be acceptable to both parties to this contract or agreement, and that 2,400 pounds will be accepted as the average weight per cubic yard of all of the above-mentioned

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

materials, and that bills will be paid for on that basis, at the rate of 75 cents per ton of 2,000 pounds f. o. b. cars, which price includes all railway freight charges from Niles to San Francisco, but does not include any additional charges, such as switching charges or trackage charges, if there be any, at destination.

"Payments to be made at Niles Sand Gravel & Rock Company by Storrie & Co. not later than the 20th of each month and every month for all material shipped from Niles to and including the last day of the preceding month."

The court found that by virtue of the terms of the agreement plaintiff agreed that the average weight per cubic yard of said material should be 2,400 pounds.

Further, there are findings that plaintiff duly performed all the conditions of the contract on its part to be performed, that it delivered 135,564.26 tons of said material to defendants in full compliance with said agreement, for which defendants agreed to pay $103,116.19; that the reasonable value of said materials was 75 cents per ton for 2,000 pounds f. o. b. San Francisco, and that no part thereof except $87,920.68 had been paid, which left a balance of $15,195.51 owing to plaintiff.

There is further finding that plaintiff delivered all said material at the railroad spur tracks in San Francisco and paid all the freight charges thereon to said railroad spur tracks.

The principal ground of error claimed here is the refusal of the court to make certain findings in support of defendants' answer and counterclaim. Defendants in substance requested that the court find that the plaintiff warranted that the average weight of the materials would not exceed 2,400 pounds to the cubic yard, while in fact the sand delivered averaged in weight more than 3,000 pounds to the cubic yard, and all other materials averaged in weight more than 2,800 pounds to the cubic yard; also that the total number of cubic yards of sand delivered was 10,464.83, and the total number of cubic yards of other material delivered was 85,619, making a total of 96,083.83 cubic yards, and that because of the excess weight of sand and materials defendants paid out and were damaged in the sum of $7,603.31 for hauling, transportation, and carriage in excess of the amount they would have been obliged to pay if the sand and materials had not exceeded an average weight of 2,400 pounds per cubic yard.

[1] The theory of the defendants is that, as plaintiff was to be paid 75 cents per ton of 2,000 pounds, and the weight was to average 2,400 pounds per cubic yard, this, in effect, was an agreement that the purchase price should be 90 cents per cubic yard, and that the court should have made a finding as to the number of cubic yards delivered, as well as the number of tons. The trouble with this theory is that the parties contracted for the purchase and sale by weight, and not by measure; and, with this idea in view, apparently an accurate account was kept of each and every ton delivered, while there is no suggestion that a measurement was ever made or an account kept of every cubic yard delivered. It is more than likely that the only evidence before the court related to the weights of various and separate cubic yards measured and weighed out by way of sample. The court, however, found that 135,564.26 tons of material was delivered, and this, taken in connection with the finding that it performed the condition of the agreement as to the average weight of 2,400 pounds per cubic yard, is in effect a finding that approximately 113,000 cubic yards was delivered, and not 96,083.83 cubic yards, as appellant requested the court to find.

[2] There is another reason why no error is shown on the part of the court in refusing to sign the findings proposed by the defendants. None of the evidence taken at the trial is before this court. The record merely shows "that plaintiff and defendant introduced evidence on each and all of said allegations." In the absence of such evidence as might have sufficed to sustain a finding of the court upon the issues raised by the answer and counterclaim, we are unable to determine whether or not it was incumbent upon the court to make the findings which the defendants proposed. As against the presumption in favor of the judgment upon appeal it must be made to affirmatively appear that the evidence introduced was sufficient to authorize such a finding as would "have the effect of invalidating a judgment fully supported by the findings made." Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098. "Such a finding," says the Supreme Court in Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504, "would not be authorized if the evidence introduced was insufficient to sustain the allegations presenting the issues, any more than it would if there were no evidence introduced in reference thereto." Bliss v. Sneath, 119 Cal. 526, 51 Pac. 848; Estate of Barclay, 152 Cal. 758, 93 Pac. 1012.

[3] It is urged that the complaint is insufficient to support the judgment because it appears therefrom that plaintiff guaranteed that the average weight of the materials should not exceed 2,400 pounds per cubic yard, but that no facts are alleged showing that this condition of the agreement was performed. There is an allegation, however, "that plaintiff fully complied with this and every other condition of the contract."

[4] Assuming that there was a defective allegation in the complaint, section 475 of the Code of Civil Procedure provides that no judgment shall be reversed by reason of any defect unless it appears that the defect was prejudicial, and that by reason thereof the appellant suffered substantial injury, etc.

The contrary not appearing, we may assume in support of the judgment that no objection was made to the admission of evidence proving that respondent had complied with this condition of the contract. The answer alleged that the sand weighed more than 3,000 pounds per cubic yard, and that all other materials averaged in weight more than 2,800 pounds per cubic yard. The question as to the average weight of the materials per cubic yard was in substance the real issue presented by the pleadings and upon which evidence was introduced by the parties during a trial which lasted 27 days. There is nothing to indicate that appellants suffered any injury because of the claimed defect in the pleading, and it must be disregarded.

[5] It is urged that there is an error in mathematical calculations, and consequently that the findings do not support the judgment. It is undisputed that plaintiff delivered 135,564.26 tons of material at 75 cents per ton of 2,000 pounds, which amounts to only $101,673.19. The court found that the defendants agreed to pay $103,116.19, and that the reasonable value of the materials was $103,116.19, and was and is 75 cents per ton of 2,000 pounds, and that no part of said sum had been paid except $87,920.68, leaving a balance of $15,195.51. Manifestly from these figures it appears that the balance due plaintiff is only $13,752.51, or $1,443 less than the amount found due by the findings.

The answer alleged that the total amount of money that became due to plaintiff under the contract was $86,475.68, and that they (defendants) paid to plaintiff $86,478.18 in full satisfaction of the claim, which was an overpayment of $2.50 made by mistake. It will be observed that the findings show that the defendants paid $1,442.50 in excess of the amount alleged in the answer. It is claimed by respondent, but disputed by appellants, that the error represents charges of $1,442.97 on respondent's ledger which were afterwards credited on the other side, which did not affect the balance due. The record shows conclusively that the actual tonnage delivered was 135,564.26 tons, just as the court found it to be, and which at 75 cents per ton amounts to only $101,673.19. The findings declare that $87,920.68 has been paid. It is true that the court found that defendants agreed to pay $103,116.19, but there is not an intimation to be found anywhere that defendants agreed to pay for anything other than the 135,564.26 tons of materials. Furthermore, it cannot be presumed, in the face of the court's finding that $87,920.68 had been paid, that any part of that sum represents a credit of some kind the nature of which is unexplained, and the fact disputed, or that it represents anything other than cash or its equivalent. Presumably the evidence established the fact that defendants paid more than the amount alleged in their answer.

From what has been said it follows that the findings do not support a judgment in excess of $13,752.51. It is therefore ordered that the judgment for the sum of $15,195.31 entered herein be modified by reducing the amount thereof by the sum of $1,442.80, leaving as the proper balance due said plaintiff the sum of $13,752.51, and that as to said last-named sum the judgment should be, and is hereby, affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

50 Cal. App. 551

STUART v. EVERLY. (Civ. 3642.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1920.)

1. Venue 🔑68—On motion for change counter affidavits as to judge's bias need not be filed within five days.

Code Civ. Proc. § 170, subd. 4, requiring counter affidavits on the question of a judge's disqualification by bias to be filed not more than five days after the filing of the affidavit, does not apply to a motion under section 397 to change the place of trial to another county on the ground of bias and prejudice on the part of the judge.

2. Venue 🔑72 — No error on motion for change because judge was sworn as witness.

Conceding that a motion to change the place of trial on the ground that the judge was biased should have been heard on affidavits, no error was committed because the judge was sworn as a witness apparently for the purpose of submitting himself to cross-examination where he only testified in effect that the matters set forth in his affidavit were true.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Z. B. Stuart against Rose Everly. From an order denying a motion to change the place of trial, plaintiff appeals. Affirmed.

Z. B. Stuart, C. W. Byrer, and J. W. Hocker, all of Los Angeles, for appellant.

Ralph C. McComish, of San Jose, for respondent.

KERRIGAN, J. This is an appeal from an order refusing plaintiff's motion to change the place of trial in an action wherein the plaintiff seeks to recover, in payment of professional services rendered as an attorney at law, a specified interest in certain real property to which he alleges he is entitled under the terms of a contract between him and the defendant.

Plaintiff demanded that the place of trial of the action be changed from Monterey county to San Benito county, basing his motion upon the ground that he could not have a fair trial in Monterey county: First, for the reason that the citizens thereof were prejudiced against him, and, secondly, on account of the alleged bias and prejudice of the judge of the superior court of that county against him. The motion was denied, and the plaintiff appeals.

As the allegation of the motion based upon the alleged prejudice of citizens against the plaintiff, the court's action, in so far as it has reference to that phase of the motion, is not attacked, nor could it well be, no proper showing having been made or attempted on that ground.

[1] As to the other allegation, concerning the state of mind of the judge of the superior court toward the plaintiff, the appellant urges that the trial court should not have considered the affidavit of the defendant for the reason that it was not filed within five days after plaintiff's affidavit was filed. Subdivision 4 of section 170 of the Code of Civil Procedure provides that, when it is sought to show that the judge before whom the case is about to be tried cannot give either party a fair and impartial trial by reason of prejudice or bias, said judge shall forthwith secure the services of some other judge of the same or another county to preside at the trial of the action, and that the affidavit alleging the disqualification of a judge must be served upon the adverse party at least one day before the day set for the trial of such action, and that the counter affidavit "may be filed at least one day thereafter, or such further time as the court may extend the time of filing such counter affidavit not exceeding five days. * * *"

Passing the point that this provision of the Code of Civil Procedure is directory only, a complete and simple answer to the appellant's position is that the present proceeding is not based upon subdivision 4 of section 170, for it is not sought to have the trial judge select another judge from the same or another county, but the motion is for a change of the place of trial from one county to another, and therefore is controlled, not by those provisions, but by the provisions of section 397 of the Code of Civil Procedure, and these include no such limit of time. Dakan v. Superior Court, 2 Cal. App. 52, 82 Pac. 1129. It is clear that the motion was not based upon the last-mentioned section through inadvertence, for the plaintiff demanded, not merely a change of judges, but that the trial of the action be transferred to another county, supporting his demand by an allegation of bias and prejudice on the part of the citizens of the county of Monterey, and the same conclusion is indicated by the circumstance that at the completion of the hearing upon this matter the plaintiff in effect declined to consent to the suggestion of the trial judge that the judge of the superior court of San Benito county be called in to preside at the trial, who is the judge before whom the case would have been tried if the case had been transferred to the county demanded in plaintiff's motion.

[2] Conceding that the rule is that a motion of this character must be heard upon affidavits (Mercantile T. Co. of S. F. v. Sunset Road Oil Co., 173 Cal. 487, 160 Pac. 545, it was not violated in this proceeding, for, while the presiding judge was sworn as a witness, all he testified to in effect was that the matters set forth in his affidavit were true. In being sworn as a witness, it would appear that he merely intended to submit himself to cross-examination.

The order is affirmed.

We concur: SEAWELL, Presiding Justice pro tem; RICHARDS, J.

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50 Cal. App. 804

STUART v. ESPINOSA. (Civ. 3641.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1920.)

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Z. B. Stuart against Manuel D. Espinosa. From an order denying a motion to change the place of trial, plaintiff appeals. Affirmed.

Z. B. Stuart, C. W. Byrer, and J. W. Hocker, all of Los Angeles, for appellant.

Ralph C. McComish, of San Jose, for respondent.

PER CURIAM. It has been stipulated by the parties to this appeal that the facts are identical with those of the case entitled "Z. B. Stuart v. Rose Everly" (No. 3642) 195 Pac. 701, this day decided by this court, and in which the order appealed from was affirmed. For the reasons given at length in that opinion the same result must follow in this case.

The order is affirmed.

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50 Cal. App. 804

STUART v. COFFRIN. (Civ. 3643.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1920.)

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Z. B. Stuart against Kissiah Coffrin. From an order denying a motion to change the place of trial, plaintiff appeals. Affirmed.

Z. B. Stuart, C. W. Byrer, and J. W. Hocker, all of Los Angeles, for appellant.

Ralph C. McComish, of San Jose, for respondent.

PER CURIAM. It is stipulated by the parties to this appeal that the facts are identical with those of the case entitled "Z. B. Stuart v. Rose Everly" (No. 3642) 195 Pac. 701, this day decided by this court, and in which the order appealed from was affirmed. For the reasons given at length in that opinion the same result must follow in this case.

The order is affirmed.

(50 Cal. App. 588)

SCHUH v. OIL WELL SUPPLY CO. et al.

(Civ. 3614.)

(District Court of Appeal, First District, Division 1, California. Dec. 24, 1920.)

1. Evidence 🔑208(6)—Witnesses 🔑392(1)—Superseded pleadings admissible as admissions or to impeach party on cross-examination.

Where a party is a witness, pleadings that have been superseded by amended pleadings are available as admissions or on cross-examination for purposes of impeachment.

2. Witnesses 🔑387—Cross-examination of plaintiff as to why he did not allege fact in complaint held argumentative.

Where plaintiff suing for injuries testified on cross-examination that he knew a belt was split at the time of the accident, a question as to why he did not so allege in the original complaint was properly excluded as argumentative.

3. Witnesses 🔑280—Question on cross-examination calling for inference or answer to argument properly excluded.

A question on cross-examination which does not call for a fact, but for an inference on the part of the witness or for an answer to an argument contained in the question, is properly excluded.

4. Evidence 🔑528(1)—As to finding of pus in injured arm several months after accident and cause thereof held competent.

In an action for personal injuries, testimony of a doctor who examined plaintiff about three months after the accident as to finding pus, and that such condition might result though the treatment was skillful and proper, was competent and it was a question for the jury whether it was one of the natural consequences of the accident.

5. Appeal and error 🔑232(2) — General grounds of objection to evidence does not raise question of proper foundation.

An objection to evidence on the general grounds of incompetency, irelevancy, and immateriality does not authorize consideration on appeal of the objection that a proper foundation had not been laid for the question.

6. Master and servant 🔑289(28)—Employee's negligence in shifting belt by hand held a question for the jury.

In an employee's action for injuries sustained in shifting a belt by hand, where there was evidence that it was the custom not only in defendant's workshop, but generally, to so shift the belt, and that it was safer to do so than to shift it by the use of a stick or tool, the question of plaintiff's negligence in using his hand to shift the belt was one of fact for the jury.

7. Trial 🔑82—Objection to evidence not stating ground is insufficient.

An objection to evidence not stating any ground of objection is insufficient.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by August Schuh against the Oil Well Supply Company and the R. H. Herron Company. From a judgment for plaintiff, the Herron Company appeals. Affirmed.

Geo. E. Whitaker, of Bakersfield, and Kemp & Clewett, of Los Angeles, for appellant.

Kuster & Salisbury and Earle Smith, all of Los Angeles, for respondent.

KERRIGAN, J. This is an appeal by defendant R. H. Herron Company from a judgment in favor of plaintiff in an action to recover damages for personal injuries.

The plaintiff was injured while operating a lathe in a machine shop owned by the appellant. While operating the lathe the plaintiff, in order to make it run faster, attempted to shift the belt by which the lathe was turned, and in doing so his left hand and arm were seriously injured. The facts of the case are fully stated by Mr. Justice Shaw in the opinion rendered upon a former appeal of this case (Schuh v. R. H. Herron Co.), and which is reported in 177 Cal. at page 13, 169 Pac. at page 682.

[1] There is a difference in the averments of the first and second amended complaints as to how the accident happened, and at the trial plaintiff's testimony was in accord with those of the later pleading. With reference to these changes and the contradictory accounts given by plaintiff of the causes of the accident, the appellant claims that it was denied permission to cross-examine him. It is true, as asserted by the appellant, that the rule is established in this state that, where a party is a witness, pleadings that have been superseded by amended pleadings are available as admissions, and for use on cross-examination for purposes of impeachment (Schuh v. R. H. Herron Co., supra); but here no objection or ruling was made against the exercise of that right, nor was there any misunderstanding as to the law on the subject, for it had been stated on the former appeal in this case. The objection which brought about the ruling here complained of was upon the ground that the question was argumentative, and it was sustained upon that ground alone. From the record it appears that immediately before the ruling assigned as error the plaintiff's attention had been directed to the difference between the allegations of his first and second amended complaints, and between the former and his

testimony in support of the latter, and upon being asked to explain this difference he replied that he left the matter of pleading to his attorneys. Upon this reply being made the following proceedings occurred:

> "Now, as a matter of fact, Mr. Schuh, was it not an afterthought of your own that the belt was split, and the fact is you did not know it was split until long after you were injured?
>
> "The Witness: I knew it was split the very instant of my accident.
>
> "Mr. Kemp: Then why did you not allege in your complaint that the belt was defective, was split, and that your hand was caught in there and you were thereby injured?
>
> "Mr. Salisbury: Just a moment;— we object to that as argumentative.
>
> "The Court: Objection; very well, objection sustained. You can argue that to the jury."

[2, 3] As before stated, the question was argumentative, and the objection thereto on that ground was correctly sustained. A question on cross-examination which does not call for a fact, but for an inference on the part of a witness, or for an answer to an argument contained in the question itself, is properly rejected. People v. Harlan, 133 Cal. 16, 21, 65 Pac. 9. Appellant did not reframe the question or make any attempt to follow this line of cross-examination, for the reason, doubtless, that he had already succeeded in getting before the jury the inconsistent statements.

[4] A further ruling complained of as error was the admission of the testimony of Dr. Clayton J. Hinman, who had not examined the plaintiff until about three months after his accident. The witness was asked to tell the jury in what condition he found the plaintiff's arm the first time he examined it. Over the general objection that the question was incompetent, irrelevant, and immaterial, he replied in part that plaintiff's left arm was shrunken, that he could not lay his left hand back down, that his grip was weak, and that the injury was permanent. He also testified that he had found the wound discharging both serum and pus and some blood with a foul odor; that upon probing the sinus he had discovered a spicule of dead bone in there, and further testified:

> "I cannot say that the condition that I found was part of or resultant from any improper treatment prior to the time he came to me. I would say that sometimes we have with a fracture, as this bone had been fractured, not a good apposition of the ends. There will be portions of the dead bone come off. I always endeavor to get good apposition, but I do not always succeed."

Appellant's attack on the answer of the witness is directed to that portion thereof which refers to the pus condition of the wound; and, if we understand the argument, it is to the effect that the proper foundation was not laid for the question in that it was not shown that the pus condition might not have resulted from the carelessness of the plaintiff or some of his attendants. It is true that the pus condition might be the result of improper care or carelessness; but, on the other hand, the witness said that such condition might result when the treatment was skillful and proper. The evidence was competent. Whether or not this condition was one of the natural consequences of the accident was, we think, a question for the jury.

[5] But, to address ourselves to the appellant's contention that the proper foundation for this evidence was not laid, a sufficient answer to this claim is that the objection was not made upon that ground. When the objection is, as was the case here, upon the general grounds of incompetency, irrelevancy, and immateriality, the objection that a proper foundation had not been laid for the question will not be considered on appeal. Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271.

[6] We are of the opinion that the court committed no error in permitting evidence tending to show that it was the custom of the appellant's employees to shift the belt of the lathe by hand. There is evidence in the record not only that such was the custom in the appellant's workshop, but that it was a general custom. There was also evidence to the effect that this is a safe method; that it is safer than to shift the belt by the use of a stick or tool. Under the circumstances of this case it is not obvious that to shift the belt by the use of the bare hand is negligence. It was not, therefore, a question of law, but one of fact for the jury, and it was so decided in the former appeal in this case.

[7] The appellant further complains of a ruling of the court on the admission of evidence, but the objection to the proffered testimony was placed on no specific ground, counsel merely saying, "I object." No ground of objection being stated, the rule is well settled that the objection is insufficient. People v. Nelson, 85 Cal. 428, 24 Pac. 1006; Hutchinson v. Whitmore, 95 Mich. 592, 55 N. W. 438. Moreover, the question called for the witness' opinion as an expert on a matter with reference to which such testimony is competent, and for that reason also there was no error in the ruling of the court.

Two certain instructions are complained of. As to the appellant's contention under this head it is sufficient to say that from a careful consideration of said instructions in connection with the record we are of the opinion that the appellant's claim of prejudicial error is not well founded.

The judgment is affirmed.

We concur: SEAWELL, Presiding Justice pro tem.; RICHARDS, J.

50 Cal. App. 581

STIEGLITZ v. SETTLE. (Civ. 3612.)

(District Court of Appeal, First District, Division 1, California. Dec. 24, 1920. Hearing Denied by Supreme Court Feb. 21, 1921.)

1. Attorney and client 🔑123(1) — Attorney who deals with client must show fair and just conduct.

In dealing with his client, the highest degree of fairness and good faith is required of an attorney, and courts view such transactions with suspicion and examine them with the utmost scrutiny; in any attempt to enforce such an agreement the burden being on the attorney to show his dealing was fair and just, and that his client made the contract freely and with full knowledge of all facts.

2. Attorney and client 🔑123(1)—Attorney in partition suit acting for owner in sale of land bound by rule of good faith.

An attorney, who acted for the owner of land in partition suit and was also her attorney in the matter of the sale of the land, was bound by the rule of good faith and just dealing in making the sale through the owner's attorney in fact, an obligation which he did not perform by agreeing with the attorney in fact, without knowledge of the owner, to divide an amount of money received from a buyer, or any commission received.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Henry Stieglitz against Maria Encarnacion de Sepulveda Settle. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. C. Petchner, of Los Angeles, for appellant.

Wm. A. Alderson and K. A. Miller, both of Los Angeles, for respondent.

KERRIGAN, J. This is an action instituted by the plaintiff to recover commissions as a broker for services rendered in the sale of the interest of the defendant, Mrs. Maria E. de Settle, in a certain tract of land consisting of 886 acres. The plaintiff had judgment for the sum of $12,581.20, and the defendant appeals, the ground for reversal urged being that the trial court, by its instructions to the jury, based upon what it deemed to be the law of the case, practically withdrew the question at issue from their consideration. We think this contention must be sustained. A reference to some of the testimony in the case will show the grounds upon which we base this conclusion.

Prior to and at the time of said sale the plaintiff was attorney at law practising in San Pedro, and the defendant, being the widow of one Aurelia W. Sepulveda, also resided in that locality. Later she married Henry Settle, and the latter for that reason has been joined as a party defendant. The deceased husband of Maria E. de Settle left a large estate, consisting principally of land; his only heirs being said defendant and his daughter. Part of the estate coming to said defendant was an undivided one-half interest in the tract of land above referred to. She was unable to speak the English language, nor could she read or write any tongue. At the time of the transaction here involved she had given a general power of attorney to one Richard Mahar, who had been the administrator of her deceased husband's estate, and the plaintiff had acted as attorney for the administrator. The plaintiff had also represented the defendant in important litigation, and was also acting as her attorney in a partition suit instituted by said daughter against her for the division of said 886-acre tract, which suit was pending at the time of the sale by him of the defendant's interest in said land. The defendant, being indebted, decided to sell said interest, and after talking the matter over with her attorney in fact, Mahar, directed him to secure a purchaser therefor. The record does not show when this conversation took place, but later, and in the month of February, 1912, Mahar reported to the plaintiff that the land had to be sold, and that the highest offer he had been able to secure for the defendant's interest therein was $250 per acre. Thereupon the plaintiff stated as his opinion that the price offered was too low and that he thought he could secure a purchaser at a better price. He accordingly requested Mahar to see the defendant, and ascertain whether she would authorize him to sell the land and pay him the usual commission. Mahar, according to his testimony given at the trial, took the matter up with the defendant, and reported to the plaintiff that she was willing to permit him to sell the property and to pay him a commission. Plaintiff thereupon began negotiations with one Geo. H. Peck, also a resident of San Pedro, with the result that on the 19th of March, 1912, plaintiff effected a sale of defendant's interest in the land for $400 per acre to Peck.

According to the testimony of the plaintiff and Mahar, the original authority from the defendant to the plaintiff to sell the property was verbal but when plaintiff was informed by Mahar that there would be some delay in paying the commission he requested that the authority theretofore given be put in writing. Thereupon plaintiff prepared such a contract, dating it two days earlier than the agreement of sale with Peck, and it was executed by plaintiff and by Mahar as attorney in fact for the defendant. Touching this phase of the case the defendant testified that Mahar had no conversation with her in which she promised to pay plaintiff a commission in the event he should secure a purchaser for

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the property. As an incident of the sale, on account of which the plaintiff is suing for a commission, is the giving of a check for $500 by the purchaser to Mahar, and its division between the latter and the plaintiff. As to this the plaintiff testified that after the contract of sale had been consummated, Peck called on him and offered him a check of $500 as a fee for preparing the written contract of sale. This the plaintiff declined to accept, saying: "I don't want anything at all. You can draw it to Richard Mahar if you want to." This was done. Mahar upon receiving the check, remarked to the plaintiff that they each had reduced their fees as administrator and attorney for the administrator, respectively, $350 and $375, that it would be fair to accept this check for $500, and to divide the amount thereof equally between them, which was done. The plaintiff's testimony is that this $500 was not paid as a fee, and Peck testified that this payment was made by him for the purpose of binding the contract and for no other purpose.

According to the testimony of Mahar, there was an understanding between him and the plaintiff to divide between them any commission collected by plaintiff on account of the sale of the property, and this is denied by the plaintiff. A witness for the defendant testified that he had, on behalf of a real estate concern, representing a prospective purchaser, about two weeks before the contract of sale to Peck was executed, made an offer to Mahar to purchase defendant's interest in the property at $400 per acre net, without liability on the part of the vendor to pay a commission; that Mahar rejected this offer, saying that the property had already been sold to Peck. According to the testimony of Mahar, the plaintiff must have been aware of this offer, for Mahar as plaintiff's witness, testified that he had submitted every offer received by him to the plaintiff. Other witnesses testified that on a certain occasion plaintiff, when asked why he had not given a certain real estate agent a chance to sell the property, replied that he had nothing to do with the matter at all, that he was merely the defendant's attorney.

From the evidence it can fairly be said that the plaintiff was the attorney for the defendant, not only in the partition suit, but also in the very matter out of which this litigation sprang, that is, the sale of the property. Mahar must have considered him as such, for he reported to and conferred with him about all offers received for it made to him either before or after the sale to Peck. We have already referred to the statement of the plaintiff that his only connection with the sale was as defendant's attorney. At the conclusion of the trial the court, taking the view that what the Supreme Court had said on the former appeal was the law of the case, virtually instructed the jury to find for the defendant.

[1] The relation of attorney and client has always been regarded as one of special trust and confidence. Therefore in dealing with his client the highest degree of fairness and good faith is required, and courts view all such transactions with suspicion, and examine them with the utmost scrutiny, and in any attempt to enforce such an agreement the burden is upon the attorney to show that the dealing was fair and just, and that the client entered into the contract freely and with full knowledge of all the facts connected with the transaction. Felton v. Le Brenton, 92 Cal. 469, 28 Pac. 490; Cox v. Delmas, 99 Cal. 123, 33 Pac. 836. In the first of these cases cited, the Supreme Court said:

> "While an attorney is not prohibited from having business transactions with his client, yet, inasmuch as the relation of attorney and client is one wherein the attorney is apt to have very great influence over the client, especially in transactions which are a part of or intimately connected with the very business in reference to which the relation exists, such transactions are always scrutinized by courts with jealous care, and are set aside at the mere instance of the client, unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect; and in any attempt by the attorney to enforce an agreement on the part of the client growing out of such transaction, the burden of proof is always upon the attorney to show that the dealing was fair and just, and that the client was fully advised."

Some of the features of this case, if the evidence and inferences fairly deducible therefrom are to be credited, are too strongly marked to admit of any doubt of the applicability to it of the rule just announced.

[2] Notwithstanding that Mahar held defendant's power of attorney, and had authority thereunder to make the contract with plaintiff here in question, still plaintiff was the defendant's attorney at law in the pending partition suit, and there is ample in the evidence to warrant the conclusion that he was also her attorney, in the matter of the sale of this property. Consequently he was bound by the rule just stated. The mere fact that he was dealing with her through her attorney in fact did not excuse him from acting through the transaction in the highest good faith toward her. How can it be said that he observed this obligation if he, without the knowledge of his client, agreed with her attorney in fact to divide with him the $500 received from Peck, or any commission received by him from a sale of her property? Can it be doubted that the prospect of profiting through such a division would naturally influence the conduct of the defendant's attorney in fact, in the discharge of his duty to his principal? And there can be no doubt that the plaintiff acted in bad faith and to the prejudice of the defendant if, according to one of the witnesses for the defendant, he,

before the sale to Peck, permitted an offer of $400 per acre net to be rejected without investigation as to the character of the offer. It is quite apparent that if Mahar, the defendant's attorney in fact, had a bona fide offer of $400 per acre net, and this was known to the plaintiff before entering into the agreement of sale with Peck (as the jury from the evidence would be warranted in believing), it was an act of gross bad faith on the plaintiff's part in concerting with Mahar to ignore such offer, and conclude a sale to another person at the same rate per acre, but upon which they were to receive and divide a large sum of money as commission.

As was said in the former appeal (175 Cal. 131, 165 Pac. 436), an attorney at law is under no actual incapacity to deal with or purchase from his client. All that he is required to do when the relation of attorney and client exists, and when the questioned transaction has a bearing upon the relationship, is to make a clear showing that there has been no abuse of confidence, no advantage taken. It may be that in the case at bar the jury would find that the plaintiff did act towards the defendant with the required high degree of good faith and without concealment. All we have endeavored to show in the foregoing references to the testimony is that, taking the evidence favorable to the defendant, a case was made out for the consideration of the jury, just as the Supreme Court in the former appeal demonstrated that considering the evidence favorable to the plaintiff, the court committed error in granting the defendant's motion for nonsuit. As to the former opinion in this case, it cannot be held that what the court there said is the law of the case. Here we are not considering an appeal from a judgment following the granting of a nonsuit, and there is a substantial difference in the evidence in the two trials.

The judgment is reversed.

We concur: SEAWELL, Presiding Justice pro tem.; RICHARDS, J.

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50 Cal. App. 562

WINBIGLER v. SHATTUCK. (Civ. 3439.)

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1920.)

1. Executors and administrators 🔑517 — Without authority outside jurisdiction of government under which appointed.

It is fundamental that, as expressly provided in Code Civ. Proc. § 1913, the authority of an executor or administrator does not extend beyond the jurisdiction of the state or government under which he is vested with his authority.

2. Executors and administrators 🔑519(1)—Foreign executor may not present claim against estate.

Under Code Civ. Proc. §§ 1494, 1496, and 1500, relative to the presentation of claims against decedents' estates, a foreign executor has no authority to present a claim against an estate being administered in California in favor of the estate of which he is executor.

3. Executors and administrators 🔑519(1) — Payment of claim to claimant's foreign executor does not discharge from liability.

Payment of a claim against a decedent's estate to the claimant's foreign executor is not an acquittance protecting the estate from which payment is made against the claims of possible creditors within the state of the claimant's estate.

4. Executors and administrators 🔑431(2) — Presentation of claim by foreign executor will not support action by domestic administrator subsequently appointed.

The presentation of a claim against a decedent's estate by the claimant's executor acting under foreign letters of administration would not support an action on the claim by the administrator with the will annexed of the claimant subsequently appointed by a California court.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Theo. A. Winbigler, as administrator with the will annexed of D. Willard Beam, deceased, against George B. Shattuck, as executor of C. E. Shattuck, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

S. M. Davis, of Santa Ana, for appellant.

Head & Rutan, of Santa Ana, for respondent.

SHAW, J. Plaintiff appeals from a judgment rendered in favor of defendant. D. Willard Beam, a resident of New York, and C. E. Shattuck, a resident of California, were joint indorsers of certain notes issued by a New York corporation designated the Hemlock Lake Canning Company. Both parties died, leaving these notes unpaid. Proceedings were had in the courts of the state of New York, wherein Otis A. Beam was appointed and qualified as executor of the last will and testament of D. Willard Beam, deceased. As alleged in the complaint, which allegation, for the purposes of this decision, we will assume to be true, a claim based upon the indorsement of the notes by D. Willard Beam, deceased, was presented to his executor, who, after approval and allowance, paid the same out of the assets of the estate, as alleged in the complaint, and which we likewise assume to be true.

Beam's co-indorser, C. E. Shattuck, died at his place of residence in California, and letters testamentary were duly issued to George B. Shattuck, who qualified as executor of his estate. Thereafter Otis A. Beam, in his capacity as executor of the estate of D. Willard Beam, deceased, and under and by virtue only of his appointment as such by the courts of New York, presented to George B. Shattuck, as executor of the estate of C. E. Shattuck, deceased, for allowance a claim in the nature of a demand for contribution, which claim was based upon the fact that said claimant had, as executor of the Beam estate, paid the notes so jointly indorsed by D. Willard Beam, deceased, and C. E. Shattuck, deceased. This claim was rejected on the 18th day of May, 1917. Thereafter proceedings were had and taken in the superior court of Orange county, Cal., wherein Theo. A. Winbigler was, by an order of court made on July 27, 1917, duly appointed administrator with the will annexed of the estate of D. Willard Beam, deceased, and upon qualifying he, as such administrator and in the absence of presenting any claim himself, instituted this action for contribution, basing it solely and alone upon the claim so presented by Otis A. Beam in his capacity as executor of the estate of D. Willard Beam under and by virtue of the appointment so made by the court in the state of New York.

Upon this statement of facts, clearly shown by the record, we are of the opinion that plaintiff in no event was entitled to maintain the action; hence no purpose could be served in discussing other rulings of the court assigned as error.

[1-3] It is fundamental law that "the authority of an executor or administrator does not extend beyond the jurisdiction of the state or government under which he is vested with his authority"; and while a foreign executor may receive property voluntarily given to him, he cannot by suit in the courts of this state enforce the right of the estate thereto. Section 1913, Code Civ. Proc.; Estate of Rawitzer, 175 Cal. 585, 166 Pac. 581. Indeed, as we understand counsel for appellant, he concedes this proposition, but, without citing any authority in support thereof, insists that a distinction should be drawn between the authority of such foreign executor to present a claim for allowance and the right to maintain such an action. Under section 1500, Code of Civil Procedure, a necessary prerequisite of enforcing the payment of a debt against the estate of a deceased person is that a claim based thereon and supported by an affidavit (section 1494, Code Civ. Proc.) shall be duly presented to the executor or administrator for allowance, and thereafter, if allowed by the executor, it shall be presented to the judge for his approval, which, if given, shall be indorsed thereon, and then, upon the filing of the same, it "shall be ranked among the acknowledged debts of the estate, to be paid in due course of administration." Section 1496, Code Civ. Proc. On the other hand, if rejected by the executor or administrator, upon a proper presentation by one entitled to have it allowed, an action may be brought, the effect of which, upon obtaining judgment, is to establish the claim against the estate, to be likewise paid in due course of administration. The act of Otis A. Beam in presenting the claim, as shown by the letters testamentary issued out of the New York court, was in his representative capacity as executor of the estate of D. Willard Beam, deceased, but such letters possessed no extraterritorial force outside of that state. Under and by virtue of them Otis A. Beam was vested with no power to exercise the functions of the office of such executor in this state, or take any of the statutory steps to collect the debt alleged to be due his testator. Schouler on Executors, §§ 164 and 173. Outside of the state of New York the letters testamentary issued to Otis A. Beam constituted no evidence of his authority to act here in a representative capacity. His relation to the estate of D. Willard Beam, deceased, was, as to defendant, that of an entire stranger, and hence entitled to no recognition as having authority to deal with the property as assets of the estate in California in any manner whatsoever. Had the claim been allowed and paid, his receipt therefor could not be deemed an acquittance to defendant in protecting him from the claims of possible creditors of D. Willard Beam in this state.

[4] Moreover, the action was brought by plaintiff herein upon a rejected claim not presented by him, but by another party, between whom and himself there existed no privity. Low v. Bartlett, 8 Allen (Mass.) 259; Richards v. Blaisdell, 12 Cal. App. 101. The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

50 Cal. App. 556

HOWARD et al. v. WORTHINGTON.
(Civ. 3432.)

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1920.)

1. Municipal corporations ⚿706(8)—Plaintiffs suing for injuries in automobile collision entitled to instruction on last clear chance.

In an action for damages for personal injuries sustained by plaintiffs through negligent operation of defendant's automobile, in view of the evidence, plaintiffs *held* entitled to an appropriate instruction in the terms proposed by them or the legal equivalent thereof on the doctrine of last clear chance.

2. Municipal corporations ⚿706(3)—Burden on defendant, automobile operator, to show contributory negligence.

In an action for damages for personal injuries sustained by plaintiffs through negligent operation of defendant's automobile, the burden was on defendant to prove his allegations of contributory negligence by a preponderance of the evidence, and plaintiffs had no burden to prove that they were not guilty of such negligence.

3. Trial ⚿296(1)—Specific erroneous instruction not cured by correct general charge.

Where the court in the instructions first correctly states a rule in general terms, and then directly states the contrary rule in language pointed specifically to the instant case, it is not appropriate to hold the error is cured by a general view of the instructions as a whole.

4. Municipal corporations ⚿706(8)—Instruction stating rule of sudden danger erroneous as not limiting doctrine to case of plaintiff's negligence.

In an action for damages for personal injuries sustained by plaintiffs through negligent operation of defendant's automobile, in stating the rule of sudden danger the court in specifying the duty of defendant's driver should have limited application of the rule to a case where the danger or emergency was caused through the negligence of plaintiff.

5. Municipal corporations ⚿705(2)—Driver approaching street intersection from right has superior right.

Under the Motor Vehicle Act of 1917, in its provisions that the operator of an automobile approaching the intersection of a public highway shall yield right of way to a vehicle approaching the intersection from the right, the driver approaching from the right has the superior right if both persons reach the intersection simultaneously.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by A. F. Howard and the State Compensation Insurance Fund against A. J. Worthington. From judgment for defendant, plaintiffs appeal. Reversed.

E. B. Drake, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

CONREY, P. J. In this action plaintiffs seek to recover damages for personal injuries suffered by the plaintiff Howard by reason of alleged negligence in the operation of an automobile of the defendant. Additional damages are claimed for injuries to the plaintiff Howard's automobile. The injuries complained of were the result of a collision between the automobile of the plaintiff Howard and the automobile of the defendant. The collision occurred at the intersection of Brand boulevard and West Sixth street in the city of Glendale, while the plaintiff was driving his automobile southerly on Brand boulevard and while the defendant's automobile, driven by his employee, one Lucas, was traveling westerly on Sixth street. The defendant by his answer denied the negligent operation of his own automobile, and alleged that at said time and place the plaintiff Howard was himself negligent and that the injuries complained of by him, if any, were directly and proximately caused solely by the negligence of said Howard. In accordance with the jury's verdict, judgment was entered in favor of the defendant, from which judgment the plaintiffs appeal.

The errors claimed and relied upon by appellants consist in the court's refusal to instruct the jury as requested by the plaintiffs, and in the giving of certain instructions to the jury.

[1] The plaintiffs requested and the court refused to give the following instruction:

> "Doctrine of last chance. Although you may find that plaintiff, by his negligence, got into a place of danger, yet if the defendant discovered in such danger and thereafterwards by the use of ordinary care could have prevented the accident, then it was his duty to have done so and a failure on defendant's part to have thus prevented the accident was negligence, and if such negligence was the sole proximate cause, then you will find for the plaintiff."

The court not only refused the proposed instruction, but it gave no other on the same subject. The instruction itself is not criticized by respondent. The only question presented is whether or not the evidence was such that appellants were entitled to have the jury instructed as requested on the topic stated. Brand boulevard in the central part thereof is occupied by the double-track railroad of the Pacific Electric Railway Company. That street is 100 feet wide from curb to curb, with a 40-foot roadway on each side of the railroad tracks. The street is used as a double street; that is, vehicles travel north and south on both sides of the car tracks. The evidence is conflicting with respect to the questions of speed of the automobiles of plaintiff Howard and of the defendant while approaching and crossing the intersection, and upon the further question concerning their relative positions at the

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time when the plaintiff Howard entered upon the intersection. According to some of this evidence, the jury might have reached the conclusion that when Howard was crossing into West Sixth street the defendant was on the westerly car track, and that the distance between the two automobiles was 30 feet or more; that Howard's machine swerved to get out of the way and he was doing all that he could in that emergency to avoid the collision; that the defendant was in a position to see and did see that unless defendant's machine was stopped a collision would occur; that the defendant could have stopped his machine in time to avoid the accident, but voluntarily did not do so. In this condition of the evidence the plaintiffs were entitled to an appropriate instruction in the terms proposed by them or the legal equivalent thereof. Starck v. Pacific Elec. Ry. Co., 172 Cal. 277, 156 Pac. 51, L. R. A. 1916E, 58; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85.

[2, 3] The court correctly instructed the jury that the burden was upon the defendant to prove his allegations of contributory negligence by a preponderance of the evidence. But the court gave the following additional instruction:

> "In order, therefore, to find a verdict for the plaintiff, you must not only find from a preponderance of all the evidence that the defendant was negligent, but also that such negligence was the proximate cause of the injury to the plaintiff; and you must further find that the evidence shows, by a preponderance thereof, that the plaintiff was not guilty of negligence, however slight, contributing proximately thereto; otherwise, your verdict should be for the defendant."

The court thus in its later instruction shifted from the defendant the burden of proving plaintiff's contributory negligence, and imposed upon plaintiff the burden of proving that he was not guilty thereof. This is not the law, and the giving of such instruction to the jury was erroneous. Where, as here, the court first correctly states the rule in general terms, and then directly states the contrary rule in language pointed specifically to the instant case, it is not appropriate to hold that the error is cured by a general view of the instructions as a whole. The case is not like that of Alloggi v. Southern Pacific Co., 37 Cal. App. 72, 173 Pac. 1117, cited by respondent, where, after holding that a certain general instruction was erroneous, the Court of Appeal said:

> "We are satisfied, however, from a consideration of the instructions as a whole, that this general instruction did not operate to mislead the jury, for the correct rule relative to contributory negligence was, in several other instructions, stated and restated, and thereby the effect of the erroneous instructions was palliated, if not entirely negatived."

[4] The court instructed the jury as follows:

> "A person suddenly confronted with danger through the negligence of another, is not required to use that calm, dispassionate judgment and action that is required in calmer moments and when not under a stress of circumstances. Therefore, if you find in this case that the plaintiff Howard was suddenly confronted with danger, caused through the negligence of the defendant, which was either caused by the excessive speed, if any, of the defendant, or his being on the wrong side of the highway, if you find he was on the wrong side of the highway or his failure, if any, to control the movement of his automobile, then the plaintiff Howard, in attempting to escape impending danger, was only required to use the care that an ordinarily prudent person would use under the same or similar circumstances, and not that degree of care that is required when not thus confronted with danger. If you find that he did use the care, under the circumstances proven, that an ordinarily prudent person would have used, then he was not guilty of contributory negligence. On the other hand, if the driver, Mr. Lucas, was confronted with danger, suddenly, of a collision between the automobile driven by him and the plaintiff's automobile, then he was required at that time to use only ordinary care to prevent such collision; that is, the care that an ordinarily prudent person would exercise under stress of circumstances, in danger of impending collision; and the care then required is not that degree of care that persons are expected to exercise in calmer moments and where they have time for deliberation; and if you find that the said Lucas was then confronted unexpectedly with danger of a collision with the plaintiff's automobile, and if you find that under those circumstances he used the care that an ordinarily prudent person would have used to avoid the collision, then he was not guilty of negligence, and your verdict should be for the defendant."

It will be observed that in stating this rule with reference to the plaintiff Howard the court, very correctly, gave him the benefit thereof only in the event that he was confronted with danger caused through the negligence of the defendant. But in specifying the duty of the defendant's driver, the court gives defendant the benefit of this rule, if confronted with sudden danger, without the limitation that it must have been caused through the negligence of the plaintiff. It is not questioned that the rule should have been applied alike in both instances. The only defense offered by respondent for this discrimination is that the instruction as a whole could not have misled the jury. The instruction as given was erroneous.

[5] Referring to the Motor Vehicle Act of 1917 (St. 1917, p. 382) and the provision therein to the effect that the operator of an automobile approaching the intersection of a public highway shall yield the right of way to a vehicle approaching said intersection from the right of such first-named vehicle, the court said:

"That means what it says, and it means that, other things being equal, the driver approaching the intersection shall yield the right of way to a vehicle approaching such intersection from the right of such first-named vehicle; but the one reaching the intersection first has the right of way, and if the one approaching from the left reaches the intersection, gets into the intersection, first, other things being equal, he has the right of way, and others will approach with sufficient care to permit the exercise of such right, without danger of collision, and a failure of such person so to do will constitute negligence. Of course, they do not have to stop their machines, unless that would be necessary; but, even though the law says that the one approaching from the right has the right of way, that means if they get there first; if the other gets onto the street first, he has the right of way. * * *"

The criticism presented by appellants upon this instruction refers to the last-quoted clause, and it is insisted that it wrongfully excludes and contradicts the proposition that the driver approaching from the right has the superior right if he gets there even simultaneously with the driver from the left. Other things being equal, it is undoubtedly true that, under the provisions of the statute, the driver approaching from the right has the superior right if both parties reach the intersection simultaneously.

We are satisfied that these several errors in the instructions may not be disregarded. In their probable effect upon the minds of the jurors, they are of serious import, and may have had controlling influence upon the decision.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

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50 Cal. App. 652

MATHIS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 3749.)

(District Court of Appeal, First District, Division 2, California. Dec. 27, 1920.)

1. **Justices of the peace 🔑159(9)—Undertaking on appeal uncertain as to whether it is filed in behalf of one or both defendants held insufficient.**

An undertaking, on an appeal from a judgment of a justice court against two defendants, which refers to a judgment against only one of them and uses the singular and plural in designating the defendants and appellants in such a way as to render it uncertain whether it is filed in behalf of both or only one, is ineffective.

2. **Justices of the peace 🔑159(13)—Filing of undertaking on appeal may be waived by respondent.**

Under Civ. Code, § 3513, providing that one may waive the advantage of a law intended solely for his benefit, the respondent on an appeal from justice's court may waive the filing of an undertaking for costs by appellant.

3. **Justices of the peace 🔑159(13)—Filing of undertaking within five days is jurisdictional, and subsequent waiver by respondent is ineffective.**

Under Code Civ. Proc. § 978a, requiring the undertaking on an appeal from justice court to be filed within five days after the filing of the notice of appeal, if this is not done the superior court has no jurisdiction, and no subsequent waiver by the respondent of the filing of the undertaking can confer jurisdiction.

4. **Justices of the peace 🔑161(5)—Failure to file undertaking not waived by filing notice of motion to set case for trial.**

The filing within 30 days after the entry of a judgment of a justice court of notice of a motion to set the appeal for trial before the superior court could not excuse the failure to file an undertaking on appeal, even though treated as a waiver of the failure to serve notice of appeal.

Original application by Laura E. Mathis for a writ of mandamus against the Superior Court of the City and County of San Francisco and others. Writ granted.

Faulkner & Faulkner, of San Francisco, for petitioner.

Elmer E. Robinson, of San Francisco (Joseph O'Rourke and Fabian D. Brown, both of San Francisco, of counsel), for respondents.

NOURSE, J. This is a petition in mandamus to require respondents to dismiss an appeal from a judgment rendered by the justice's court. On the 21st day of June, 1920, petitioner herein, as plaintiff, recovered a judgment against Belle Benett and John C. Orcutt in the justice's court in the city and county of San Francisco on an assigned claim for taxi hire in the sum of $187.75. On the 25th day of the same month counsel for defendants filed in the justice's court a notice of appeal on behalf of both defendants. On the 29th of June there was filed what purported to be an undertaking on appeal from said judgment, but which refers to a judgment against John C. Orcutt only, and states that "said defendants are dissatisfied with said judgment and desirous of appealing therefrom," and that "said appellants claim a stay of proceedings," and that "said appellants will pay the amount of the judgment so appealed from." Numerous interlineations appear upon the face of the undertaking, which would indicate an intention of some one, either before or after its execution, to change it to a bond in favor of the defendant Orcutt alone and at the same time to convey the impression that it was a stay bond for both appellants. No objection was made to the form of the undertaking or to the sufficiency of the sureties thereon by the plaintiff in the justice's court action within the time allowed by law, but thereafter and on the 21st day of July, 1920, she gave notice of a motion to set the cause for trial before the superior court, said motion being noticed for hearing at a date after the expiration of the time within which the appellants in said action might have perfected their appeal. Thereafter the plaintiff in said action, and petitioner herein, moved said court for an order dismissing said appeal on the ground that it had not been perfected as required by law. This motion was denied and petitioner now asks that the court be directed to enter its order dismissing said appeal.

[1] The purported undertaking is clearly insufficient for any purpose. The interlineations and alterations appearing thereon are of such a nature as would avoid liability on the part of the sureties. It was apparently filed in support of a notice of appeal given on behalf of both defendants in a judgment against both, yet it refers to a judgment against one of the defendants alone and the singular and plural are used in designating the defendants and appellants in such a way as to render the bond ineffective within the rule of Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685; Title Ins., etc., Co. v. Cal., etc., Co., 168 Cal. 397, 405, 143 Pac. 723; Brownell v. Superior Court, 32 Cal. App. 227, 162 Pac. 419; Little v. Thatcher, 151 Cal. 558, 91 Pac. 321; McAulay v. Tahoe Ice Co., 3 Cal. App. 642, 86 Pac. 912; Hibernia, etc., Society v. Freese, 127 Cal. 70, 59 Pac. 769; Bergevin v. Wood, 11 Cal. App. 643, 105 Pac. 935.

[2, 3] In view of section 3513 of the Civil Code, the respondent in a justice's court appeal may waive the filing of an undertaking of costs by the appellant, since the filing of such an undertaking is a matter provided for his sole benefit. To be effective such a waiver must, however, be made within the time within which such an undertaking might have been filed. By the provisions of section 978a, Code of Civil Procedure, an undertaking on appeal must be filed within five days after the filing of the notice of appeal. If this is not done the superior court has no jurisdiction of the appeal and any action which the parties may thereafter take which may be treated as a waiver of these mandatory provisions of the statute cannot confer upon the court jurisdiction to hear the appeal. Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74; Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411; Crowley, etc., Co. v. Superior Court, 10 Cal. App. 342, 101 Pac. 935.

In addition to this, it is alleged in the petition that the plaintiff in the justice's court action was not served with either a notice of the appeal or notice of the filing of the undertaking as required by law. Respondents deny that notice of appeal was not served, but the record which is presented as evidence in support of the respondents' case substantiates the allegations of the petition. No denial is made of the allegation that the plaintiff was not served with notice of the filing of the undertaking.

[4] Notwithstanding the great number of authorities which require the service of a notice of appeal in the justice's court and the filing of a valid undertaking in support thereof, respondents argue that all these matters were waived by petitioner's motion to set the cause for trial before the superior court, which it was claimed was made within 30 days from the entry of the judgment in the justice's court. The record, however, does not support respondents' argument. A notice was filed on July 21, 1920, the thirtieth day after the entry of judgment in the justice's court that on a future day the plaintiff in said action would move the superior court to set said cause for trial. It does not appear when this motion was made, but there is sufficient in the record to show that it could not possibly have been made within the 30-day period. No authorities are cited to the point that service of notice of appeal or the filing of a sufficient undertaking may be waived merely by the filing of a notice of motion to set a cause for trial. And even though it could be treated as a waiver of the failure to serve notice of appeal, it cannot excuse the failure to file a valid undertaking within the time required.

Let the writ issue as prayed.

We concur: LANGDON, P. J.; BRITTAIN, J.

50 Cal. App. 596

STEVENS v. SOUTHERN PAC. LAND CO.
(Civ. 3224.)

(District Court of Appeal, Second District, Division 2, California. Dec. 24, 1920. Hearing Denied by Supreme Court Feb. 21, 1921.)

1. Public lands 🔑35(1)—Rights through homestead entry can vest only in lands subject to disposition.

Before any rights can vest through a homestead entry, the government land sought to be thus acquired must be subject to disposition under the homestead laws.

2. Public lands 🔑29—Land held not open to settlement at time party claimed homestead rights were vested.

In a proceeding to establish a trust under a claim of homestead rights in public lands, *held*, that the land was a part of that included in the federal act creating the Smiley Commission (section 3), and was in reserve under executive order of May 15, 1876, and was not restored to the public domain by said commission's order of December 29, 1891, so that plaintiff acquired no homestead rights therein.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Suit by Buell V. Stevens against the Southern Pacific Land Company. Judgment for the defendant, and plaintiff appeals. Affirmed.

J. C. Needham and L. L. Dennett, both of Modesto, for appellant.

Frank Thunen, of San Francisco, for respondent.

WELLER, J. Plaintiff instituted suit in the superior court of Riverside county seeking to have it decreed that certain lands in that county which had been patented to the defendant by the United States were held in trust for plaintiff, by reason of irregularities in the actions of government officials through which the patents were issued.

Chronologically, the events which enter into the history of the land in controversy transpired in the following order:

On May 15, 1876, by executive order, certain lands (including the lands in controversy) were set apart for the use and benefit of the Mission Indians. An act of Congress approved January 12, 1891 (26 Stat. 712), provided for the appointment of a commission of three persons to select a reservation for each band or village of the Mission Indians residing in the state of California, the selection to include, as far as practicable, the lands and villages which had been actually occupied by the Indians. The commission submitted its report to the Secretary of the Interior on December 5, 1891, and, among other things, recommended that the land here in controversy should be restored to the public domain. On December 28, 1891, the report of the Smiley Commission was approved by an order reading as follows:

> "Executive Mansion, December 29th, 1891. The report of the Mission Indian Commission, appointed under the act of January 12, 1891 (26 Stat. 712), is hereby approved, except so much thereof as relates to the purchase of lands from and exchange of lands with private individuals, which is also approved subject to the condition that Congress shall authorize the same. All of the lands mentioned in said report are hereby withdrawn from settlement and entry until patents shall have been issued for said selected reservations, and until the recommendations of said Commission shall be fully executed, and, by the proclamation of the President of the United States, the lands or any part thereof shall be restored to the public domain. Benj. Harrison. Department of the Interior, Washington, D. C., December 29th, 1891. Under the act of Congress as provided. Approved: John W. Noble, Secretary."

No proclamation has ever been made restoring any of the lands to public entry.

In a letter of date February 17, 1911, addressed to the Commissioner of the General Land Office, the Commissioner of Indian Affairs expressed the opinion that the lands described in the complaint had been restored to the public domain, and on April 1, 1911, the register and receiver of the United States land office at Los Angeles, Cal., were directed to note upon their records that the land was subject to disposition in accordance with the provisions of the law relating to public lands.

On April 24, 1911, the plaintiff, being in all respects qualified to acquire public land, made a homestead application to the register and receiver of the United States land office at Los Angeles for the N. W. ¼ of Sec. 24, T. 5 S., R. 7 E., S. B. M., being a part of the land described in the recommendation of the Smiley Commission for restoration to the public domain. After complying with all the prerequisite details, plaintiff entered into the possession of the land, and proceeded to cultivate and improve it as required by law.

April 26, 1911, the Secretary of the Interior ordered the land withdrawn from entry, and, on May 2, 1911, the Commissioner of the General Land Office notified the register and receiver at Los Angeles by telegram that the land was reserved from public entry. By order dated June 15, 1911, the Department of the Interior suspended the entry of plaintiff, pending a determination as to whether the land was subject to homestead entry by plaintiff, which was followed by an order from the Commissioner of the General Land Office on July 6, 1911, canceling plaintiff's entry. Plaintiff appealed from the action of the General Land Office, and, after a hearing, the Secretary of the Interior affirmed the decision.

On December 11, 1914, a patent was issued by the United States conveying to the defendant the land claimed by plaintiff. This conveyance was made in exchange for certain odd-numbered sections which had theretofore been patented to the Southern Pacific Railway Company as part of the general grant to that company by the act of March 3, 1871. The complaint alleges that the sections surrendered had been occupied by the Mission Indians from time immemorial as a home, and that therefore the railroad company obtained by the patent the bare legal title, to be held in trust for the Indians, and the consideration given by the company for the land involved in this litigation was valueless.

Defendant demurred to the complaint on the general grounds, and at the same time gave notice of motion for judgment on the pleadings. When the demurrer and motion were argued, copies of all the proceedings affecting the title to the land in question were presented and considered by the court. In due time the demurrer was sustained, and 10 days' time given plaintiff to amend, in default of which the motion for judgment was granted, and the judgment entered from which this appeal is taken.

It is conceded that appellant must succeed by the strength of his own title; and unless he can show title in himself he cannot avail himself of any defect in defendant's title to the property.

[1] Before any rights can vest through a homestead entry, the land sought to be thus acquired must be subject to disposition under the laws applicable to such proceedings. Plaintiff recognizes this principle, and seeks to show that the land entered by him was restored to public purchase by the approval of the report of the Smiley Commission. Such, in fact, is the sole basis of his contention; for, if the land was not restored to the public domain by the order of December 29, 1891, it was still in reserve under the executive order of May 15, 1876. The controversy, therefore, must be resolved by a construction of the order approving the Smiley Commission report.

[2] Reverting to this order, it will be noted that it provides that "all the lands mentioned in this report are hereby withdrawn from settlement and entry." The land claimed by the plaintiff was mentioned in the report, and consequently is included in the expression "all the lands." The order certainly could not have been intended to mean that only lands to be set apart for the Indians were withdrawn, because it was the purpose of the Commission to provide a permanent reservation for their use; and it was not contemplated that their lands should ever be thrown open to settlement or entry. The withdrawal covered lands which had been selected pursuant to the provisions of section 3 of the act creating the Smiley Commission, and was to remain effective until patents had been issued in conformity with the Commission's recommendations. The paragraph of the executive order above quoted indicates the intention to hold in reserve all of the lands described in the report of the Commission until such time as adequate provision had been made for the accommodation of the Indians and the President satisfied that any part of the land was no longer necessary for that purpose. Subsequent proceedings demonstrate the wisdom of this action; for some of the lands allotted to the Indians were within the limits of the railroad grant, and, in accordance with section 3 of the act, the railroad company selected the lands recommended for restoration by the Smiley Commission in lieu of the portion of its grant set apart by the Commission for the Indian reservation. The Commissioner of Indian Affairs erred in the conclusion expressed in his letter of February 17, 1911, to the Commissioner of the General Land Office, that the approval of the report of the Smiley Commission carried with it the recommendations of the Commission regarding restoration. This erroneous opinion was adopted by the General Land Office, and the officers at Los Angeles notified to note the land as available for public entry. On further consideration, however, the Commissioner of the General Land Office decided that the conclusion was unauthorized, and ordered plaintiff's entry canceled. On appeal to the Secretary of the Interior this action was upheld. We entertain no doubt that the later decision was correct, and that the cancellation of plaintiff's entry was justified.

Plaintiff attacks the proceedings by which defendant acquired title to the premises; but, as we have seen, he shows no title in himself, and hence is in no position to defeat defendant's claim to the property.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

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50 Cal. App. 805

STEVENS v. SOUTHERN PAC. LAND CO.
(Civ. 3225.)

(District Court of Appeal, Second District, Division 2, California. Dec. 24, 1920. Hearing Denied by Supreme Court Feb. 21, 1921.)

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Suit by Frank W. Stevens against the Southern Pacific Land Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. C. Needham and L. L. Dennett, both of Modesto, for appellant.

Frank Thunen, of San Francisco, for respondent.

PER CURIAM. The facts in this proceeding are in all material respects the same as in the matter of Buell V. Stevens v. Southern Pacific Land Co. (Civil No. 3224) 195 Pac. 712, this day decided. For the reasons there given, the judgment is affirmed.

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50 Cal. App. 806

BEGGS v. SOUTHERN PAC. LAND CO.
(Civ. 3226.)

(District Court of Appeal, Second District, Division 2, California. Dec. 24, 1920. Hearing Denied by Supreme Court Feb. 21, 1921.)

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Suit by Mary V. Beggs against the Southern Pacific Land Company. Judgment for the defendant, and plaintiff appeals. Affirmed.

J. C. Needham and L. L. Dennett, both of Modesto, for appellant.

Frank Thunen, of San Francisco, for respondent.

PER CURIAM. The facts in this proceeding are in all material respects the same as in the matter of Buell V. Stevens v. Southern Pacific Land Co. (Civil No. 3224) 195 Pac. 712, this day decided. For the reasons there given, the judgment is affirmed.

50 Cal. App. 676

HELPLING v. HELPLING. (Civ. 3651.)

(District Court of Appeal, First District, Division 1, California. Dec. 29, 1920. Hearing Denied by Supreme Court Feb. 24, 1921.)

1. Divorce ⟹172—Judgment for wife in her action for separate maintenance res judicata in husband's subsequent action for divorce.

Judgment for plaintiff wife in her action for separate maintenance under Civ. Code, § 137, involving consent elements as to the amount and duration of the separate maintenance, *held* res judicata as to defendant husband's subsequent action for divorce, predicated on facts in existence prior to the entry of the former judgment, some of which were pleaded, and all of which were pleadable by him in such former action.

2. Judgment ⟹526—Remarks of judge during case become no part of judgment.

The remarks of a trial judge made during the progress of the case, even though they amount to giving his reasons for his decision, become no part of the judgment, and cannot be held to control or alter its substance and effect.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action for divorce by Osmond T. Helpling against Margaret J. Helpling. From judgment dismissing the action, plaintiff appeals. Affirmed.

J. L. Fleming, R. J. Gardner, and O. T. Helpling, all of Los Angeles (Wm. T. Helms, of Los Angeles, of counsel), for appellant.

O. T. Helpling, of Los Angeles, in pro. per.

Schweitzer & Hutton and Kyle Z. Grainger, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal by the plaintiff from a judgment in the defendant's favor in an action for divorce, dismissing said action; the defendant's special plea of res adjudicata being sustained by the trial court. The facts of the case are undisputed and are briefly these:

The parties to this action intermarried on April 26, 1898. On September 26, 1917, the plaintiff's wife, who is the defendant in the present action, commenced an action in the superior court of the state of California, in and for the county of Los Angeles, against her husband for separate maintenance, and in her complaint therein set forth several alleged causes of action for divorce, accusing the defendant therein of failure to provide, of extreme cruelty and of adultery. The defendant in that action appeared and answered, specifically denying each and all of the averments of said complaint, and in addition thereto alleging by way of further and separate defense certain asserted delinquencies on the part of the plaintiff, as tending to show cruelty on her part, and as tending to justify whatever acts the said defendant was alleged to have committed in the way of nonsupport. That cause went to trial upon the issues presented by the detailed averments, denials and recriminations of the parties. Evidence pro and con was taken, and at the conclusion of the trial the court called the counsel for the respective parties into his chambers in an apparent effort to arrive at an amount for which a judgment should be entered in favor of the plaintiff upon her demand for separate maintenance. There was some discussion in relation to the sufficiency of the evidence to sustain certain averments of the plaintiff's complaint, particularly with respect to his alleged wrongful relations with another woman. The trial judge suggested that the parties should consent to an allowance of $50 a month to be paid to the plaintiff for a period of two years, and upon the respective counsel signifying their willingness to accept that amount as a basis for the judgment they returned to court, whereupon the court ordered, and there was presently entered, the following judgment:

"The above-entitled cause came on regularly to be heard on the 22d and 23d days of May, 1918, both parties being in court, represented by their respective counsel. * * * Evidence is taken. The court calls counsel for the respective parties into his chambers; whereupon both parties consent, and in open court stipulate, that plaintiff shall have a judgment against the defendant in full settlement of all matters of support and property the sum of $50 per month for a period of 24 months, and no more. Both plaintiff and defendant are in open court, and each personally consents to such a judgment, and that the defendant pay to plaintiff, for and on account of her attorney fees, the sum of $50. Wherefore it is ordered, adjudged, and decreed that the defendant pay the plaintiff the sum of $50 as attorney fees, and the sum of $50 per month for 24 months commencing June 1, 1918, and that each party pay his and her respective costs. Done in open court this 4th day of June, 1918."

In ordering and entering the foregoing judgment no findings were made, nor was any objection made by either of the parties to said judgment upon that ground, nor was any appeal taken therefrom. Thereafter, and on June 8, 1918, the present action for divorce was commenced by the plaintiff, who, as we have seen, was the defendant in said former action.

The complaint in this action was based upon the charge of extreme cruelty, and proceeded to set forth as the probative facts supporting said charge much of the same matter which was embraced in the affirmative defense set forth in the defendant's answer in the former action. Other matters of the same general nature were added, all of which, however, were alleged to have occurred prior to the commencement of said former action. The defendant in this case presently filed her answer, denying specifically the averments of the plaintiff's complaint, and then proceeding to set forth as a further and separate defense and plea in bar the foregoing facts with reference to said former action and to the judgment rendered and entered therein, and that such judgment had become final. Upon the trial of the instant case the matter was first heard upon the defendant's plea in bar, in support of which there was presented the judgment roll in said former action; and in addition thereto the trial court further permitted the introduction in evidence of the remarks of the trial judge in said action made in chambers just prior to the entry of the judgment therein. Upon the submission of this particular matter to the court upon the evidence thus presented the court found and decided that the judgment in said former action was a bar to the further prosecution of this action, and having so found, entered a judgment of dismissal. It is from that judgment that this appeal has been taken; and the sole question presented upon said appeal is as to whether said former judgment in said action for separate maintenance, considering the circumstances under which it was entered, constitutes a bar to the maintenance of this action for divorce, based as it is upon averments of matters of fact existing prior to the date of the entry of said former judgment and to some extent at least made a part of the pleadings and is such therein.

The appellant herein contends that said former judgment was a judgment by consent, and hence could not be available to the defendant herein as a bar to the present action. In support of this contention the appellant urges the admitted facts that the trial judge in said former action at the conclusion of the trial therein called counsel for the respective parties into his chambers, and there made certain remarks, wherein he indicated some doubt as to whether the plaintiff's case had been fully made out as to her charge of cruelty, and that as to the averments of her complaint accusing her husband of wrongful relations with another woman, these had not been sufficiently proven. The appellant argues from these facts that the issues raised in said former action had never in fact been determined, and that the judgment which the court rendered therein was merely a compromise judgment unsupported by anything else than the agreement of the parties made in adopting the suggestion of the court, and without any finding on the part of the latter as to the merits of the case.

[1] We are unable upon the record before us to sustain this contention. The action in which said former judgment was entered was an action instituted under the provisions of section 137 of the Civil Code which, at the time of the institution of said action, read as follows:

> "When the husband willfully deserts the wife or when the husband willfully fails to provide for the wife or when the wife has any cause of action for divorce as provided in section ninety-two of this Code, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children."

It was essential to the maintenance of said action under said section of the Civil Code that the plaintiff should have alleged facts showing willful desertion or willful failure to provide on the part of her said husband, or showing the existence of any other of the causes for divorce specified in section 92 of the Civil Code; and it was further necessary in order to entitle her to a judgment for separate maintenance that she should establish by proof her averments in the above regard. These averments on her part tendered issues which the defendant, her husband, was bound to meet with denials on his part, or with special averments of facts in the nature of recrimination which would constitute a bar under section 122 of the Civil Code. The defendant in that action embraced in his answer both forms of defense, and by way of recrimination undertook to set forth substantially the same facts as those upon which he now relies to sustain his action for divorce. The cause came on to trial upon the issues thus presented, and said trial was concluded so far as the testimony in the case was concerned at the time when the trial judge called the counsel for the respective parties into consultation as to the amount for which judgment should be rendered upon the plaintiff's demand for separate maintenance. Having agreed with counsel as to what that amount should be, and as to the time during which it should be paid, the court proceeded to render its judgment in the plaintiff's favor for the agreed sum. No findings of fact were made, but since no appeal was taken from said judgment, and since the same has become final, we are bound to assume in support of said judgment that the court rendering the same found in the plaintiff's favor upon every issue necessary to be determined in order to support said judgment, and found against the defendant upon every such issue, and hence necessarily upon the issues presented by him in that affirmative portion of his answer wherein he pleaded by way of recrimination facts in bar of the plaintiff's asserted grounds for divorce. This being so, we can perceive no difference between this case and a case wherein upon similar pleadings, but without any conference or agreement between the parties as to the amount of the judgment to be rendered, the trial court had upheld the plaintiff's cause of action for separate maintenance. In such a case it would seem to be beyond question that such a judgment would be a bar to a later action for divorce instituted by the defendant therein and predicated upon facts in existence prior to the entry of said former judgment, some of which were pleaded, and all of which were pleadable by him in said former action.

The case of Greer v. Greer, 142 Cal. 519, 77 Pac. 1106, is similar in certain of its features to the case at bar. The plaintiff in that case brought an action for divorce upon the ground of desertion. The defendant pleaded by way of abatement a judgment which had been rendered in a former action between the same parties wherein the plaintiff had sought to recover permanent alimony, alleging as a basis for said action desertion on the part of the defendant. In both actions there was also involved the question of the validity of a deed to certain of the defendant's separate property which the plaintiff alleged the defendant to have made for the purpose of preventing said property from being subjected to a lien for the plaintiff's support and maintenance. In said former action the court found against the plaintiff upon the issue of desertion, and hence also found that the plaintiff was not entitled to recover permanent alimony. The court also found that since the defendant had not deserted plaintiff, she could not in said action question his right to dispose of his separate property, and hence found in favor of the defendant also upon that issue. In the second action the trial court found against the defendant upon his plea in bar, but upon appeal the Supreme Court reversed this finding, holding that the judgment in the former action for permanent maintenance was a bar to the maintenance of the second suit.

In so holding the Supreme Court cited with approval the case of Miller v. Miller, 150 Mass. 111, 22 N. E. 765, in which an adverse judgment in favor of the wife in an action for separate maintenance while living apart from her husband for justifiable grounds, was held to be a bar to a subsequent suit by the husband for divorce on the ground of the alleged desertion of the wife. In the Estate of Bell, 153 Cal. 333, 95 Pac. 376, the Supreme Court declared the rule to be as follows:

"An adjudication is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and defense"—citing Harris v. Harris, 36 Barb. (N. Y.) 88; Gray v. Daugherty, 25 Cal. 266.

See, also, Suisun Lumber Co. v. Fairfield School Dist., 19 Cal. App. 587, 127 Pac. 349, and cases cited.

[2] The appellant's contention that the former judgment between the parties hereto did not render matters involved therein res adjudicata, for the reason that it was a consent judgment, is not borne out to the extent claimed by the appellant; for while it appears that the trial judge, in an informal interview with the parties, gave expression to some doubts as to the sufficiency of the evidence in the case, these doubts were not carried into the formal judgment, and it has been repeatedly held that the remarks of a trial judge made during the progress of the case, even though they amount to the giving of his reasons for his decision, become no part of the judgment, and cannot be held to control or alter its substance and effect. So far as the record herein discloses, the only matter embraced in said judgment, to which it was suggested that the parties give their consent, was that of the amount and duration of the separate maintenance to be allowed the plaintiff therein. As to all other matters involved in the case the judgment became res adjudicata, and hence properly relied upon by the respondent herein to defeat the present action.

Judgment affirmed.

We concur: SEAWELL, Presiding Justice pro tem.; KERRIGAN, J.

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50 Cal. App. 667

ELLIOTT v. BAILEY et al. (Civ. No. 3649.)

(District Court of Appeal, First District, Division 1. California. Dec. 28, 1920.)

Joint adventures ⚿8—Evidence held to sustain findings that promoters were liable on agreement for services and advances.

In an action for services rendered and advances made to the promoters of a mining venture, evidence *held* to sustain findings that the agreement was with defendants individually, before formation of a mines company by defendants, and that plaintiff was to be paid whenever defendants received enough money from the promotion of the enterprise, and that they had received such funds as amounted to such fulfillment of the conditions as to render them liable to pay plaintiff.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by Alexander T. Elliott against James H. Bailey and others. From judgment for plaintiff, defendants appeal. Affirmed.

Theodore Stensland, of San Diego, for appellants.

Charles P. Huey, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action brought by the plaintiff on his own behalf and also as the assignee of certain other parties to recover certain sums of money alleged to be due for services rendered and advances made.

The facts were substantially these: The defendants, who were copartners in a real estate business, which included, among other activities, the promotion of mining enterprises, undertook to promote the development of certain mining claims lying in the vicinity of Las Vegas, Nev. These mining claims had been located by a number of persons, among whom were J. K. Mildebrandt and H. F. Christie. The plans of the defendants contemplated the formation of some sort of organization to exploit these claims. Prior to the formation of this organization, and in a sense essential to its successful operation, it was necessary to have certain assays made of the ores and minerals of these claims. The plaintiff, Alexander T. Elliott, was a professor of chemistry, and as such was an expert analytical and chemical assayer of ores and minerals, and to him the defendant Cox, representing his firm, applied for the purpose of securing his services in making such assays. An agreement was made between Cox and the plaintiff by which, for the services he was to render in that behalf, he was to be paid at the rate of $50 a week, of which $20 was to be paid weekly in cash, and payment of the balance of $30 per week was to be deferred until the said partners were enabled to realize some money from the sale of stock or otherwise in the course of the promotion of said enterprise. The next step in the course of said promotion proposed to be taken by said defendants was that of going to the place of location of said mining claims for the purpose of completing their organization; and in order to pay the expenses of the trip they applied to said Mildebrandt and Christie for the advance of sufficient money to meet said expenses, and received from each of said parties the sum of $187.45. Having thus been enabled to reach Las Vegas, Nev., the defendants, together with said Mildebrandt and Christie, and certain other persons who were also holders of some of said mining claims, proceeded with their organization. They selected the name of "Radio Mines Company." They did not organize a corporation, but instead thereof undertook to create some sort of a trust, and for that purpose arranged with one Walter T. Casey for the transfer to him, as trustee, of these several mining claims, and for the issuance by him as such trustee of certificates, supposed to represent the extent of the ownership of the holders thereof in the properties covered by said trust. There was thereupon issued to said Walter T. Casey certificates representing $50,000 as the par value thereof, purporting to be his recompense for professional services rendered by him. These certificates were later transferred by said Casey to the defendants, who sold and disposed of the same from time to time, and realized from the proceeds thereof the sum of about $3,600. The enterprise apparently languished and came to naught; and when the plaintiff applied to the defendants for the balance of the payments due him for his services as an assayer, and when said Mildebrandt and Christie also applied to the defendants for payment of the sums respectively advanced by them, each of these was referred to the Radio Mines Company for the payment of their claims; but, receiving nothing from that source, the present action was instituted by the plaintiff, on his own behalf and also as assignee for Mildebrandt and Christie. There was another party of whom the plaintiff was also assignee, but as to his claim no recovery was had. On the trial of the cause judgment was rendered in favor of the plaintiff for the sum of $445 upon his own account, and also for the sum of $374.90, the aggregate of the assigned claims of Mildebrandt and Christie.

It is the contention of the defendants that the evidence is insufficient to sustain a judgment against them, or either of them, upon any of these claims, for the reason that each of these claimants was to look to the Radio Mines Company for payment. We have examined with some care the rather voluminous record in this case, and, without undertaking to detail the testimony, we have reached the conclusion that there is sufficient evidence to sustain the findings of the trial court to the effect that the services performed by the plaintiff, and the moneys advanced by his two assignors, Mildebrandt and Christie, were in each instance services performed and moneys advanced to the defendants prior to the formation of any such organization as the Radio Mines Company, and that the plaintiff and his assignors were to be reimbursed by the defendants whenever the latter had received sufficient money so to do as the result of the promotion of said enterprise, and that the sum of $3,600 or thereabouts, which the defendants had received from the sale of the certificates transferred to them by said Walter T. Casey, amounted to such a fulfillment of the conditions under which they had received the services of the plaintiff and the advances of his assignors as to render the defendants liable to pay for such services and advances.

The trial court so held, and we think the evidence amply sufficient to sustain its findings in that regard.

No other contention being urged by the appellant, the judgment is affirmed.

We concur: SEAWELL, Presiding Justice pro tem.; KERRIGAN, J.

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50 Cal. App. 649

JACKSON v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3756.)

(District Court of Appeal, First District, Division 2, California. Dec. 27, 1920. Hearing Denied by Supreme Court Feb. 24, 1921.)

1. Master and servant ⟹416—Findings as to disability of aged compensation claimant held not conflicting.

In a proceeding under the Workmen's Compensation Act to obtain compensation for injury to and loss of a toe, a finding of the Industrial Accident Commission that the applicant was 66 years of age, and by reason of his advanced age and other systemic condition previous to the injury was afflicted with hardening of the arteries which materially interfered with a sufficient blood supply to the injured member and caused gangrene to set in and greatly retarded a normal recovery, but that the disability resulting, combined with the previous physical condition, was the legitimate and proximate result of the injury, and is compensable as such, was not in conflict with a finding that the injury had resulted in a permanent disability, and that the disability was 19¾ per cent. of the total disability.

2. Master and servant ⟹372—Disabilities, not traceable to injury, not compensable.

Disabilities of a servant due to his general physical condition, and not directly traceable to the injury, are not compensable under the Workmen's Compensation Act.

Proceeding by Charles Jackson under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Maryland Casualty Company. There was an award of compensation and an order releasing insurance carrier from further payments, and applicant brings certiorari. Writ denied.

Geo. D. Collins, Jr., of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

LANGDON, P. J. The petition for a writ of certiorari is denied. It appears that the order releasing and discharging the insurance carrier from further payments to petitioner, which is sought to be reviewed here, was made upon a finding that the injury forming the basis of this proceeding had resulted in a permanent disability, consisting of the loss of the fourth toe of the right foot at the proximal joint, with a chronic discharging sinus; that the disability, in view of the age and occupation of petitioner, is 19¾ per cent. of total disability, and that the insurance carrier has paid to applicant, as indemnity under a previous temporary disability order of the commission, a sum in excess of the total sum due as compensation for a permanent disability of 19¾ per cent. of total disability.

It also appears that the petitioner himself contends here, and also maintained before the commission, that his disability was permanent. The finding on this point is therefore in conformity with his contention. His position, however, is that he is unable to compete in the open labor market or to earn anything at all, and therefore his disability is total under the intendment of the Compensation Act (St. 1917, p. 831).

Respondents have stated the evidence to be that petitioner is 66 years of age and is suffering from syphilis, hardening of the arteries, and heart disease, all of which necessarily enter to some extent into his inability to compete in the open labor market.

[1] Further objection of petitioner to the order sought to be reviewed is based upon the fact that a prior order of the commission, made at the time temporary disability compensation was allowed, was based upon a finding:

> "That the applicant is of the age of 66 years and upwards, and, by reason of his advanced age and other systemic condition previous to said injury was afflicted with hardening of the arteries, which materially interfered with a sufficient blood supply to the injured member, and caused gangrene to set in, and greatly retarded a normal recovery from said injury, but that the disability resulting, combined with the said previous physical condition, was the legitimate and proximate result of the injury, and is compensable as such."

[2] It is contended that this finding is contradictory of and opposed to the present position of the commission that the disability resulting from the loss of the toe is 19¾ per cent. of a total disability as defined by the act, and that any further disability suffered by petitioner is due to his age and systemic condition. We do not think there is any conflict in these findings. The commission found that the condition of the toe at the time of the first order, although it was contributed to by the systemic condition of the patient, was, nevertheless, proximately caused by the injury. This condition of the toe has become permanent, and full allowance is made for the loss of the toe, which has been amputated. The commission made no deduction for the result of the systemic disturbances upon the injured member. The orig-

inal injury was slight, and it is conceded that in a younger and healthier subject it would have healed readily and completely. That the entire toe was lost was a result obviously contributed to by the systemic condition of the patient, and no deduction has been made on this account by the commission, but full compensation has been allowed for the total loss of a toe, although the condition making the amputation necessary was indisputably contributed to by pre-existing systemic ailments. However, any disabilities of petitioner, due to his general physical condition, and not directly traceable to the loss of this toe, are clearly not compensable under the Compensation Act.

It is stated in the answer of the respondent that the percentage of disability was arrived at by the commission by the use of a table adopted by respondent under the provisions of section 9, subdivision 11, of the "Workmen's Compensation, Insurance, and Safety Act of 1917." Under this method of computation, it appears that a much larger percentage of disability was allowed for the loss of the toe than would have been warranted had there been no other matters taken into consideration except the amputation of the toe. It is fair to assume, therefore, that the larger percentage allowed was due to the evidence relied upon by petitioner indicating that the surgical wound due to the operation has not entirely healed, and that the muscles of the foot have become stiffened as an indirect result of the injury and amputation.

Under the statement of the evidence contained in the petition and the answer of respondents, we are of the opinion that the Industrial Accident Commission has acted within the powers conferred upon it.

The petition for a writ of certiorari is denied.

We concur: BRITTAIN, J.; NOURSE, J.

50 Cal. App. 643

RICE et al. v. UNION TRUST CO. OF SAN DIEGO (THOMAS et al., Interveners). (Civ. 3653.)

(District Court of Appeal, First District, Division 1, California. Dec. 27, 1920.)

1. Bills and notes ⚷499—Possession without indorsement of payments raised presumption of no payment.

Possession of a note by defendant bank without payments indorsed thereon raised a presumption that no part of the note had been paid.

2. Appeal and error ⚷1011(1)—Finding on conflicting evidence not disturbed.

Where there was a conflict in the evidence on the issue of payment of a note involved in action to enjoin sale under a trust deed, the appellate court cannot disturb the finding of the trial court.

Appeal from Superior Court, San Diego County; Franklin J. Cole, Judge.

Action by J. C. Rice and others, as trustees of the Rice-Landswick Company, against the Union Trust Company of San Diego, wherein Charles E. Thomas and others intervened. From judgment for defendant, plaintiffs appeal. Affirmed.

Charles B. McCoy, of San Diego, for appellants.

R. C. Springer and William G. Mirow, both of San Diego, for respondent Union Trust Co. of San Diego.

Doolittle & Morrison, William L. Morrison, and Patterson Sprigg, all of San Diego, for interveners Thomas and others.

KERRIGAN, J. This is an action to enjoin a sale under a trust deed made by Rice-Landswick Company to the defendant. Judgment went in favor of the defendant, and the plaintiffs have appealed.

The plaintiffs are the trustees of Rice-Landswick Company, a defunct corporation. On May 2, 1914, said company, at that time in active existence, borrowed $2,000 from Joseph W. Thomas, executing and delivering to him its promissory note in that amount, secured by 35 shares of the preferred and 17½ shares of the common stock of said corporation, standing in the name of the Central Mortgage Company. On May 8, 1915, there was due as interest upon said note the sum of $142, at which time it was arranged that Joseph W. Thomas should lend to Rice-Landswick Company an additional $4,000, and take the corporation's note for $6,241. This was done, the note for $2,000 being surrendered. To secure payment of the new note the corporation conveyed certain real property to the Union Trust Company of San Diego, and the trust company executed its declaration of trust to that effect.

On May 15, 1919, the trust company gave notice of its intention to proceed to sell the said real estate to pay the principal sum of $6,142, with interest due thereon from the date of the note. Thereafter the plaintiffs, as trustees of the defunct concern, brought the present action to enjoin such sale upon the ground, as alleged in the amended complaint, that the sum of $1,000 had been paid upon the note, and that there was not due thereon the full amount of principal and interest as claimed by the defendant. The allegations of the complaint as to part payment were put in issue by the answer of the defendant, and also by the complaint in intervention served and filed by the executors of the estate of Jos. W. Thomas (who had in the meantime died). Another issue in the case was as to whether or not the plaintiffs had any interest in the real property the sale of which they sought to enjoin.

[1, 2] The court, on what appears to be sufficient evidence, found that the plaintiffs have no right, title, or interest of any kind in said property. This finding is not attacked by the appellants, and it would seem to be fatal to their appeal. The only ground urged for the reversal of the judgment is that the evidence shows that the sum of $1,000 was paid on account of the note—$300 in cash at a certain time and $700 by check upon another date. The witness Rice testified to this effect, and also that he had taken receipts for these alleged payments, but he did not produce such receipts nor the returned check for $700. This doubtless impaired the weight of his testimony. The defendant, on the other hand, produced the note, which bore no indorsements of any payments. The possession of the note by the defendant having no payments indorsed thereon raised a presumption that no part of the note had been paid. 8 Cyc. 248; 30 Cyc. 1268. It thus appears there was a conflict in the evidence on the issue of payment, and under a familiar rule we cannot disturb this finding of the court.

Judgment affirmed.

We concur: SEAWELL, Presiding Justice pro tem.; RICHARDS, J.

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50 Cal. App. 719

PARISH v. STUDEBAKER et al.

(Civ. 2992.)

(District Court of Appeal, Second District, Division 1, California. Dec. 30, 1920.)

1. Landlord and tenant 🔑132(1)—After termination of lease lessee could not recover damages for interference with possession.

Where, on July 17th, a lessor exercised her option to terminate a lease because of the nonpayment of rent on demand, the lessees' possession thereafter was wrongful, and the lessor's interference therewith could furnish no legal basis for the recovery of damages because the lessees were compelled to sell their merchandise at a loss and move from the premises.

2. Landlord and tenant 🔑171(3)—No eviction by trespass not causing vacation of premises.

Trespasses by a lessor not causing the lessees to vacate the premises could not support a recovery of damages as for eviction.

3. Set-off and counterclaim 🔑29(2)—Tenant's damages for landlord's interference with possession proper counterclaim in ejectment for default in rent.

Under Code Civ. Proc. § 438, relative to counterclaims, in a lessor's action of ejectment in which she seeks to recover damages for the tortious withholding of the property, the lessees' cause of action for damages from the lessor's interference with the possession may be set up by counterclaim as a cause of action connected with the transaction.

4. Damages 🔑81—Forfeiture of deposit for rent not enforceable when damages not incapable of definite calculation.

Where a lessee made a deposit to be applied on the rent for the last two months of the term, a provision in the lease, that if it was terminated or forfeited by the lessees the deposit should become the property of the lessor without affecting her right to damages, could not be applied unless the lessor's damages could not be calculated with reasonable definiteness, and, in the absence of any such showing, the lessees were entitled to the deposit.

5. Landlord and tenant 🔑285(9)—Lessor bringing ejectment because of nonpayment of rent entitled to attorney's fees.

Where a lease provided that, if the lessor should commence any action to enforce the lease, a reasonable attorney's fee should be included in the judgment, and, rent not having been paid according to the lease, the lessor brought ejectment, she was entitled to recover attorney's fees which she had incurred.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Julia A. Parish against W. B. Studebaker and another. From a judgment for defendants, plaintiff appeals. Reversed.

Henry E. Carter, J. A. Adair, and Henry O. Wackerbarth, all of Los Angeles, for appellant.

Warden D. Isenberg and W. A. Martin, both of Los Angeles, for respondents.

JAMES, J. Plaintiff brought this action to secure judgment of ejectment against the defendants; to recover certain specified rents, and to recover damages for the alleged unlawful withholding of the real property. The court made findings awarding plaintiff a money judgment, declined to make a judgment for the possession of the premises because at the time of the trial it appeared that such possession had been surrendered to the plaintiff, and, further, upon a cross-complaint and supplemental cross-complaint, allowed judgment to the defendants for a sum in excess of that demanded by the plaintiff. It is from this judgment upon the alleged cross-complaint, and from an order denying the plaintiff's motion to vacate the judgment and enter a different judgment on the findings, that the appeal is taken.

The plaintiff, prior to the commencement of her action, had leased to defendant Studebaker one-half of a storeroom on a business street in the city of Los Angeles. The rental agreed to be paid under the written lease was the sum of $800 per month. The rental which became due on the 1st of July, 1917, for that month was not paid, and on July 13th plaintiff demanded payment thereof and gave notice to the defendants that unless such payment was made by July 16th she would exercise her option to terminate the lease without further notice. The rental was not paid, and the court finds that the defendants "thereby forfeited all right, title and interest in and to said premises, and every part thereof, under said lease, and plaintiff was entitled to re-enter and possess the same, and on the 17th day of July, 1917, plaintiff exercised her option to terminate such lease and did terminate the same, * * * and then and there demanded possession of said premises thereunder, but defendants did not surrender or quit the possession of said premises thereunder, but continued to hold, use, and occupy the same until September 8, 1917." The complaint in this action was filed on July 19, 1917. The court further determined that there was due to the plaintiff as rent and as the reasonable value of the use and occupation of the premises from the 1st day of July to the 8th day of September, 1917, the sum of $1,813.35; that the reasonable value of the use of the premises from July 17th to September 8, 1917, was the sum of $800 per month. As to the correctness of the calculation, no question is made by the plaintiff. It may be here mentioned that defendant Studebaker and the Studebaker Quality Shop, a corporation, were one and the same, so far as the real ownership of the business conducted by Studebaker is concerned. The defendant Studebaker Quality Shop was owned by W. B. Studebaker and the corporation was organized only for the purpose of business convenience. The court so found the fact to be. Defendant filed, in addition to an answer containing denials of the issues proposed by the complaint, a statement of an alleged counterclaim, which was made up of two things: First, an alleged cause of action to recover a $1,600 deposit made to cover the rental for the last two months of the lease term; second, an alleged cause of action for damages of interference with the possession of the premises occupied by the defendant. In the form of a cross-complaint, all these matters were re-asserted, and a large amount of damages was prayed for against the plaintiff. This cross-complaint was filed on the 3d day of August, 1917. It will already have been noted that, according to the findings of the court, the defendants were at that time in possession of the premises, unlawfully so, and that they continued in such unlawful possession up to the 8th day of September, 1917. On September 14th, the cause came on for trial. Whereupon the defendants offered, and the court allowed to be filed, an alleged supplemental cross-complaint, wherein it was asserted that by reason of the acts complained of in the counterclaim and cross-complaint first filed, and continuance thereof after the filing of the cross-complaint, defendants had been compelled to retire from business and had been compelled to sell (on September 8, 1917) their merchandise at a loss of 25 per cent., which loss was asserted to be in total the sum of $2,500. The court in its findings determined the issues in favor of the defendants on the supplemental cross-complaint and determined that defendants had been compelled to sell their merchandise and that it had been sold to Margaret Studebaker, wife of defendant Studebaker, and that the stock of merchandise was of the value of $8,500 and the price for which it was sold to Studebaker's wife was $7,500. The court then calculated the total loss as arising under all of the allegations in the affirmative pleadings of the defendant as being the sum of $1,300. At the time the supplemental cross-complaint was filed, plaintiff objected, on the ground that it did not constitute proper subject-matter for a cross-complaint.

[1] The findings are not sufficient to support the judgment as to the cause of action set up in the supplemental cross-complaint. While the findings as made by the court are, in part, conflicting and uncertain, it is quite clear that in making up the computation of the amount of $1,300 damages which the court found had been suffered by defendant, $1,000 was included as being the loss suffered by the sale of the merchandise from the defendant Studebaker to his wife. The court had already found that the defendants were not lawfully possessed of the premises after July 17, 1917, and their occupancy thereafter, under that finding, was wholly without right, and it could not be said that any acts committed by the plaintiff after said 17th of July furnished legal basis for a claim that on the 8th day of September defendants were compelled to sell the merchandise at a loss and move from the premises. Had they obeyed the requirement of the law, they would have moved on the 17th of July. It is also uncertain as to whether the court intended to apportion the $300 of the $1,300 found as damages on account of the acts set forth in the original counterclaim and cross-complaint, they being acts wherein the plaintiff molested and annoyed the defendants in the conduct of their business. For that reason alone the judgment would necessarily have to be reversed. There are other questions, however, to be decided.

[2, 3] Appellant asserts that in this action of ejectment no recovery could be had under the allegations of the counterclaim and cross-complaint because of alleged acts of the defendants, for the reason that no damages could be recovered unless an eviction, actual or constructive, had been worked against the tenant of appellant; in other words, that unless the acts complained of had caused the defendants to leave the premises, there would

be no constructive eviction, and admittedly there was no actual eviction. This rule relating to damages for eviction is undoubtedly the correct one. Counsel have cited many cases affirming the same, among them Kinney v. Libboy, 54 Misc. Rep. 595, 104 N. Y. Supp. 863. And it is further asserted by appellant that, under the facts stated, whatever interference was made by the plaintiff with the possession of the defendants amounted to a trespass merely and was as though it had been committed by a stranger to the lease. This general proposition appears, also, to be sound and to be supported by the authorities. The action here was, in part, for tort and, in part, upon contract. Section 438, Code of Civil Procedure, relating to counterclaims, provides that a counterclaim may be made of:

> "(1) A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action."

The trespass found to have been committed by the plaintiff against the defendants was, of course, a tort, but we think that it was such a tort as would be connected with the subject of the action, as defined in subdivision one of the section quoted. It must be admitted that separate torts cannot be set up in complaint and counterclaim. Wigmore v. Buell, 116 Cal. 94, 47 Pac. 927. The court has never decided, however, that torts may not be set up one against the other, so long as they fall within the Code classification as being connected with the subject of the action or arising out of the transaction set forth in the complaint. Van Bibber v. Hilton, 84 Cal. 585, at page 589, 24 Pac. at page 310, opinion denying rehearing. Were the action to recover possession of the property only, the authorities cited to the effect that there could be no counterclaim or cross-complaint for damages for tort would be directly in point, as Yorba v. Ward, 109 Cal. 107, 38 Pac. 48, 41 Pac. 793, where it is said:

> "The only transaction there set out [in the complaint]—if it could be so denominated—is that defendant withholds from plaintiff the demanded premises, claiming some title to it. The cross-complaint does not show any right or title to the demanded premises in defendant. By it defendant asserts no rights with reference to the land, nor any claim save his alleged right to demand from plaintiff four thousand six hundred and fifty dollars. This demand is not connected with the 'subject of the action,' however that phrase be defined."

In that case the demand was upon a count entirely distinct and in no wise connected with the subject-matter of the action. Here a claim for damages was made for a tortious withholding of the property, and we are of the opinion that the trespass alleged to have been committed by the plaintiff may be properly set up in favor of the defendants by counterclaim as being a cause of action connected with the transaction alleged by the plaintiff.

[4] Up to this point we have not referred to the further claim which was allowed to the defendants for the sum of $1,600, with $96 interest. This claim, we think, was properly allowed as an offset. The court found that on the 27th day of December, 1913, the lessee delivered to the plaintiff the sum of $1,600, which was delivered under a written agreement which recited that the lessee had paid to the lessor $1,600 as payment of rents for the months of December, 1918, and January, 1919, for the premises leased, and that the $1,600 so advanced was to bear interest at the rate of 6 per cent. per annum. The agreement, which was set forth in the findings, further provided that in the event the lease was terminated or forfeited by Studebaker, or his successors, the money should become the poperty of plaintiff without affecting her right to damages which she might be entitled to. Clearly this money was to be applied on the last two months of the lease term as payment for the use of the premises, and the forfeiture provision could only be made applicable by a showing that any damages which the plaintiff had suffered could not with reasonable definiteness be calculated. Such payments have become common to lease contracts. The record shows no ground for inferring that plaintiff's damage by reason of the forfeiture of the lease could not be calculated, or that by the judgment herein her damages were not fairly ascertained and awarded to her. In conditions of the kind involved in the agreement last referred to, when a forfeiture is declared, the lease contract becomes at an end and the right of the tenant to further possession of the premises is lost. Such being the case, the situation would be that a lessee must either have forfeited the amount paid for the last two months of the term or be entitled to recover it. That such a recovery, under circumstances which this case illustrates, should be allowed, is held in Rez v. Summers, 34 Cal. App. 527, 168 Pac. 156. And so we think that the counterclaim for the $1,600 and interest, as against the demand for rent, was properly allowed.

[5] Another complaint made by appellant is that the court should have allowed attorney's fees to her. The lease agreement contained the following condition:

> "It is further agreed that in the event said party of the first part shall commence any action to enforce any of the provisions of this lease, or any of its rigbts hereunder, that in any judgment recovered by it a reasonable attorney's fee shall be included."

The lease agreement further provided that if the rental payments were not made within ten days after the first of the month, the party of the first part should have the right to declare the lease terminated without notice. By this action plaintiff did seek to enforce rights which the lease contract gave her. The complaint properly alleged that plaintiff had incurred a charge on account of attorney's fees and such allowance should have been made, assuming that evidence was offered to sustain that claim.

From the conclusions announced it follows that the judgment should be reversed.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

50 Cal. App. 725

CONRAD v. HAUSER. (Civ. 3243.)

(District Court of Appeal, Second District, Division 2, California. Dec. 30, 1920.)

1. **Corporations ⚷92—Answer, in action by indorser against maker of note for stock, alleging fraud, must show damage.**

In an action for the amount paid by the indorser of a promissory note against one of the makers, an answer, alleging that a note was given for the purchase price of corporate stock and that defendant was induced to buy the stock by fraudulent representations of plaintiff and another as to the amount of stock outstanding and as to the indebtedness of the company, but not alleging that the stock was not worth the amount defendant agreed to pay for it, does not show that defendant was damaged by the misrepresentations, and is insufficient.

2. **Corporations ⚷92—Subscriber held to have received title to stock, so that he could not defeat recovery by indorser of his note therefor.**

Where a certificate for stock purchased by defendant in payment for which he gave his note was issued by the corporation and placed in an envelope marked "to be called for," the title to the stock had vested in defendant, and it was his fault that he did not secure possession of the certificate, so that he cannot defeat on that ground recovery from him by an indorser of his note, who was forced to pay it.

3. **Appeal and error ⚷1011(1)—Findings on conflicting evidence not disturbed.**

Findings of the trial court on conflicting evidence cannot be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Julius Conrad against H. J. Hauser. Judgment for plaintiff, and defendant appeals. Affirmed.

Isidore B. Dockweiler and Dockweiler & Mott, all of Los Angeles, for appellant.

James Donovan, of Los Angeles, for respondent.

THOMAS, J. On December 31, 1915, at Los Angeles, Cal., this defendant, together with two others—Charles W. Fox and F. H. Evans—made, executed, and delivered a certain promissory note by the terms of which each promised to pay to the Halberg-Mier Automatic Press Company, or order, the sum of $18,000; the note being set out in hæc verba in the complaint. On the same day this note was transferred, by the payee therein named, to the Commercial National Bank of Los Angeles. Prior to the actual transfer, however, the bank refused to discount or to accept the note unless the same was indorsed by some person or persons in whose financial ability it had confidence. Plaintiff, having previously been requested by the makers of the note to act in the capacity of indorser, and admittedly fulfilling the requirements above referred to, signed his name on the back thereof, thereby guaranteeing payment of the same. Upon maturity of the paper, defendant refused to pay it, or any portion thereof, although the other two makers, Fox and Evans, paid their proportionate share, i. e., each the sum of $6,000. Thereupon the bank called upon plaintiff to make good on his indorsement to the extent of the amount remaining unpaid on the note, and, rather than stand a suit thereon, the latter paid the sum of $6,000 to the holder thereof. The action is brought, not upon the note, but to recover of Hauser the amount so paid by plaintiff in the former's behalf.

The board of directors of the Halberg-Mier Automatic Press Company was composed of the following named persons: J. T. Merrill, Julius Conrad (plaintiff), H. S. Ryerson, Charles W. Fox, and F. H. Evans, the first three of whom were also the president, vice-president, and secretary-treasurer, respectively, of that company. By his answer, defendant admits the execution of the note, but attempts to avoid payment of the sum so paid in his behalf by plaintiff on the ground that the two officers first above named, as such officials, directors, and agents of said company, procured defendant's signature thereto, together with the signatures of Fox and Evans, by means of the following false and fraudulent representations, to wit: That there were 550,005 shares of the capital stock of said company issued and outstanding, and that there were still 449,995 shares of the same stock undisposed of; that said company was "free from debt and that it had no liabilities whatever"; that said company owned and controlled the patent of a certain printing press known as the Halberg-Mier automatic press; that the company was in need of money and that it would require a large amount for the purpose of purchasing machinery and equipping a plant for the purpose of manufacturing and selling such printing press; that it was the intention of said company to sell a portion of the treasury stock, using the money so obtained in placing its product on the market; that if this defendant, together with Fox and Evans, would purchase 30,000 shares of such treasury stock at a price of 60 cents per share, executing their note in payment therefor, they, the officers mentioned, had arranged with the Commercial National Bank of Los Angeles to discount the note for said company, and that the latter would deposit the money so received with said bank to its credit, such sum to be used in purchasing and installing machinery in a plant to be operated for the purpose of manufacturing and marketing the printing press, the patent to which was controlled by it; and that in the event the money was so secured, the machinery necessary to fully equip the plant would be purchased and installed within 90 days, whereupon the company would commence operations. The answer further avers that defendant relied upon these representations, and, believing them to be true, was induced to and did, together with Fox and Evans, 'purchase said shares of stock, and executed the note in question in payment therefor, whereupon the note was by the bank discounted and the money received therefrom deposited to the credit of said company.

Defendant further alleges, upon information and belief, that at the time said representations were made all of the capital stock of said company was issued and outstanding, and that said Merrill, the president, and this plaintiff, as vice president thereof, well knew that there were not at that time 449,995 shares of said company's capital stock still unissued; that at said time the company had outstanding liabilities to the extent of several thousand dollars; that said company did not own or control the patents to the printing press aforesaid; and that each and all of said representations and statements were made to induce this defendant and others to buy said stock and to sign the note in controversy, but for which false and fraudulent representations that instrument would not have been executed.

Finally, defendant contends that no stock has ever been issued to him, or to Fox or Evans, and that no portion of the money received from and deposited in the bank referred to has been used by said company for all or any of the purposes for which it was represented that it would be used; but that, on the contrary, said Merrill, the president, and this plaintiff, caused the same to be diverted and used for purposes other than as stated, and that the directors of said company neglected their duty as such, allowing the moneys to be so misappropriated.

The court found in favor of plaintiff on all the issues, and judgment was entered accordingly. There was a motion for new trial, which was denied. Defendant appeals from the judgment.

[1] It may be observed that defendant's answer fails utterly to allege any injury to or detriment sustained by him. It is not charged that there was any want or failure of consideration, or that the stock was worth less than the price paid for it, or that it would have been worth more had the alleged false representations been true. Nor is it alleged that defendant tendered or offered to return that which he had received. "Where fraud is attempted to be pleaded as a defense, no defense to a note is shown by answer alleging that, by false representations of plaintiff's officers, defendant was induced to make the note * * * given, * * * no damage being shown." Farmers' & Merchants' Bank v. Richards, 6 Cal. Unrep. 19, 53 Pac. 439. There was no evidence offered tending to show that the stock purchased by Hauser was not worth the amount for which he executed his note in payment therefor.

[2] Appellant argues that no stock was delivered to him. The evidence shows that three certificates, each for 10,000 shares, were issued, one to Fox, one to Evans, and one to Hauser; that said stock was treasury stock; that each stock certificate was inclosed in an envelope with the name of the respective owner thereon; and that the envelope containing appellant's certificate was further marked, "To be called for." When Hauser signed the note, he became entitled to 10,000 shares of the corporate stock —which was in fact issued in his name and held subject to his order—and if it was not delivered to him, it was his own fault. At any rate, the certificate is evidence of ownership of such shares, and, under the facts of the case, title thereto undoubtedly was in him.

[3] Appellant contends that he was to receive 10,000 shares of the treasury stock, but that the company had none. Plaintiff, however, maintains that the company did, in fact, have such stock at that time. The evidence sustains plaintiff's contention, it appearing that there were 450,000 shares of such stock in the treasury at the time of the execution of the note. In fact, all of the issues of fraud tendered by defendant's answer were resolved in favor of the plaintiff, on conflicting evidence; and under these conditions, we cannot disturb those findings.

We fail to find anything in the record which appears in any way to have prejudiced appellant's rights.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

50 Cal. App. 656

GAMMON v. McKEVITT et al. (Civ. 2219.)

(District Court of Appeal, Third District, California. Dec. 27, 1920. Hearing Denied by Supreme Court Feb. 24, 1921.)

1. Mandamus 🔑90—Not issued to control discretion of commission in selecting portions of highway work.

Under the Good Roads Act, § 9, requiring the county highway commission to prepare detailed specifications for the work to be done or for such parts of it as they deem advisable to have done separately, mandamus will not issue to compel the commission to make specifications for a portion of the highway selected by petitioner, since, while it may be invoked to compel the exercise of discretion, it cannot compel such discretion to be exercised in any particular way.

2. Highways 🔑103—Road held not "durable road," intended by a Good Roads Act.

The purpose of the Good Roads Act was to obtain roads of a durable or permanent character, and durable is not limited to roads capable of withstanding the wear of the traffic upon them, but must be considered in reference to availability for public travel and general road purposes, so that a road which would be subject to inundation at periodic intervals, and which would be buried by proposed levee work in connection with a drainage district and reclamation project, cannot be considered durable.

3. Evidence 🔑48 — Court takes judicial notice of reports of débris commission and of state engineers.

Under Code Civ. Proc. § 1875, subd. 3, requiring the court to take judicial notice of the public and private acts of the departments of the state and the United States, courts take judicial notice of the reports of the California débris commission and of state engineers which have been adopted by state statutes.

4. Mandamus 🔑90 — Initiation of highway work on levee which must be changed not enforced.

Mandamus will not be issued to compel the county highway commission to initiate work on a highway authorized by vote under the Good Roads Act, where the highway was located along an existing levee which was below the flood plane, and which would be raised and changed in location at points in the carrying out of work for the reclamation of lands in a drainage district, and to improve the navigation of the river under the plans of the California débris commission.

5. Highways 🔑103 — Substantial compliance with route of adopted plan sufficient.

The route of a proposed highway as stated in the plan adopted by the electors of the county under the Good Roads Act need be only substantially complied with, and slight departures therefrom, made necessary to obtain practical and economic results, are not legally objectionable.

6. Mandamus 🔑7, 16(1)—Writ within judicial discretion not granted where act commanded would be useless.

A writ of mandamus is not wholly a writ of right, but lies within the sound judicial discretion of the court, and will not be issued to compel an act the right to which would otherwise be clear, where change of conditions contemplated in the near future would render such act useless, and especially where the petitioner's interest was to cast upon the road fund the burden which his land would otherwise have to bear for construction of drainage levee on which the highway was to be located.

Original application for mandamus by E. A. Gammon, on behalf of himself and all other citizens and taxpayers of Sacramento County, against Frank B. McKevitt and others, as members of and constituting the Sacramento County Highway Commission. Petition dismissed.

Devlin & Devlin and Downey & Downey, all of Sacramento, for petitioner.

Hugh B. Bradford, of Sacramento, for respondents.

SEAWELL, Presiding Justice pro tem. The county of Sacramento, in 1916, elected to bring itself within the benefits conferred by the provisions of an act entitled "An act providing for the laying out, constructing, straightening, improvement and repair of main public highways in any county, providing for the voting, issuing, and selling of county bonds and the acceptance of donations to pay for such work and improvements, providing for a highway commission to have charge of such work and improvements, and authorizing cities and towns to improve the portions of such highways within their corporate limits and to issue and sell bonds therefor" (St. 1907, p. 666), and amendments thereto. Said act is commonly known as the "Good Roads" Act, and future reference will be made to it as such. The county highway commission's report and recommendation that bonds issue in the sum of $1,750,000 to be expended in the improvement and repairing of the highways of said county, was adopted by the board of supervisors, and subsequently ratified by the electors of said county at an election held for that purpose.

The report of the highway commission, as adopted by the board of supervisors, designated certain main highways, aggregating 124.42 miles, and divided said highway mileage into districts or sections. The court's attention in this proceeding is directed specifically to a certain selected portion of the main highway designated "No. 14, River Road." The full length of this section or division is 34.10 miles, and the total cost of said improvements, as planned, was estimated to be $570,410. This sum has been set aside and is available for use. It is the complaint of petitioner, who is a resident and taxpayer of said Sacramento county, and an owner of real property abutting on the highway to be improved in said "River Road" district, that respondents, who constitute the county highway commission of said county, have refused, and still refuse, to proceed to "initiate proceedings to prepare detailed specifications, plans, and profiles for the improving" of a portion of the public highway included in said "River Road" district or section, and described in said petition, notwithstanding demand made by petitioner on said commission on June 15, 1920, to comply with the mandate of the statute.

The language of the act with which compliance is sought by the aid of a peremptory writ of mandate is as follows:

> "Sec. 9. The doing of the work for which said bonds are issued shall be under the supervision and direction of the highway commission; provided that the final acceptance thereof shall be by the board of supervisors. As soon as the funds raised by the sale of said bonds are in the treasury the commission shall proceed to prepare detailed specifications, plans and profiles for the work to be done, or for such parts of it as they deem it advisable to have done separately, if they have not already done so, and for this purpose they may hire assistants, with the consent of the board of supervisors; and they shall then present said specifications, plans and profiles, with their recommendations in regard to the doing of the work and letting of contracts to the board of supervisors, who shall either adopt or reject the same as presented. If the board adopt the same they shall thereupon advertise for bids for doing the said work, or any part thereof which the highway commission recommend should be done separately, in accordance with said plans, profiles and specifications, by publishing a notice for ten days in a daily newspaper or two weeks in a weekly newspaper published at the county seat. * * *"

It further provides that the board may authorize the highway commission to make contracts without advertisement for any part of said work, the cost of which does not exceed $1,000. Aside from mandatory duties expressly imposed upon said commission, the board of supervisors may, at its discretion, delegate to it other duties.

[1] It will be observed that section 9 of said act requires the highway commission to proceed to prepare detailed specifications, plans, and profiles for the work to be done, or for such parts of it as the commission deems it advisable to have done separately. The work to be done means, of course, the whole work. The commission may, it is true, in its discretion, have parts of it done separately. Petitioner, as a matter of fact, has made for the commission a selection of the part or portion which he would compel the commission to act upon. To compel the making of specifications, etc., as selected by petitioner, for the portion of the work described in the petition would destroy the right of the commission to exercise the discretion given by statute. While mandamus may be invoked to compel the exercise of discretion, it cannot compel such discretion to be exercised in any particular way. 26 Cyc. 160.

The regularity of the proceedings leading up to the refusal or failure of said highway commission to act as demanded is admitted. The initiation of the work by the highway commission by preparing detailed specifications, plans, and profiles for the improvement of a designated portion of said "River Road" is all that petitioner seeks. The performance of other duties necessary to a completion of the work which are or by direction of the board of supervisors may be cast upon the commission is not sought.

Without considering whether an attempt to merely compel the "initiation of the work" falls within the rule laid down in Boyne v. Ryan, 100 Cal. 265, 34 Pac. 707, and carried forward in later decisions, the question will be discussed on equitable principles.

The general courses of the highway as described in the petition follow the easterly bank of the Sacramento river. The crown of the reclamation levee, constructed to shut out overflow waters from said river, furnishes a base for the roadbed. In its original state, and before the construction of any levees, the area now covered by the base of said levee formed the roadbed. As the levee was raised from time to time to greater heights the roadbed, of course, was correspondingly elevated. When changed the highway followed the levee. The levee served a dual purpose, and has since been thus jointly used. Such use is common in areas subject to overflow.

It is the admission of petitioner that the levee which the highway now traverses "has never been raised nor constructed to conform to the standards heretofore adopted by the Reclamation Board of the State of California, and does not now conform to the standards fixed by said Reclamation Board."

[2] The purpose of the "Good Roads" Act is, unquestionably, to obtain roads of a durable or permanent character, and thereby prevent a waste of public funds by inefficient road construction. Its requirements are therefore that all main highways to be constructed and all improvements to be made by virtue of its provisions shall be of a "durable and lasting character." Permanency or durability of construction does not mean in the sense used in the statute, as contended for by petitioner, merely impregnability to any sort of an attack that may be made upon the work. These terms have, however, a well-understood meaning in the public mind and in the minds of those engaged in the construction of roads adequate to meet the requirements of modern vehicle traffic. A highway subject to be inundated by flood waters dur-

ing the period of its greatest need or likely to be overlaid with great depths of earth in the execution of state or federal authority, or rendered inaccessible from inevitable cause, would not be such a road as the act contemplates. Durability and lasting character must be considered in reference to availability for public travel and general road purposes. The character of the materials used in the construction of a durable roadbed would amount to nothing if it was to become overlaid with masses of earthen material to the extent that it is rendered inaccessible.

[3] The highway described in the petition lies, as above stated, in a vast drainage district known as the "Sacramento and San Joaquin drainage district." The controlling jurisdiction of the State Reclamation Board over the same order to carry into effect the plans of the California débris commission for the control of the flood waters of the Sacramento and San Joaquin rivers and their tributaries is fully defined in Gray v. Reclamation District No. 1500, 174 Cal. 622, 163 Pac. 1024. It is there declared to possess very plenary powers. The power of reclaiming swamp and overflowed lands being in the lawful exercise of the police powers of the land, is one of the most essential powers of government, one that is the least limitable. It is further said that navigability of the Sacramento river is inextricably associated with flood control conditions. Upon these matters the nation and state are acting not only in harmony, but, it may be fairly said, under contract. Gray v. Reclamation Dist. No. 1500, supra. The report of the California débris commission, known as House Document No. 81 of the Sixty-Second Congress, has been approved by the statutes of this state as the plan and, in fact, forms the basis of the Sacramento valley flood control plan and the State Reclamation Board Act. This report fixes the standard for the levees of the Sacramento river south of the city of Sacramento at a required height of 3 feet above the adopted flood plane, 23.5 feet at the head of Grand Island, and 35 feet at American river. The crown-width, slopes, grades, etc., are standardized. Levees already constructed are subject to reconstruction and realignment. Where physical conditions require it the river is to be widened, and, of course, this means that levees in such cases are to be entirely rebuilt. The so-called "maximum assumed flood plane" as part of the plan of flood control is founded upon experience and exhaustive engineering investigation by experts of the highest skill, and has the sanction and approval of both national and state governments. It cannot be presumed that momentous plans thus adopted will be readily changed. It at least possesses some of the inherent qualities of permanency. Whatever uncertainty, if any, that may attend the permanency of the flood plane as now fixed is overshadowed by the certainty that the levees upon which the roadbed now rests must be raised beyond the present height. Also changes in placement, realignments, and a number of other requirements are pointed out in an official notice given by L. H. Rand, colonel, corps of engineers, executive officer of the California débris commission, to the state reclamation board, dated July 12, 1918. The date set for the completion of this work is December 1, 1922.

> "The reports of the California débris commission and of state engineers have been adopted by state statutes. This court takes judicial notice of them. * * * In addition to this, the history of the state, its topographical and its general conditions, including notorious facts concerning its rivers, are all matters of judicial cognizance." Gray v. Reclamation Dist. No. 1500, supra.

Courts will take judicial notice of the public and private official acts of the legislative, executive, and judicial departments of this state and the United States. Subdivision 3, § 1875, Code Civ. Proc.

Gov. William D. Stephens, as the executive head of this state, and the department of the Secretary of War of the United States have, for several years past, been joined in earnest co-operation in an effort to carry forward the plans of the California débris commission and the several flood control acts affecting the Sacramento river. To this end vast sums of money have been raised and expended by both state and nation in promotion of the project. The state has declared through its legislative voice that the "state of California and the people thereof are hereby declared to have a primary and supreme interest in having erected, maintained and protected on the banks of the Sacramento * * * river * * * good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed by said streams," etc. Stats. of 1913, p. 252, § 7. The Governor of the state in a public document, dated June 19, 1917, and addressed to the Secretary of War, says:

> "The state is bound, therefore, in honor, by legislative enactment and by her own interest as well to carry out the terms of the contract, and the provisions (a), (b) and (c) of the flood control act, quoted in your letter are included in the obligation imposed upon her."

[4] Provision (c), above referred to, contains the requirement of the California débris commission (which has been expressly adopted by the Legislature) that said levees shall be constructed to such grade and section and within such time as may be required by said commission. The day fixed for the completion of said work is December 1, 1922. It is to be presumed that the Governor will insist by messages to the Legislature and through other official channels that the stat-

utory agreements of the state with the federal government be complied with. Unquestionably it is to be presumed that the Legislature will provide the ways and means and that both branches of the state government, its executive and legislative, will co-operate in redeeming through specially created agencies, the solemn obligations of the state, which are surely in accord with our declared legislative policy. If this be done the levees upon which the proposed durable main highway is to be constructed will, beyond doubt, be raised, with probable necessary realignments occurring, and it is likely to be otherwise disturbed. If the work contemplated be now forced a waste of public funds would inevitably follow. Surely no contention is made that the writ of mandate may be employed to compel such a result. Neither is it to be employed to accomplish a useless or vain thing.

Petitioner's claim is that the highway commission has taken no step to "prepare detailed specifications, plans, and profiles," a preliminary prerequisite for the completion of the improvements. The work, indeed, must therefore stand still until detailed specifications, plans, etc., are prepared by the highway commission, and it should be compelled to act unless it can find legal justification in so refusing.

It must be presumed that the statutes and the well-defined policy of the state will be carried out, and that said levees will be raised to prescribed heights and realigned or reconstructed or set further away from the river banks as necessity or safety shall require.

The work of preparing detailed specifications, plans, and profiles for the improvement of the highway would doubtless be done at a considerable cost. After such preparation it is quite certain that they would prove to be valueless for any purpose. The elements necessary for a calculative basis would be exceedingly uncertain, if not wholly lacking. Without knowledge of the full details concerning the proposed levees, including height and width to be added to the present levees, realignments to be made, and a score of other important details, a reasonably accurate knowledge of which would be essential for an intelligent result, the demanded specifications, plans, and profiles would necessarily be founded on speculation and vagaries and of no practical value. For the highway commission to prepare its specifications it must first know in detail what the state is to require in its levee construction.

[5] While the general course of the road was described by the commission in its adopted plan there could be no very serious legal objection, as suggested by petitioner, to slight departures therefrom made necessary to obtain practical and economic results. A substantial compliance is all that the law would require in this respect. It is not beyond hope that the same co-operation that has heretofore existed between levee builder and road builder will continue. There can be no doubt but that the whole plan of highway improvement was formed and adopted on the theory that the moneys raised by the issuance and sale of bonds was to be only applied and used, except in a few minor instances, in constructing durable roadbeds. It was but a fair and natural presumption that the levees as now constructed, or hereafter to be raised, would furnish support for the finished roadbed or pavement surface. There was no reason for the electors of the county who voted on the issuance of bonds to believe that the general custom of the county would be departed from in this particular instance. The amount of money provided to meet the cost of the proposed improvements refutes a contrary theory. Levees are ordinarily constructed at the expense of the landowners who are benefited therefrom. It scarcely requires the aid of testimony to show that $570,410 would not construct 34.10 miles of durable roadway upon embankments or levees to be erected at a safe height above flood plane and in addition build expensive bridges across broad streams. Petitioner does not claim that it will. He only insists that the fund provided is sufficient to build a durable road and argues that a durable road is one that possesses from the character of the material used in its construction inherent wearing strength or durability. Inferentially, however, the highway is to be built on the present levee grade, which is below the flood plane.

The petition is silent as to whether the rights of way to be secured by Sacramento county, as shown by the report of the highway commission, over the lands of certain named private landowners which lie within the "River Road" section have yet been acquired; and also as to the result of the proposed joint construction by the supervisors of Sacramento and Solano counties of a bridge across the Sacramento river at Rio Vista.

The argument that the highway having been established before any levee was built, and that the dominant easement therefore goes with it for highway purposes, and that this right cannot be lost except by direct provision of the Legislature that it be subject to uses for reclamation purposes or unless taken by condemnation proceedings, is not important in the light of the facts presented by the issues. The writ of mandate may not be employed to aid in the unnecessary or wanton destruction of property, even though its loss may be made whole to the owner. Equity abhors wanton waste. The reasonable certainty that a durable highway constructed upon the levee at its present grade would within a reasonable period become inextricably lost or rendered inaccessible for use would be a sufficient reason for a denial of the writ.

[6] The road construction cases cited by petitioner are not wholly in point here. The obstacles to be overcome in those cases were the natural incidents to the building of roads in the particular localities in which they were constructed, and were obviously within the contemplation of their projectors. Cuts or tunnels through mountains or causeways across swamps and morasses are difficulties to be surmounted in districts in which they are known to exist. Such difficulties are quite patent, however, and are always reckoned with in such projects of construction. In the instant case, however, the facts are different. Here it would be but natural to suppose that the levee, if raised to a height to insure safety against overflow, would be so raised at the expense of the landowners and others directly benefited thereby; secondly, if not raised, it would still serve reasonably well as a subgrade for the highway as it had served for many years past. Its height was sufficient as a roadbed, but insufficient for levee purposes.

> "The writ of mandamus is not wholly a writ of right, but lies, to a considerable extent, within the sound judicial discretion of the court where the application is made; * * * and no court should allow a writ of mandamus to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law. * * * The writ of mandate should not be used to wrongfully wrest a statute from its true purpose." Wiedwald v. Dodson, 95 Cal. 450, 30 Pac. 580.

A well-known principle of law is announced in State ex rel. Southern New England Tel. Co. v. Towers, Commissioner, 71 Conn. 657, 42 Atl. 1083, to the effect that where the city council had in contemplation and under consideration a plan to be worked out within a reasonable period of time that would change an established system of stringing telephonic, telegraphic, fire alarm and electric light wires to a new and improved system, a writ of mandate would not lie to compel the street commissioner to grant permission to a telephone company to lay wires under the old system, although the right was absolute, and would have been compelled but for the contemplated change. This is surely a sound principle of equity, and has its application to the instant case.

It is the claim of respondent that the only interest that petitioner has in this proceeding that may be differentiated from the interest of any other taxpayer of the county is an ulterior interest of profit by shifting a burden that belongs to him and his associates to those who would not otherwise be called upon to contribute to the construction of levees for the protection of himself and other abutting landowners. It is true that petitioner's legal grievance is not greater than that common to other taxpayers of the county. He is not denied a privilege by delay that he had ever enjoyed. The means of egress and ingress to his property remain unchanged and no complaint is made as to its adequacy. If the levee is raised to the flood height at the expense of the bond fund, it will directly relieve him of a burden that would otherwise be his. As a matter of law, he cannot be said to be any more beneficially interested in the improvement of the designated portion of the highway sought to be improved than in any other part, or the whole thereof, or than any other citizen taxpayer should be.

The delay complained of has not lagged beyond state highway construction or similar public work in other counties of the state. The highway commission, by resolution, as shown by the petition, gave as a reason for not acting as demanded the failure of petitioners themselves to comply with the requirements of the state reclamation board and to bring the river levee up to the prescribed grade. This much is admitted.

It is not charged that the highway commission has in any wise acted contumaciously. It has declined only to act until such time as it may be able to proceed efficiently.

It is a matter of record and a notorious fact that the reclamation board is at the present time through the state department of engineering completing surveys such as are necessary for the adoption of a definite project to follow the requirements of the California débris commission, which shall include the east levee of the Sacramento river south from the city of Sacramento. The work will doubtless be carried forward with such acceleration as is consistent with the magnitude of the project. The right to the issuance of the writ of mandate is largely within the discretion of the court. Much that has been said here is directed to the discretionary powers of the court. There appears, however, sufficient equitable reasons for denying the petition. It is ordered, therefore, that the demurrer be sustained and the petition dismissed.

We concur: HART, J; BURNETT, J.

50 Cal. App. 683

KOEBIG v. NORTH AMERICAN DREDGING CO. OF NEVADA. (Civ. 3654.)

(District Court of Appeal, First District, Division 1, California. Dec. 29, 1920. Hearing Denied by Supreme Court Feb. 24, 1921.)

Assignments 🔑106—Payment for assignment of electric power contract held to be computed on dredging under existing and later contracts.

Contract by which, in consideration of plaintiff assigning his contract for electric power for dredging at N., defendant agreed to pay plaintiff one cent per yard of material dredged through use of defendant's dredge leased to the city of N., payments to be made out of moneys as received from the city as rentals for the dredge, *held* to apply, not only to the lease contract then made by defendant with the city, but to a later lease contract made between them; the later contract amounting merely to an extension of the earlier, and under both the dredge being operated, not only on the same work but, as contemplated, by use of the electric power, contract for which was assigned.

Appeal from Superior Court, Los Angeles County; John N. York, Judge.

Action by A. H. Koebig against the North American Dredging Company of Nevada. Judgment for plaintiff, and defendant appeals. Affirmed.

Overton, Lyman & Plumb, of Los Angeles, for appellant.

Ralph Bandini, of Los Angeles, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiff in an action brought to recover the sum of $3,028, claimed to be a balance due from the defendant to the plaintiff under a certain agreement in writing which, as set forth in the complaint, reads as follows:

"A. H. Koebig, Sr., Los Angeles, California—Dear Sir: In consideration of your assigning the agreement which you hold with the Southern California Edison Company, to furnish electric power for dredging purposes at Newport Beach, California, to C. F. Guthridge, the North American Dredging Company of Nevada, a corporation, hereby agrees to pay you an amount equal to one cent per cubic yard of material dredged through the use of said company's dredge leased to said city of Newport on November 20, 1918, such payments to be made out of moneys as received from said city as rental for said dredge; provided, however, that any sum over and above $2,500.00 which said Southern California Edison Company may charge to said C. F. Guthridge for the construction and erection of a line for transmitting electric current to a point marked station S north, of Bay Island, on the Harbor channel map of Newport Harbor, approved by Paul Kressly, April 30, 1918, shall be deducted from the amount so to be paid by said North American Dredging Company of Nevada to said A. H. Koebig, Sr., as above specified. North American Dredging Company of Nevada, a Corporation, by C. F. Guthridge, Vice President."

The complaint further alleges that prior to the making of said contract between himself and the defendant the latter was negotiating for a contract with the city of Newport Beach, by the terms of which the defendant was to lease to said city of Newport Beach a certain dredger to be used by said city in dredging a channel through its harbor, but was unable to consummate said agreement because of the defendant's inability to provide the electric energy for the operation of said dredger, and for that reason the defendant had entered into the aforesaid contract with the plaintiff, and was thus enabled to consummate their transaction with the city of Newport Beach, and that under their said contract with said city a large amount of dredging was done. The plaintiff further alleges that he performed the portions of said agreement on his part to be performed, and that the defendant proceeded, through the aid of the power thus obtained, to do the dredging work specified in said agreement, and thereby and in accordance with the terms thereof became indebted to the plaintiff in a certain amount, upon which certain payments were made, leaving a balance due of the sum for which this action has been brought, and which the defendant is alleged to have failed and refused to pay.

The defendant in its answer put in issue the material averments of the plaintiff's complaint, and in addition thereto set forth a state of facts tending to show that the contract which it was alleged to have entered into with the city of Newport Beach had expired by reason of the fact that the funds of the municipality which had been set apart to do said dredging work had become exhausted, and that said defendant had paid to the plaintiff all moneys which had become due prior to the expiration of said contract and termination of said work, and that after the suspension of dredging work under said contract the defendant had entered into a new or supplemental contract with said city of Newport Beach, to which new contract and to whatever dredging work was to be done thereunder the contract between itself and the plaintiff did not apply, and hence that the defendant was under no liability to the plaintiff by reason of any dredging work done under said new and supplemental contract with said city.

The case went to trial upon the issues as thus made up, and upon the submission of the cause the trial court made its findings of fact, following in the main the averments of the plaintiff's complaint, and further finding that the original and supplemental contracts between the defendant and the city of Newport Beach constituted but one entire and inseparable contract, to which the agreement between the plaintiff and the defendant applied, with the result that the defendant was held liable to plaintiff for the percentage to be paid him for all dredging done under both the first and the supplemental agreement, and hence found as a conclusion of law that the plaintiff was entitled to judgment for the balance claimed to be due. Judgment was entered accordingly for said sum, and it is from this judgment that the defendant prosecutes the present appeal.

We find no merit in the appellant's contention that the agreement between itself and the plaintiff was to be confined as to its scope and effect to the original contract between the defendant and the city of Newport Beach. The agreement with the plaintiff does not so state either expressly or by reasonable implication. It was in plain terms an agreement to pay the plaintiff an amount equal to one cent per cubic yard of material dredged through the use of the defendant's dredge while the same was being used by said city of Newport Beach for dredging purposes and was operated through the power obtained by the defendant through the contract which plaintiff held with the Southern California Edison Company and which had by him been assigned to the defendant. This is made plain by reference to the supplemental contract which the defendant entered into with the city of Newport Beach, and which amounts merely to an extension of the terms of the original contract for the use by said city of the defendant's dredger. Under both the original and supplemental contract with the city of Newport Beach the defendant's dredger was to be used, and was to be operated, and the same was in fact operated, by the use of the electric power to which the defendant acquired the right of use through the assignment to it of the paintiff's contract with the Southern California Edison Company. The trial court properly treated the arrangement between the defendant and the city of Newport Beach as continuous in its character, and hence as one to which in its entirety the plaintiff's contract applied. This being so, there were no errors committed, we think, in ordering judgment in plaintiff's favor for the amount which became due through the use and operation of the defendant's dredger by the city of Newport Beach under the supplemental arrangement for the completion of the dredging operations for which the defendant's dredger and the plaintiff's contract for electric power requisite to operate the same were acquired.

Judgment affirmed.

We concur: SEAWELL, Presiding Justice pro tem.; KERRIGAN, J.

50 Cal. App. 374

HOWDERSHELL v. HOWDERSHELL.

(Civ. 3622. L. A. 6209.)

(District Court of Appeal, First District, Division 1, California. Dec. 13, 1920. Hearing Denied by Supreme Court Feb. 11, 1921.)

1. Divorce ⚷136—Separation by consent not shown.

In an action by husband for divorce on ground of desertion, evidence *held* to sustain finding that separation was not by consent with the understanding that one party should apply for divorce under Civ. Code, § 99, though an agreement for division of property was entered into soon after the separation.

On Hearing in Supreme Court.

2. Divorce ⚷56—"Consent separation" immaterial by reason of subsequent refusal to cohabit.

Divorce for desertion was properly granted although there was a "separation by consent" within the meaning of Civ. Code, § 99, where after the execution of the consent agreement plaintiff requested defendant to resume the marriage relation with him and the defendant refused his request.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by B. J. Howdershell against Norma Howdershell. Judgment for plaintiff, and defendant appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

William Ellis Lady, of Los Angeles, for appellant.

Milton K. Young, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal by the defendant from a judgment of divorce in plaintiff's behalf on the ground of desertion. The sole contention of the appellant herein is that the evidence in the case shows that the separation between the parties, upon which the plaintiff's claim of desertion on the part of the defendant is based, was a voluntary separation occurring as the result of an agreement in writing between the parties for such separation and for a settlement of their property rights. Defendant claimed at the trial and contends upon this appeal that under section 99 of the Civil Code "separation by consent with or without the understanding that one or the other party will apply for a divorce is not desertion." The difficulty with the defendant's contention in that regard does not arise out of the section of the Code above cited, but arises out of its application to the facts of the case at bar. These facts as found by the court and as fully supported by the evidence are briefly these:

[1] The parties to this action intermarried in the year 1904, and lived together as hus-

band and wife until some time in the month of April, 1917, at which time they were residing in the city of Los Angeles. For some time prior to the latter date their marital relations had been inharmonious to an extent which seemed to render their separation imminent and inevitable. On or about April 22, 1917, a meeting was held between the plaintiff and defendant and two friends of theirs, a Mr. and Mrs. Hamilton, with a view to attempting to bring about a reconciliation. After considerable discussion the effort of these friends to effect a reconciliation proved unsuccessful, and the plaintiff left his home where the interview occurred and went to his office in another part of the city, to which shortly thereafter the defendant sent Mr. Hamilton with a message, stating that she did not wish to see the plaintiff any more and directing him not to return to their home. Plaintiff, however, returned to the home, but only for the purpose of removing his effects to a rear bedroom therein, which he occupied for a short while thereafter but with no intercourse with the defendant. A few days later, at the defendant's request, the plaintiff prepared and presented to the defendant the written agreement for a division of their property upon which the defendant herein relies as showing a separation by consent. The trial court embodied this writing in its findings, but in connection therewith expressly found that said writing was entered into after the defendant's desertion of the plaintiff had been accomplished by her refusal to be reconciled to him and by her direction that he remain away from the home. The written agreement between the parties, while it recites the existence of conditions which render it impossible for the parties to longer live together in the relation of husband and wife, does not purport otherwise to be an agreement to separate or, in other words, to amount to a separation by consent, but does purport to amount to nothing more than a property arrangement predicated upon an already existing separation. The finding of the court in that respect is:

> "That said agreement was not intended as an agreement between the plaintiff and defendant to live separate and apart, but was intended to recognize the fact that plaintiff and defendant were then living separate and apart by reason of the defendant's refusal to live with said plaintiff, and was for the purpose of providing a property settlement between the plaintiff and defendant and to assure maintenance and support for said defendant."

The court further makes this suggestive finding, namely:

> "That the next day after the execution of said agreement, to wit, on April 29, 1917, the said plaintiff requested the said defendant to resume the marriage relation with him and to thereafter live with him, but the said defendant refused so to do, and ever since has continued to live separate and apart from the plaintiff and to desert and abandon him."

The evidence fully sustains these findings of fact, and the findings amply support the judgment in plaintiff's favor rendered and entered herein.

It may be noted that the defendant, while relying solely upon her contention that the evidence showed a separation by consent, has never either in her pleadings or proofs offered to return to plaintiff or to resume their marital relations.

We find no merit in the appellant's contention, and the judgment is affirmed.

We concur: KERRIGAN, J.; SEAWELL, Presiding Justice pro tem.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2] In denying the application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, we desire to say that our denial is not to be taken as an approval of the portion of the opinion of the District Court of Appeal dealing with the question of the character of the written agreement referred to therein, and the finding of the trial court that the same was not intended as an agreement between the plaintiff and defendant to live separate and apart. We base our denial of the petition for hearing in this court upon what is said in the opinion with relation to the finding of the trial court to the effect that after the execution of the agreement the plaintiff requested the defendant to resume the marriage relation with him and that the defendant refused this request and has ever since continued to live separate and apart from him. This finding does not appear to be attacked, and sufficiently disposes of the case.

All concur.

50 Cal. App. 621

McMILLAN v. GREENAMYER et al.
(Civ. 3234.)

(District Court of Appeal, Second District, Division 2, California. Dec. 24, 1920.)

Appeal and error ⚷124—Associations ⚷20(1)—One trustee of association may appeal from alleged collusive confessed judgment.

In an action on a note given by trustees of an association, one of the trustees, representing himself and other shareholders, is entitled to maintain a defense on a showing that the other trustees were acting in collusion with plaintiff in attempting to enforce a note on which the consideration had failed, so that appeal from a judgment by confession by such trustee whose answer was ignored should not be dismissed.

Appeal from Superior Court, Los Angeles County; S. M. Marsh, Judge.

Action by Joseph McMillan against C. V. Greenamyer and others as trustees, doing business under the name and style of Mechanical Development Company. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal. Motion denied.

Rupert B. Turnbull, of Los Angeles, for appellants.

W. R. Millar, of Los Angeles, for respondent.

WELLER, J. Respondent moves to dismiss the appeal, stating as ground for the motion that judgment against the defendants was entered by confession, and that appeal does not lie from such a judgment.

The transcript shows that the complaint was filed May 29, 1917, to recover judgment on a promissory note executed by the Mechanical Development Company, an unincorporated association doing business under a declaration of trust such as is commonly used in similar organizations fashioned after the plan of the so-called "Massachusetts Trust." On June 12, 1917, an answer was filed, purporting to be on behalf of all the defendants, to which a demurrer was sustained with leave to amend, on June 27, 1917. A confession of judgment was filed July 2, 1917, on behalf of the association, signed by Josephine M. Johnson, vice president, and P. Borden Johnson, secretary. Attached to the confession appears a copy of a resolution passed by the trustees, ordering the confession to be executed. It is recited in the resolution that the association has no defense to the action, and that the appearance by answer and the employment of an attorney by trustee Greenamyer was unauthorized. An amended answer was filed July 12, 1917, purporting to be on behalf of the defendant trustees, which, by order of court made July 20, 1917, was stricken from the files, and the names of Josephine M. Johnson and P. Borden Johnson were also eliminated from the amended answer; the defendant Greenamyer being granted leave to file an amended answer within ten days. The defendant Greenamyer, answering for the Mechanical Development Company and himself individually as trustee, on July 24, 1917, filed an amended and supplemental answer attached to which appears an order of the presiding judge permitting its filing. This pleading avers that there was no consideration for the execution of the note, or, at least, that the consideration has failed to a material extent through the manipulations of the plaintiff; that the defendants Josephine M. Johnson and P. Borden Johnson are subservient to the will of plaintiff; and that they are conniving with the plaintiff to wreck the association in order to deprive Greenamyer of his valuable interest therein. Plaintiff moved the court, on July 12, 1917, to render judgment on the confession. The notice of motion bears the following indorsements: "Jul. 12, 1917. Motion denied. Attest: H. J. Lelande, Clerk, by Geo. B. Whiteleather, Deputy. Department No. 16;" and "Nov. 21, 1917. Motion granted. Attest: H. J. Lelande, Clerk, by E. E. Ekdale, Deputy. Department No. 5." The judgment from which this appeal is taken provides that, in accordance with the confession of judgment, the plaintiff recover from the defendants Greenamyer, Josephine M. Johnson, and P. Borden Johnson, as trustees doing business under the name and style of Mechanical Development Company, the sum of $6,887, etc.

The record does not disclose that any action was ever taken on the answer filed by order of court subsequent to the filing of the confession, and the judgment itself is entirely silent with reference to the answer. The court apparently ignored this pleading, no trial was had on its issues, and no finding made in regard to the truth of its allegations. If the statements made therein were substantiated by proof, the court would have been justified in rendering a different judgment than that founded on the confession.

The defendant Greenamyer, being one of the trustees, representing himself and the other shareholders, in the association, is entitled to maintain a defense in its behalf, on showing that the other trustees are acting in collusion with the plaintiff in his attempt to enforce an illegal demand against the association. Newhall v. Western Zinc Min. Co., 164 Cal. 380, 128 Pac. 1040.

Motion denied.

We concur: FINLAYSON, P. J.; THOMAS, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

50 Cal. App. 553

Ex parte LAMSON. (Cr. 947.)

(District Court of Appeal, First District, Division 2, California. Dec. 23, 1920.)

1. Infants 🔑19—Minutes of court held to show voluntary appearance of parents waiving service.

In a proceeding to make a child a ward of the juvenile court, a recital in the minutes that the parents "were present in open court," and that they participated in the proceedings and were sworn and testified shows a voluntary appearance as contemplated by St. 1915, p. 1227, § 4, waiving a failure to serve the parents with process.

2. Habeas corpus 🔑99(1)—Facts held to show child in lawful custody under court order.

In a parent's habeas corpus proceeding to secure release of a child adjudged a ward of the juvenile court, where failure to serve the parents with citation had been waived by voluntary appearance, and at a subsequent hearing in which the parents were served and from which no appeal was taken the child was committed and is in custody, *held*, that the custody was not without due process of law.

In the matter of the application of Fred M. Lamson for a writ of habeas corpus to be directed to the juvenile court of Butte county to secure the release of petitioner's daughter, a ward of the court, from custody. Petition denied.

Walter F. Lynch, of Stockton, for petitioner.

John R. Robinson, Dist. Atty., of Chico, and R. A. Leonard, of Oroville, for respondent.

NOURSE, J. The petitioner, who is the father of Gertrude Lamson, a ward of the juvenile court of the county of Butte, filed his application in this court for a writ of habeas corpus for the purpose of examining into the legality of the confinement of said ward and obtaining her discharge from custody. The grounds of the petition are that said ward is illegally held in custody because at the time of the original commitment no service of citation was made upon the parents of said ward, that the same was not filed with the clerk of the court prior to hearing, and that service thereof was not waived by them by a voluntary appearance entered in the minutes of the court, as required by section 4 of the juvenile court law. Stats. 1915, p. 1225.

The facts of the case are that on the 2d day of June, 1916, the judge of the superior court, sitting as a judge of the juvenile court in the county of Butte, made and entered his judgment adjudicating said Gertrude Lamson a ward of the juvenile court and finding that the parents of said ward were incapable of exercising proper parental control over her. Said judgment and findings were made as a result of the hearing conducted by said court on the 29th day of May, 1916, based upon a petition regularly filed therein on the 25th day of the same month. Thereafter, and on the 9th day of April, 1917, the petitioner herein filed with the District Court of Appeal for the state of California in and for the Third Appellate District his application for a writ of habeas corpus directed to the probation officer of said county of Butte, based on the same grounds urged herein. This application was denied. On April 24, 1917, a new petition was filed in the juvenile court of the county of Butte, asking that said ward be committed to the St. Catherine's Home and Training School in San Francisco. Citation thereon was duly served upon the parents of said ward, and they duly appeared at the hearing thereof, were present in court, were represented there by counsel, and took part in all said proceedings. As a result of said hearing said court did on the 2d day of May, 1917, commit said ward to the St. Catherine's Home and Training School where she is now confined. No appeal was taken from this order.

[1, 2] For the first hearing no citation was served upon the parents, and service thereof was not waived by them in writing. Hence petitioner's whole case rests upon a claimed insufficiency of the minutes of the court of the 29th day of May, 1916, the day when the first hearing was had. In these minutes it is recited that "F. M. Lamson and Martha Lamson were present in open court." The minutes further show that these parties, the father and mother of Gertrude Lamson, participated in the proceedings and were sworn and testified as witnesses therein. If the clerk had used the word "appeared" instead of the words "were present," there would be no ground for argument. The statute requires that the voluntary appearance be entered in the minutes of the court unless citation has been served or waived in writing. We are satisfied that the clear intendment of the entry made by the clerk was that of a voluntary appearance as contemplated by the statute, and in view of the fact that the same question was determined adversely to petitioner in the application for habeas corpus before the District Court of Appeal of the Third Appellate District, and of the further fact that the ward is now committed under a subsequent order made after due notice to the parents from which no appeal was taken, we cannot say that the ward is now in custody without due process of law.

The petition is denied, and the ward remanded.

We concur: LANGDON, P. J.; BRITTAIN, J.

50 Cal. App. 695

NEELY v. BUSTER et al. (Civ. 3239.)

(District Court of Appeal, Second District, Division 2, California. Dec. 29, 1920. Hearing Denied by Supreme Court Feb. 24, 1921.)

1. Appeal and error 🔑931(1)—Inferences to support court's findings considered as established facts.

On appeal from a judgment denying cancellation of a deed, the evidence must be considered on the theory that every reasonable inference deducible therefrom, and which is favorable to the court's finding that the deed was delivered, is an established fact.

2. Appeal and error 🔑842(2)—Finding of delivery is finding of fact.

Delivery or nondelivery of a deed is a question of fact to be found from the surrounding circumstances, so that a finding of delivery based on conflicting testimony, or on inferences reasonably deducible from the evidence, cannot be questioned on appeal.

3. Deeds 🔑54, 56(6)—Delivery essential; delivery must be in lifetime of grantor.

Delivery of a deed is essential to a valid transfer of title to real estate, and must take place during the life of the grantor.

4. Deeds 🔑61—Delivery to third person who delivers to grantee after grantor's death is sufficient.

Delivery of a deed need not be made to the grantee in person, but it is sufficient where the grantor, parting with all dominion and control over it and intending it to take effect as a present transaction, delivers it to a third person to be delivered to the grantee, though the third person does not transfer possession to the grantee until after the grantor's death.

5. Deeds 🔑58(3)—Leaving with attorney held delivery to grantee.

Where the grantor, after signing and acknowledging his deed, gave it to his attorney, with directions to give it to the grantee without any reservations or conditions attached to such delivery, it is sufficiently shown that the grantor parted with all control over the deed and intended it should operate as a present transfer of title.

6. Deeds 🔑65—Grantee's assent to deed delivered to third person relates to time of delivery.

Where a deed is delivered by the grantor to a third person for the grantee without the grantee's knowledge, the grantee's subsequent assent to or acceptance of the deed relates back to the delivery to the depositary.

7. Deeds 🔑208(6)—Evidence held to show acceptance by grantee during grantor's lifetime.

In a suit to cancel a deed for nondelivery, where it was shown that the grantor left the deed with his attorney for the grantee, evidence that thereafter the grantee in the grantor's presence instructed the attorney to retain the papers for her sufficiently shows an acceptance by her, though she testified that, while she knew the papers transferred the property to her, she did not know it was a deed.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by G. W. Neely, as administrator, against Ethel Stella May Buster and another. Judgment for defendants, and plaintiff appeals. Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Henry M. Hurd, of Los Angeles, for respondents.

FINLAYSON, P. J. This is an appeal by plaintiff as administrator of the estate of Wilbur F. Earl, deceased, who died intestate on December 29, 1915. Plaintiff's intestate was the grandfather and adoptive father of the defendant Ethel Stella May Buster.

Wilbur F. Earl, something more than a year before his death, namely, on September 11, 1914, signed and acknowledged and left with his attorney, Henry M. Hurd, Esq., a deed to the property in controversy, wherein his granddaughter, Mrs. Buster, is named as the grantee. The deed, which was without any pecuniary consideration, recites that it is made for love and affection. Without doubt, it was intended as a gift from the grandfather to his granddaughter. Plaintiff, as administrator of the estate of Wilbur F. Earl, deceased, alleging that the deed was never delivered, brought the action to have the instrument declared to be null and void. The answer put in issue the allegations of nondelivery. The lower court found that the deed was delivered, judgment, accordingly, was entered in favor of defendants, and plaintiff appeals.

The evidence bearing upon the one question in the case, that concerning the alleged nondelivery of the deed, is, in substance, as follows:

The deed was prepared by the grantor's attorney, Mr. Hurd. After being signed and acknowledged by the grantor, it was left by him with his attorney for delivery to the grantee. Mrs. Buster testified, in substance, as follows:

> I was not present when the deed was signed; I knew nothing about it until after it was recorded. I knew I was going to get the property, and I knew that grandpa had some papers made out, because he told me so. I learned that in the latter part of September, 1914, some time after the deed was actually made. He did not tell me it was a deed that he had made out. He said it was just some papers. Grandpa said he thought he would have it made out in a deed, so there would be no mistake. Nobody ever told me it was a deed. I must have known it was a deed. I did not have it in my possession until it was recorded, which was after grandpa had died. I told Senator Hurd to keep the papers for me. (The witness is here referring to a conversation, testified to by Mr. Hurd, that took place between him and Mrs. Buster during Mr. Earl's lifetime and in the latter's presence.)

Mr. Hurd testified, in substance, as follows:

> I prepared the deed. Mr. Earl acknowledged it before me as notary. I was present when it was signed. It was signed in my office. The deed was left with me at the time it was made. When it was signed Mr. Earl told me to give it to Mrs. Buster—the grantee. He told me that at the time he signed it. He told me to keep it and give it to her. He did not tell me to wait until after his death before giving it to her. I was instructed to deliver the deed to Mrs. Buster at once. I did not deliver it until after it was recorded. I recorded it on January 3, 1916, after Mr. Earl's death. I was not told not to deliver it or not to record it. The deed was in my possession from the time it was made until recorded. Mr. Earl was talking about giving Mrs. Buster his property, and I said, "Do you want to make a will?" and he said, "No; I want to deed it to her. I want Ethel to have it;" and he says, "Can you make that out?" and I said, "Yes." The proposition at that time in my mind was to leave the deed in escrow. I told him if he made the deed he never could have it, and he said he wanted her to have it, and I said, "Do you want the deed?" and he said, "No; just give it to her." Following that, I think in the latter part of September, as I was going to court, I met Mr. Earl and Mrs. Buster at the entrance to the building (referring, evidently, to the building in which the witness had his offices), and I spoke to them and I said, "How do you do, Mr. Earl?" and he said, "I was just going up to see you;" and I said, "What was it?" and he says, "I was going to give Ethel those papers;" and I said, "All right, how soon do you get back?" He said, "Not for some time." I said, "I am just going to court and I will soon be back." She said, "All right, Mr. Hurd, you keep them for me." I said, "All right, Mrs. Buster, I will;" and I hurried on to court. I kept the papers for her.

[1, 2] It is the contention of appellant that the finding that the deed was delivered by the grantor and accepted by the grantee is contrary to the law and the evidence. The evidence must be considered on the theory that every reasonable inference deducible therefrom, and which is favorable to the court's finding that the deed was delivered, is an established fact. Delivery or nondelivery is always a question of fact to be found from the surrounding circumstances of each transaction; and a finding that a deed has been delivered, if the finding is based upon an analysis of conflicting testimony or upon inferences reasonably deducible from the evidence, may not be questioned here.

[3, 4] Delivery of a deed is, of course, an essential element of a valid transfer of title to real estate, and must take place during the life of the grantor; for a deed cannot be made to perform the functions of a will. But the delivery need not be to the grantee in person. The deed may be delivered to a third person to be by him delivered to the grantee. Where the grantor, parting with all dominion and control over the deed, and intending it to take effect and pass the title as a present transfer, delivers it to a third person to be delivered to the grantee, and such person does deliver it to the grantee, as authorized and directed by the grantor, there is a good delivery to the grantee, though the grantor be dead at the date of the last delivery. Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326; Kelly v. Woolsey, 177 Cal. 325, 335, 170 Pac. 837; Carr v. Howell, 154 Cal. 372, 381, 97 Pac. 885; Nelson v. Colton, 36 Cal. App. 69, 79, 171 Pac. 701.

[5] Earl, after signing and acknowledging the deed, gave it to his attorney with directions to give it to the grantee. No conditions whatever were attached to this delivery of the deed to the grantor's attorney. The grantor parted with it without any reservation or condition. Moreover, it is a justifiable inference from the evidence that Earl had formed a determination to convey this property to his granddaughter, and that the deed was signed and acknowledged by him pursuant to that formed and expressed design. These circumstances show quite conclusively that when he delivered the deed to his attorney he parted with all control over it, and intended that it should operate as a present transfer of the title to the land.

Appellant's chief contention appears to be that the grantee's assent during the lifetime of the grantor has not been shown. He concedes, as indeed he must, that where a deed is delivered to a third person with instructions to deliver it to the grantee upon the death of the grantor, the latter parting with all dominion over the instrument and reserving no right to recall it or to alter its provisions, such third person will, in such case, have authority, after the death of the grantor, to deliver the deed to the person named as grantee, and, as between the grantor and grantee and those claiming under them, the rights of third persons not intervening, the grantee's acceptance of the deed, though after the death of the grantor, will constitute a good delivery. But, says appellant, here the grantor did not authorize his agent to deliver the deed after his death, but to make immediate delivery to the grantee. Hence, says counsel for appellant, Hurd's agency was dissolved by the grantor's death, his authority to deliver the deed thereupon terminated, and, as no assent by the grantee or manual tradition to her was given or made during the grantor's lifetime, the deed never became operative; citing, among other cases, Furenes v. Eide, 109 Iowa, 511, 80 N. W. 539, 77 Am. St. Rep. 545.

Without a doubt, a deed, to be effective, must be delivered, actually or constructively, to the grantee, or to some person for his use, during the lifetime of the grantor. A deed is to be deemed constructively delivered "where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed." Civ. Code, § 1059, subd. 2. For reasons presently to be stated, we incline to the view that, under the circumstances of this case, the grantee's assent during the lifetime of the grantor may be "presumed," not inferred as a fact, but presumed as a matter of law, within the meaning of the above-quoted Code provision. However, be this as it may, we are quite satisfied that the grantee's actual assent, during the lifetime of the grantor, has been shown.

[6] It has been held in this jurisdiction and elsewhere that, as between the grantor and grantee, or those claiming under them, and in the absence of the rights of third persons superior to those of the grantor, the grantee's assent to a deed delivered to a third person for delivery to the grantee, made after such tradition to the third person, constitutes a full and complete delivery to the grantee as of the date of the manual tradition to the depositary. Under the doctrine of relation, the grantee's subsequent assent to or acceptance of the deed relates back to the date of the delivery to the depositary and makes such tradition to the latter and the grantee's subsequent assent contemporaneous. Hibberd v. Smith, 67 Cal. 547, 561, 4 Pac. 473, 8 Pac. 46, 56 Am. St. Rep. 726; Kelly v. Woolsey, supra; Fischer Leaf Co. v. Whipple, 51 Mo. App. 181, 184; note to Munro v. Bowles, 54 L. R. A. 890. In Kelly v. Woolsey, supra, it is said:

> "Where a grantor intends that the deed executed by him shall operate as a present transfer of title, and delivers it to a third person without condition, the title passes *as of the date of the delivery to such third person*, although the deed is not actually delivered to the grantee until after the grantor's death." (Italics ours.)

It also is held, with few, if any, exceptions, that there is a presumption of acceptance by the grantee of a deed beneficial to, and imposing no burdens upon, him, delivered to a third person for his benefit. De Levillain v. Evans, 39 Cal. 120; Bryan v. Wash, 2 Gilm. (Ill.) 557, 565; Rivard v. Walker, 39 Ill. 413; Holcombe v. Richards, 38 Minn. 38, 35 N. W. 714; note to Munro v. Bowles, supra, 54 L. R. A. p. 892. In Bryan v. Wash, supra, the court stated the rule as follows:

> "The delivery may be made by the grantor himself or by any one authorized to make the delivery, nor is it indispensable that the delivery be made to the grantee, or even to any person authorized by the grantee to accept the deed, for if the delivery be made to a stranger, for, and in behalf of the grantee, and to his use, it is a good delivery, although the grantee may in truth be entirely ignorant of the conveyance, for, if the delivery be absolute, the assent of the grantee is presumed from the fact that the conveyance is beneficial to him."

In the light of these legal principles, we incline to the view that, the grantor having unconditionally delivered the deed to Mr. Hurd, without any right to recall it, and it being wholly beneficial to the grantee, and the latter having actually accepted it from Mr. Hurd after the death of the grantor, her assent to the delivery, during the lifetime of the grantor, even though she then had no knowledge that the instrument was a deed, will be presumed as a matter of law. See Standiford v. Standiford, 97 Mo. 231, 10 S. W. 836, 3 L. R. A. 299; Miller v. Meers, 155 Ill. 284, 40 N. E. 577; Winterbottom v. Pattison, 152 Ill. 334, 38 N. E. 1050; McCutchen v. McCutchen, 9 Port. (Ala.) 650; Buffum v. Green, 5 N. H. 71; Phillips v. Houston, 50 N. C. 302; Sneathen v. Sneathen, supra.

[7] However, regardless of whether Mrs. Buster's assent during the lifetime of the grantor may be presumed as a matter of law from the fact that the deed was wholly beneficial to her and was accepted by her after the grantor's death, we are satisfied that, under all the facts of the case, viewed in the light most favorable to the finding of the lower court, and, under the well-known rule, that is the light in which we must consider the evidence, her actual assent to the deed during the grantor's lifetime has been shown. When she and her grandfather met Mr. Hurd at the entrance to the building in which Mr. Hurd had his offices, and after the latter had told the grandfather that he could not at that time get him the papers (referring to the deed) to give them to his granddaughter, for the reason that he was then on his way to the courthouse, Mrs. Buster, addressing Mr. Hurd, said: "All right, Mr. Hurd, you keep them for me." This was said in the presence of, and presumably with the assent of, the grantor. Mr. Hurd testified that thereafter he did keep the papers for her. Then and there Mrs. Buster assented to a delivery to her of this deed. By making Hurd her agent and the custodian of the papers for her, his possession thereupon became and was her possession, and, eo instanti, there was an actual delivery to her. True, she testified that she was not sure that the instrument was a deed. She does say, however, that she "must have known it was a deed." She testified that her grandfather had told her he had made out some papers and that she knew she was going to get the property. So that, regardless of whether she knew that it was a deed that Mr. Hurd held in his possession, she did know that he had the custody for her of some paper or papers under which she was to get the property. She agreed to accept those papers, whatever they might prove to be, and when she told Mr. Hurd to hold the papers for her, she assented to their final and complete delivery, whatever might be their nature.

Judgment affirmed.

We concur: THOMAS, J.; WELLER, J.

(50 Cal. App. 593)

WOOD et al. v. BOARD OF FIRE COM'RS OF CITY OF LOS ANGELES.
(Civ. 3419.)

(District Court of Appeal, Second District, Division 2, California. Dec. 24, 1920.)

Prohibition 🔑3(3)—District Court of Appeal will not exercise jurisdiction where superior court has denied similar petition by appealable judgment.

The District Court of Appeal will not entertain jurisdiction of an original proceeding for a writ of prohibition where a similar application has been made to and has been denied by the superior court, since an appeal may be taken from the superior court's judgment, and since the Court of Appeal will not exercise original jurisdiction when an appeal lies.

Petition for writ of prohibition by George W. Wood and another against the Board of Fire Commissioners of the City of Los Angeles, State of California. Writ denied.

A. J. Morganstern, of San Diego, for petitioners.

Charles S. Burnell, City Atty., and William P. Mealey, both of Los Angeles, for respondent.

WELLER, J. This is an original proceeding for a writ of prohibition against the board of fire commissioners of the city of Los Angeles. On the filing of the petition an alternative writ issued.

It is alleged in the application that a similar application was made to the superior court and denied, on the 19th day of August, 1920, the judgment not having become final at the time of instituting the proceeding here. Under the circumstances there existed a right of appeal from the judgment of the superior court; and this court will not exercise original jurisdiction when an appeal lies. In re Burt, 17 Cal. App. 309, 119 Pac. 674.

Writ denied.

We concur: FINLAYSON, P. J.; THOMAS, J.

(50 Cal. App. 594)

WOOD v. BOARD OF FIRE COM'RS OF CITY OF LOS ANGELES. (Civ. 3449.)

(District Court of Appeal, Second District, Division 2, California. Dec. 24, 1920.)

1. Prohibition 🔑34—Appeal from judgment denying writ does not continue alternative writ in force.

An appeal from judgment of the superior court denying a writ of prohibition does not operate to continue in force the alternative writ issued by the superior court.

2. Appeal and error 🔑477—District Court of Appeal empowered to stay proceedings on judgment appealed from.

The District Court of Appeal in the exercise of its appellate jurisdiction possesses the inherent power to stay proceedings on the judgment appealed from, although no statutory provision is made for such stay.

3. Prohibition 🔑34—Supersedeas not granted pending appeal from judgment denying writ of prohibition.

The District Court of Appeal will not grant application for a supersedeas pending an appeal from judgment of the superior court denying writ of prohibition, since in such case there is nothing to supersede and the writ would be ineffectual for any purpose; no process being necessary to carry the court's judgment into effect.

4. Supersedeas 🔑1—Writ of "supersedeas" defined.

The writ of "supersedeas" cannot operate as an injunction against any of the parties to the action, its function being confined solely to staying proceedings for the enforcement of the judgment in the court below.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Supersedeas.]

5. Court 🔑207(5) — Extraordinary circumstances must exist to warrant District Court of Appeal in awarding writ.

In view of Supreme Court Rule 26 (176 Pac. xii), requiring petition to District Court of Appeal for writ of prohibition to state the reasons for an original application to such court, the appellate court will not assume original jurisdiction unless it appears that special or extraordinary circumstances exist which warrant such action.

6. Courts 🔑207(5)—Possibility of adverse decision in superior court not ground for application to District Court of Appeal.

The possibility of an adverse decision in the superior court on application for a writ of prohibition would not be sufficient cause for applying to the District Court of Appeal in the first instance.

7. Prohibition 🔑23—District Court of Appeal can issue alternative writ pending adjudication on merits.

The District Court of Appeal, in original proceeding for writ of prohibition, can issue an alternative writ, thus preserving the status of the controversy until the final adjudication on the merits.

8. Prohibition 🔑34—District Court of Appeal on appeal from judgment denying writ is without power to restrain proceedings pending appeal.

On appeal from judgment of the superior court denying writ of prohibition, the District Court of Appeal is without power to issue any writ which would operate as, or effectuate the purpose of, the alternative writ of prohibition.

Application for writ of supersedeas by George W. Wood in his proceeding against the Board of Fire Commissioners of the City of Los Angeles, State of California. Writ denied.

A. J. Morganstern, of San Diego, for petitioner.

Charles S. Burnell, City Atty., and William P. Mealey, both of Los Angeles, for respondent.

WELLER, J. Appellant applies for a supersedeas during the pendency of the appeal from a judgment of the superior court of Los Angeles county denying a writ of prohibition against the board of fire commissioners of the city of Los Angeles.

[1] In an original proceeding instituted in this court for the same purpose before the appeal was taken, it was considered that sufficient cause was shown by the petition, and an alternative writ was issued. We have this day decided that (195 Pac. 739), as the right to appeal existed, this court should not exercise its original jurisdiction, and the writ was denied for that reason alone. As the appeal does not operate to continue in force the alternative writ issued by the superior court, the defendant will not be restrained from proceeding after our action on the original application in this court has become final, and unless we can afford the relief prayed, the appellant may be deprived of the results of a favorable decision, if he should finally prevail in this appeal.

[2, 3] This court, in the exercise of its appellate jurisdiction, possesses the inherent power to stay proceedings on the judgment appealed from, although no statutory provision is made for such stay. Rogers v. Superior Court, 158 Cal. 467, 111 Pac. 357. The action sought to be enjoined by this application is not in execution of the judgment, but is entirely distinct and separate therefrom. The superior court adjudged merely that the plaintiff was not entitled to any relief, and no process of the court is necessary to carry its judgment into effect. There is therefore nothing to supersede, and the writ would be ineffectual for any purpose. Tyler v. Presley, 72 Cal. 290, 13 Pac. 856.

[4-8] The writ of supersedeas cannot operate as an injunction against any of the parties to the action, its function being confined solely to staying proceedings for the enforcement of the judgment in the court below. Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 Pac. 123. By Rule 26 (176 Pac. xii) promulgated by the Supreme Court, the petition for a writ of prohibition must state the reasons for an original application to this court, and unless it appears that special or extraordinary circumstances exist which warrant such action, the appellate courts will not assume original jurisdiction. We take it that the possibility of an adverse decision in the superior court would not be considered as sufficient cause for applying to this court in the first instance. The practical effect of this rule is to relegate the applicant to the jurisdiction of the superior court, in the vast majority of cases, and to confine this court to its powers as an appellate tribunal. In the exercise of original jurisdiction, this court could issue an alternative writ of prohibition, thus preserving the status of the controversy until the final adjudication on the merits. But on an appeal from a judgment of the superior court we find no authority for the issuance of any writ which would operate as or effectuate the purpose of the alternative writ of prohibition. Thus, by rule and practice, we are divested of a power which the Constitution has expressly conferred. Proper legislation or a modification of the rule might eliminate this difficulty in the future; but in the present instance we are powerless to grant any relief.

Petition denied.

We concur: FINLAYSON, P. J.; THOMAS, J.

50 Cal. App. 533

Ex parte HIGGINS.

In re ROBERTS, Chief of Police.

(Cr. 948.)

(District Court of Appeal, First District, Division 2, California. Dec. 22, 1920.)

1. Constitutional law ⚷48 — Statutes to be declared constitutional if possible.

No legislative enactment will be declared unconstitutional unless no other reasonable conclusion is possible.

2. Constitutional law ⚷70(1)—Taxation ⚷25—Courts will not interfere with legislative discretion in tax provisions unless Constitution violated.

What things are subject to taxation, and the amount and method of levying and collecting taxes, are essentially matters of legislative concern with which the courts will not interfere unless some provision of the Constitution is clearly violated.

3. Constitutional law ⚷70(1) — Licenses ⚷7(1)—General rules of taxation apply to license fees.

The same general rules apply to license taxes for revenue as to other taxes in relation to the legislative discretion being controlling, as also to license fees enacted under the police power of the state in matters affecting the public health, safety, or morals.

4. Licenses ⚷3—Power to tax and collect license fees must be found in generic law.

The power to tax and collect license fees under the police power must be found in the generic law.

5. Licenses 🔑6(1)—City of San Francisco empowered to levy license taxes and to collect fees.

Under Charter of San Francisco, art. 2, c. 2, § 1, subd. 15, article 8, c. 3, § 1, subd. 9, and chapter 4, § 7, the power exists in the city board to levy license taxes for revenue and to collect license fees under the general police power; where both powers exist in relation to a specific public interest, it is a matter of indifference whether the particular enactment is under one or the other or both.

6. Licenses 🔑1 — Ordinance exacting license from dealers in secondhand automobiles not mere revenue measure.

Ordinance No. 5132, New Series, of the City and County of San Francisco, § 18, providing every person, firm, or corporation engaged in the business of selling, exchanging, or buying secondhand or used automobiles for resale or exchange shall pay a license of $50 per quarter for each place maintained, but that persons reselling used automobiles taken in exchange for new automobiles shall pay $25 a quarter, need not be considered only as a revenue measure, in view of Charter of the City, art. 2, c. 2, § 1, subd. 15, but may be regarded also as a licensing or permit ordinance.

7. Evidence 🔑5(2)—Frequency of thefts of motorcars, etc., a matter of common knowledge.

It is a matter of common notoriety that the theft, disguise, and resale of motorcars has become so common as to tax the powers of the police throughout the United States to recover the stolen cars and to bring the criminals to trial.

8. Evidence 🔑47 — Necessity to regulate pawnbrokers, junk dealers, etc., a matter of common knowledge.

It is a matter of common notoriety that the temptation to buy cheaply, which is so often presented to those carrying on the business of pawnbroker, junk dealer, secondhand dealer, and kindred activities, renders it necessary for the public safety and morality that their business activities be subjected to police scrutiny and regulation.

9. Licenses 🔑7(2) — Ordinance exacting license fee from dealers in secondhand cars not discriminatory.

Ordinance No. 5132, New Series, of the City and County of San Francisco, § 18, providing every person, firm, or corporation engaged in the business of selling, exchanging, or buying secondhand or used automobiles for resale or exchange, shall pay a license of $50 per quarter for each place maintained, but that persons reselling used automobiles taken in exchange for new automobiles shall pay $25 a quarter, *held* not discriminatory against those regularly engaged in the business of selling secondhand cars at a fixed place of business as compared with those selling such cars and maintaining no place of business.

10. Licenses 🔑7(9) — Ordinance exacting license fees from dealers in secondhand cars valid.

Ordinance No. 5132, New Series, of the City and County of San Francisco, § 18, providing every person, firm, or corporation engaged in the business of selling, exchanging, or buying secondhand or used automobiles for resale or exchange shall pay a license of $50 per quarter for each place maintained, but that persons reselling used automobiles taken in exchange for new automobiles shall pay $25 a quarter, considered as a revenue measure, makes no unreasonable classification, and, considered as a police measure, imposes no excessive, burdensome, or unjust charge incommensurate with the cost of the required police supervision, but is valid under either or both of the powers vested in the supervisors of the city and county by Charter, art. 2, c. 2, § 1, subd. 15, and article 8, c. 3, § 1, subd. 9.

Application for writ of habeas corpus on behalf of Richard Higgins, petitioner, against R. L. Roberts, as Chief of Police of the City and County of San Francisco. Petitioner remanded to custody.

Chas. W. Haswell, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Milton T. U'Ren, Deputy Dist. Atty., both of San Francisco, for respondent.

BRITTAIN, J. From the petition it appears that Richard Higgins was arrested and, until his release on bail when the writ of habeas corpus was issued, was imprisoned, on a complaint charging him with the violation of section 18 of Ordinance No. 5132, New Series, of the City and County of San Francisco. The ordinance is the general license ordinance, and section 18 is as follows:

"Every person, firm or corporation engaged in the business of selling, exchanging or buying secondhand or used automobiles or other motor vehicles for the purpose of resale or exchange of same shall pay a license of fifty dollars ($50) per quarter for each such place maintained, provided, however, that persons reselling used automobiles or other motor vehicles taken in exchange or part payment for new automobiles or other motor vehicles, shall pay a license of twenty-five dollars ($25) per quarter."

The record fails to show whether Higgins was dealing in new automobiles or in secondhand vehicles only. If he was in the second category of those sought to be taxed by the section in question, some of the matters on which he relies would require no consideration at this time. Since both the petitioner and the respondent present the entire matter of the validity of the enactment, it may be assumed that Higgins was engaged in the business of dealing in secondhand automobiles, and, if subject to any tax, to that of $50 a quarter. In the brief for the petitioner reliance is placed on four propositions, but since the whole matter is before the court it is unnecessary to follow any artificial segregation of mere points.

[1-4] In such cases as this certain funda-

mental rules should be borne in mind. They are so well known that citation of authority is unnecessary, but since they are sometimes overlooked, a reference to them is not amiss. No legislative enactment will be declared unconstitutional unless no other reasonable conclusion is possible. Government cannot exist without recourse to the power of taxation. What things are subject to taxation, and the amount and method of levying and collecting taxes are essentially matters of legislative concern with which the courts will not interfere unless some provision of the Constitution is clearly violated. The same general rules apply to license taxes for revenue as to other taxes as also to license fees enacted under the police power of the state in matters affecting the public health, safety, or morals. The power to tax and to collect license fees under the police power must be found in the generic law.

[5] The charter of San Francisco (article 2, c. 2, § 1, subd. 15) provides that the board of supervisors shall have power "to impose license taxes and to provide for the collection thereof; but no license taxes shall be imposed upon any person who, at any fixed place of business * * * sells or manufactures goods, wares or merchandise, except such as require permits from the board of police commissioners as provided in this charter." It further provides (article 8, c. 3, § 1, subd. 9) that the board of police commissioners shall have the power "to grant or refuse to grant permits to any person engaged or desiring to engage in business as a pawnbroker, peddler, junk-shop keeper, dealer in secondhand merchandise, auctioneer and intelligence office keeper," etc. The chief of police (article 8, c. 4, § 7) "shall possess powers of general police inspection, supervision and control, over all pawnbrokers, * * * dealers in secondhand merchandise. * * * All persons engaged in said callings must first procure permits from the commissioners. * * * The chief may * * * empower members of the police department, when in search of property feloniously obtained or in search of suspected offenders, or in search of evidence to convict any person charged with crime, to examine the books and the premises of any such person. Any such member of the police department, when thereunto empowered * * * may examine property alleged to have been * * * lost * * * or stolen." Under these provisions the power exists both to levy license taxes for revenue and to collect license fees under the general police power. Where both powers exist in relation to a specific business, it is a matter of indifference whether the particular enactment is under one or the other or both of the powers. Gundling v. Chicago, 177 U. S. 183–188, 20 Sup. Ct. 633, 44 L. Ed. 725.

[6-9] The argument that the section of the ordinance must be considered only as a revenue measure is without force. Under subdivision 15, § 1, of chapter 2, art. 2, of the Charter, while the supervisors have no general power to levy a tax upon the business of those who sell merchandise at a fixed place of business, they have such power if the business is one requiring a permit from the police commission. As to the latter kinds of business, the supervisors have power also to charge a license or permit fee. There is nothing in the decision of the Supreme Court in Rapp & Son v. Kiel, 159 Cal. 702, 115 Pac. 651, nor that of this court in the Matter of Dees, 194 Pac. 717, which helps the petitioner here. In the Rapp Case, as in the Dees Case, the imposition, whether considered as a tax in its technical sense or a permit fee under the police power, could not be upheld because in each case it was a charge on a business within the protection of the charter provision and not within the exception. A dealer in secondhand merchandise is within the exception which permits the license charge to be made whether considered as a revenue or a police measure. The correlative argument that the ordinance cannot be considered as regulatory in character because it discriminates between the business of taking secondhand vehicles in exchange for new ones and the business of dealing in secondhand vehicles is fallacious. It is a matter of common notoriety that the theft, disguise, and resale of motorcars has become so common as to tax the powers of the police throughout the United States to recover the stolen cars and to bring the criminals to trial. It would be fatuous to assume that a motorcar thief would very often pay the difference between the secondhand value of a used car and the selling price of a new car. The tendency of the thief would be to get money in exchange for the stolen car from those in the business of buying used cars for resale. Without reflecting in any way on the petitioner or on any other dealer in used cars, of whom there must be as honest and honorable men as those in any other mercantile pursuit, it is also a matter of common notoriety that the temptation to buy cheaply, which is so often presented to those carrying on the business of pawnbroker, junk dealer, secondhand dealer, and kindred activities, renders it necessary for the public safety and morality that their business activities be subjected to police scrutiny and regulation. There is a clear distinction between the business of buying at the lowest price secondhand automobiles for resale and the business of selling new cars at the highest price and taking used cars in part payment. In the one case the object is to make a profit on original sales of new cars, and in the other to make a profit on the purchase and resale of secondhand cars. These reasons furnish a sufficient ground for a classification between the two classes of dealers in secondhand cars. In this case the license charge is upon a business subject to police control. The Richardson Case, 170 Cal. 71, 148 Pac. 213, dealt only with license taxes imposed solely for revenue. It is therefore inapplicable to this phase of the present case. The last contention of the petitioner is that the section is discriminatory against those regularly engaged in the business of selling secondhand automobiles at a fixed place of business as compared with those selling such cars and maintaining no place of business. This same argument might have been made in ancient times against every saloon license charge because a license was not imposed upon bootleggers. There is no question before the court, and no evidence, to warrant it in discussing other police regulations which may or may not have been made. The license regulations in question apply to all engaged in the business of dealing in secondhand automobiles.

[10] In conclusion, it appears to the court that in the section of the ordinance in question, considered as a revenue measure, the classification is not unreasonable, and, considered as a police measure, it cannot be held as a matter of law that the charge of $50 a quarter is excessive, burdensome, or unjust, or not commensurate with the cost of the required police supervision. The enactment is valid under either of the powers vested in the supervisors, and under both.

It is ordered that Richard Higgins be remanded to the custody of the chief of police of the city and county of San Francisco.

We concur: LANGDON, P. J.; NOURSE, J.

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50 Cal. App. 702

MILLER v. SHAW et al. (Civ. 3433.)

(District Court of Appeal, Second District, Division 1, California. Dec. 29, 1920. Hearing Denied by Supreme Court Feb. 24, 1921.)

1. Deeds 🔑155—Forfeiture in event of default held sufficiently expressed.

Condition in a deed, conveying land in consideration of payment of $70 per month to grantors as long as they should live, that property should be forfeited in the event that monthly payments were not made, *held* sufficiently expressed.

2. Frauds, statute of 🔑116(5)—Agent may not bind owner of interest in real estate in absence of writing.

Where land was conveyed in consideration of monthly payments to grantors for life and grantees defaulted, the grantors could not be bound by an agreement of an agent to take a certain amount of money from the grantees in settlement of defaulted payments and their interest remaining in the property, without a writing authorizing the agent so to do.

3. Frauds, statute of 🔑116(8)—Letter did not constitute writing authorizing agent to dispose of interest in land.

A letter, "I will withdraw my consent given on Friday the 13th to Monday the 17th and then do what you can for me, as I must have money to live on, and if you cannot get what they already owe me take what you can get so long as it does not below the $1,500 which I understand they have offered you," *held* not a sufficient writing of authority to the addressee to enter into a binding contract concerning the disposal of an interest in real estate.

4. Frauds, statute of 🔑129(3)—Facts held not to show part performance of agreement to convey interest in land.

In action to quiet title to land claimed to have been forfeited under a deed, where defendants claimed an oral agreement on the part of plaintiffs to accept a certain amount in settlement of plaintiff's claims against or interest in the property, facts *held* not to show such part performance on the part of the grantors as would take the agreement out of the statute.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Lavina H. Miller against Walter P. Shaw, Jr., and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles L. Chandler, Frank M. Bering, and E. O. Leake, all of Los Angeles, for appellants.

James G. Owen and Henry M. Willis, both of Los Angeles, for respondent.

JAMES, J. This action was brought to quiet title in the plaintiff to a certain parcel of real estate. Judgment was entered agreeable to the prayer of the complaint. Defendants have appealed.

[1] On the 27th day of February, 1912, plaintiff and Jacob C. Miller, her husband, executed a deed conveying the title to the property in controversy to Mervin Miller. The deed was made upon the consideration that the grantee should pay to the grantors the sum of $70 per month as long as the said grantors should live, and to the survivor in the event one should die. Jacob C. Miller did die, and the plaintiff during all of the times herein mentioned was entitled to receive the $70 per month provided to be paid. The condition subsequent was definitely and expressly stated in the deed that in the event of the nonpayment of the $70 and in the event such default should continue for a period of 15 days, "then the title to said real property will revert to said parties of the first part, * * * and it shall be lawful for the parties of the first part or survivor of said parties of the first part, to re-enter, and have, and enjoy the said real property as of their former estate, and to eject, oust and remove the party of the second part, his heirs, executors, administrators, and assigns

therefrom; and in event that said condition to pay said sum of $70 per month as hereinbefore described, is not strictly performed as described, then the title to said property shall vest in the parties of the first part or their survivor, and all right, title and interest therein of said second party, his heirs, successors or assigns, shall terminate." In addition to the provisions quoted, it was expressly provided that time should be of the essence of the agreement. The condition that in the event of default committed by the grantee, forfeiture of title should result, is sufficiently expressed. Firth v. Marovich, 160 Cal. at page 261, 116 Pac. 729, Ann. Cas. 1912D, 1190; Fitzgerald v. County of Modoc, 164 Cal. 493, 129 Pac. 794, 44 L. R. A. (N. S.) 1229. Payments were made to the plaintiff up to and including the month of April, 1918. The defendants herein at that time claimed to have succeeded to whatever title the Millers had divested themselves of in the property. In the summer of the year last mentioned, plaintiff employed attorneys to look after the matter of collecting the amounts due, and negotiations were had to that end. But no payments were made and the default of the defendants continued; in fact, default had never been relieved up to the time of the commencement of this action, which was in the middle of February, 1919. Defendants in their answer asserted that an agreement had been entered into with the plaintiff whereby the plaintiff had agreed to accept $1,500 in full settlement of her claim against them and in full settlement of her interest in the property, and that she had agreed to execute to them a deed conveying all such interest therein held by her. In the attempt to support this defense, they offered to show that plaintiff had authorized her attorneys to make a "compromise" settlement, and that an agreement was made with plaintiff's attorneys, and at the latter's direction the defendants had deposited $1,500 with an abstract company. They first offered in evidence a letter written by plaintiff to her counsel, which read as follows:

> "December 14, 1918. I will withdraw my consent given on Friday the 13th to Monday the 17th and then do what you can for me, as I must have money to live on, and if you cannot get what they already owe me take what you can get so long as it does not below the $1,500 which I understand they have offered you. Mrs. Lavina H. Miller."

[2-4] They offered to show that by oral conversation had between Mrs. Miller's attorney and defendant Leake, the agreement for the payment of $1,500 had been arrived at; they offered also to show that instructions were given to a title company, and that the sum of $1,500 had been paid (at what time is not shown by the offer) to the title company, and that certain expenses had been incurred by the defendants in connection therewith. The instructions and papers used in connection therewith show that instructions signed by defendant Leake had been left with the title company on January 17, 1919, but no money, and that on January 22d a person from whom defendants were intending to borrow the money on mortgage filed certain instructions, without the money, however, and by their exhibits in connection with the escrow offer it appeared that on the 30th day of January no money had yet been placed with the title company. It does not appear that any instructions were ever given to the title company for Mrs. Miller, either directly by herself or through her attorneys. The court sustained the objection to the letter on two grounds: First, that it amounted to a confidential communication between a client and attorney; second, that as it was claimed that authority was thereby given to dispose of an interest in real property, the writing was insufficient because it contained no mention of any real property. Objection was sustained to the other testimony and documentary evidence offered, on the ground that it was incompetent and immaterial, and particularly because it was not shown that any one had acted with authority to bind the plaintiff thereby. It may be further stated that up to the time this action was brought, the plaintiff had not by suit sought to enforce any claim against the defendants. She had left the matter of the collection of the money in the hands of her attorneys. At the end of the year 1918 there was approximately $600 due to plaintiff from the defendants on account of the $70 payments which had accrued for each month subsequent to April, 1918. Defendants were not only in default under the condition of the deed under which they deraigned whatever title they had, but were allowing a new default to be committed each month by failing to make the payments so plainly provided to be made. In so far as the matter of the settlement of this account is concerned, there was nothing to "compromise." The amounts were definite and ascertained; the whole sum was a debt, if the plaintiff so elected to treat it, due her from the defendants. Defendants made no attempt or offer to pay, except that it appears they did seek to secure plaintiff's interest in the property by paying therefor the sum of $1,500. Presumably that was to settle all matters between the parties. However that may be, it is clear enough that some part of that money was to be considered as payment for the interest of plaintiff in the real estate, and before any agent would be authorized to make a contract binding upon the plaintiff, engaging to transfer such interest, it was necessary that there be a writing sufficiently expressing such intent. The letter written by plaintiff did not constitute such a writing. It contained no description of the real estate and no reference thereto from which it could be deduced as to what property was in the mind of the plaintiff, if any, at the time; and if we assume for the moment that the attorneys possessed authority to enter into a binding engagement with respect to the plaintiff's interest in the property, it does not appear that they did this. They made no written contract with the defendants such as is required. Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179; Craig v. Zelian, 137 Cal. 105, 69 Pac. 853. Neither was there any part performance of an oral agreement. If we still keep in mind the assumption that the attorneys possessed the requisite authority and that they did orally agree to accept $1,500 in payment for plaintiff's interest in the real estate, and that, while not entering into a written agreement with the defendants, the defendants attempted to make performance of their part of the obligation, it does not appear that there was such part performance as to take the case away from the operation of the statute of frauds. As we have suggested after viewing the offered "escrow instructions," it appears that, while such escrow was commenced on the 7th of January, no money had been placed therein up to the 30th of January, 1919. When such money was so placed does not appear, even in the offer to prove the same made by counsel. The offer was that the money had been so deposited, which statement was made at the time of the trial, which occurred in June, 1919. In the view we take of this case, any other judgment than that entered by the trial court would not have been justified. Whether the letter first referred to was objectionable as being a confidential communication between client and attorney, we need not decide. It was, as was the other offered evidence, clearly objectionable on the ground that no sufficient authorization was expressed or appeared to have been given by the plaintiff which would entitle her attorneys to make any contract which would bind her interest in the real estate to the defendants. While it is wholly aside from any material question in the case, in fairness to those attorneys, it may be added that they did not appear and claim that they ever had made the agreement which defendants insisted upon and which plaintiffs by this action repudiated.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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50 Cal. App. 413

MILLER et ux. v. DOHENY et ux.
(Civ. 3476.)

(District Court of Appeal, First District, Division 2, California. Dec. 15, 1920.)

1. Boundaries 🔑37(1)—Evidence held to sustain findings as to boundaries.

Evidence *held* to sustain court's finding as to the true boundary of property in question.

2. Appeal and error 🔑1011(1)—Findings on conflicting evidence conclusive.

The trial court's findings on conflicting evidence are conclusive.

3. Boundaries 🔑37(3) — Evidence held to overcome presumption that a fence marked boundary line.

In an action to quiet title, involving question of boundaries, positive testimony as to the location of a fence by guess *held* to overcome any presumption that it marked or was intended to mark the true boundary line.

4. Adverse possession 🔑34, 37—Possession held not exclusive; exclusiveness necessary element.

Defendants' claim that they had acquired title by adverse possession to a 7-inch strip of plaintiffs' land, which strip was included in an alleyway which was mainly on defendants' land and which had been graveled and laid out by defendants, could not be sustained, where it appeared that the eaves of plaintiffs' house had extended over the strip from a time within the limitation period, and that during such period plaintiffs and their predecessors used the alleyway jointly with defendants; for exclusiveness is a necessary element of adverse occupancy.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Suit by Louis F. Miller and wife against Edward L. Doheny and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Olin Wellborn, Jr., and Stephen Monteleone, both of Los Angeles, for appellants.

Muhleman & Crump, of Los Angeles, for respondents.

LANGDON, P. J. This is a suit to quiet title to property in Los Angeles, described as the west 14 feet of lot 42 and all of lot 44 of the Ellis tract, as per map recorded in Book 10, p. 91, miscellaneous records of said county. Plaintiffs also asked that the trial court decree that they had an easement of right of way over a certain private alley east of their east line, which alley is owned by defendants. Upon this latter point, the judgment was against plaintiffs, and this matter is not involved, therefore, upon this appeal, which is taken by the defendants from the portion of the judgment quieting title in plaintiffs to the property claimed to be owned by them.

The only dispute is over the title to a strip of land approximately 7 inches wide by 138 feet deep along the east line of the property involved in this action. Plaintiffs have a house and sidewalk upon their land. The eaves of this house project to a point within abount one inch of the boundary line as found by the trial court. In 1913 defendants erected a fence at a place which plaintiffs claimed was upon their land. This fence extends under the eaves of the plaintiffs' building.

The plaintiffs and defendants, adjoining landowners, derived their title from a common source, to wit, George A. Newhall. It was stipulated at the trial that plaintiffs are the record owners of lot 44 and the west 14 feet of lot 42 of the Ellis tract. These lots lie on the south side of Twenty-Third street in the city of Los Angeles, as shown by the maps of the tract contained in the record before us.

Appellants make two contentions: First, that the survey of their witness Wright, starting with a dividing fence as a monument, should have been accepted as conclusive as against the testimony of the surveys by other engineers who testified on behalf of plaintiffs, and who had taken as a starting point an old stake which had been found at the northwest corner of lot 44 of Ellis tract. In this connection, it is the contention of appellants that the dividing fence was evidence of an agreed boundary line, and that the survey of the property should have been made from it as a starting point rather than from the location of the stake found by plaintiffs' surveyor. The second contention of appellants is that they should have been awarded title to the strip of land in controversy upon the theory of adverse possession. We shall consider these contentions in the order in which they are made.

The conclusion of the trial court upon the first question, obviously, was arrived at upon a consideration of the testimony of the witnesses on behalf of plaintiffs who had made surveys of the land in dispute. Surveys of the portion of lot 42 in dispute were made at various times by V. J. Rowan and Leonard O. Hall, witnesses for plaintiffs. These surveys all agree and according to them the eaves of plaintiffs' house are within an inch of plaintiffs' easterly line as found by the court. A conflict occurs in the evidence on this point, raised by reason of the fact that defendants introduced the testimony of George A. Wright, who had surveyed the land. His survey differed from those of the other surveyors, and according to his records and maps, the eaves of plaintiffs' house are over the line on defendants' property.

Mr. Rowan, testifying for plaintiffs, stated that he had been engaged in the occupation of civil engineer and surveyor in the city of Los Angeles for over 30 years. He testified to having made original surveys of all the lines of all the properties involved in this suit before the properties were subdivided into small holdings, except a few of the lots in St. James Park. He surveyed the entire district, covering the lots of the Ellis tract facing the south line of Twenty-Third street before the year 1900. In January, 1899, he surveyed the Ellis tract annex, lying on the west of lot 44 of the Ellis tract, and at that time found an old 3x3 stake planed down and marked with the figures "44" at the northwest or most northerly corner of lot 44 of the Ellis tract. He placed a tack in lead at this point and it is so marked on the maps before us here, and it appears thus in his notes taken at the time of the survey. This was used as a starting point for his survey. This witness also found a stake in place in February, 1898, marked "24—26" for the dividing line between lots 24 and 26 of the Ellis tract, and this was also found in place again on June 1 and June 26, 1898, and used for the east line of the Doheny property as it now exists. Mr. Rowan's testimony as to the existence of this stake is as follows:

> "The first survey I made out there was in October, 1895. This was the first time I saw this stake that I have described as a 3x3 stake marked '44.' The next survey I made in that vicinity was February, 1898, and then followed the June survey in 1898, and the one in January, 1899, and the one in October, 1901. I found identically the same stake on each of these occasions; it was pretty well protected by an old cypress hedge. I first saw that stake in October, 1895. It was about a 3x3—what we call 3 by 3, and it was a little bit longer one way than the other. I should say perhaps a 2½ by 3 inch stake; and was marked '44' on the easterly side toward the Ellis tract. It stood up about 2 to 3 inches from the ground; it was marked with a stencil or painted—it is pretty hard to remember those things. I was so certain of it I made notes of it in my note book, and thought it might come in handy in the future to simply tie to it."

The engineer, Leonard O. Hall, in 1917, found the tacks in lead placed by Rowan at these points where he had found the stakes, and as these points checked with his survey, he adopted them. The survey made by Hall was in accordance with that of Rowan and in accordance with the judgment of the trial court. The testimony of the surveyors was further corroborated by the testimony of J. H. Claudius who was at one time the owner of lot 40 and the easterly 21 feet of lot 42 of the Ellis tract, and who purchased lot 44 and the westerly 14 feet of lot 42 in 1902. He testified that he located a stake at or near the northwest corner of lot 44 at the place where an old stake was found by him. His testimony regarding the location of this stake is as follows:

> "Subsequently I bought 45 or 46 feet of land west of the alley. I located the stake at or near the northwest corner of lot 44. I burned some grass there one day, and it kind of spread on me, and I took some wood stakes and went through under it, and found a stake there, and I never knew it was there before—I guess it was about three foot inside of the sidewalk. I found that stake right after I bought lot 44. I guess it was an old stake; it was painted white. I found it under a hedge fence. I found two stakes. I found one right at the southwest corner of the barn and the other

one over there, at or near the northwest corner of lot 44, the point marked 'R' on the map; it was in from the Twenty-Third street line, about two feet, I guess, on the west side of the hedge. The stake I found under the hedge was a survey stake, painted white. It had no marks on it, nothing but a tack in the middle of it. It was an inch and a half square; or it might have been 2 inches or larger maybe. It was in pretty good condition when I found it. It was above the ground a very little. At the time I found the stake at the point marked 'R' on plaintiffs' Exhibit 1, being at or near the northwest corner of lot 44, the sidewalk had not been widened to 8 feet. When I said that I found the stake about 3 feet in from the sidewalk, I referred to the old sidewalk, which was in place at that time."

[1-3] Appellants contend that the testimony quoted and referred to herein, together with the other testimony in the record upon the subject, is not sufficiently definite to establish the location of the monuments of the original survey of the Ellis tract, and that, because these cannot be established, the location of various hedges and fences erected by prior owners of the land involved are the best evidence of the boundary line, and that these conform to the survey of Mr. Wright, who testified on behalf of the defendants. We think the testimony establishes the location of these stakes with sufficient accuracy and certainty. The true location of the survey is a question of fact. Washburn on Real Property (6th Ed.) vol. 3, p. 410, § 2343; Abbott v. Abbott, 51 Me. 581; Opdyke v. Stephens, 28 N. J. Law (4 Dutch.) 90; Pettingill v. Porter, 3 Allen (Mass.) 349. This fact was decided in this case, upon conflicting evidence, in favor of the plaintiffs. This in itself would be a sufficient answer to the appellants' contention upon this question, but we have the further fact that it appears in the record that some of the fences and monuments relied upon by appellants were not placed with any idea of marking the boundary line. Mr. Claudius, a former owner of the property, testified in rebuttal that he did not intend to mark the exact boundary line when he erected a fence upon the property. He testified that he had not measured to locate his fence upon the true line, but merely "took a guess at it." This positive testimony, of course, would overcome any presumption relied upon by appellants that this fence marked or was intended to mark the true boundary line. Any presumption with reference to the other fences and hedges, relied upon by appellants, is overcome by the definite testimony of several persons as to the existence of survey stakes upon the property which did not conform to a boundary line consistent with the location of said fences.

Under all the testimony in the record, it is apparent that the finding of the trial court with reference to the true boundary of the property in dispute is amply sustained by the evidence.

The other question presented by the record is the one of adverse possession. It is contended by appellants that as the alley upon appellants' property was graveled and laid out by them in accordance with the survey of Mr. Wright, for more than five years before the filing of this action, and said alley included the strip of land claimed by plaintiffs, that regardless of the finding of the trial court as to the true boundary line, appellants have acquired title by adverse possession against the plaintiffs herein. Appellants rely upon the fact that a copy of the survey by Mr. Wright was filed for record, and assert that, thereafter, appellants occupied the strip of land in dispute adversely to the plaintiffs under color of title. Cases are then cited to the effect that where possession is created adversely under color of title, an actual possession of all of the property is not necessary —a continuous possession of a part extending to the whole.

The evidence of the existence of the gravel walk over the line of plaintiffs' property was the testimony of Mr. Wright to the effect that in December, 1907, he made a survey of the land and at that time the driveway was graveled and smoothed out to the point contended for by appellants as the boundary line. Assuming, but not deciding, that this would constitute adverse possession of the 7 inches of plaintiffs' land included in such driveway, nevertheless, before this possession ripened into a right, and in 1909, the plaintiffs erected a house upon their property and occupied the land in dispute by the eaves of said house which the record shows extended to within an inch of their true line. The case of Gillespie v. Jones, 47 Cal. 259, cited by appellants to meet this state of facts, does not serve their purpose. It is true that case holds that one claiming possession adversely to the true owner by reason of the fact that the eaves of his house overhang the land of said true owner, only establishes an easement for such use by adverse possession and not a full title to the land. But in the present case the situation is reversed. It is the true owner who is occupying the land with the eaves of his house. His ownership extends up to the sky and down to the center of the earth. He is holding his own, and not seeking to acquire the land of another by adverse possession. We apprehend that he need not occupy his land by resting his structure upon the ground. We are of the opinion that he would be occupying his land if he built his house on stilts; and one claiming adversely could not dispossess him by building a fence thereunder, even under color of title.

[4] However that may be, it also appears that since 1909, the plaintiffs and their predecessors in interest have used the cement

sidewalk along the side of the house for the purpose of ingress and egress to their premises until the erection of defendants' fence in 1913. Appellants' contention with reference to this fact is that as the court found plaintiffs had no right, title, or interest in the alleyway of which this sidewalk is a part, plaintiffs' use of the same was permissive. It is to be remembered that in addition to finding that the use of the alleyway by plaintiffs was permissive, the court found that the seven inches of the alleyway in dispute was the property of the plaintiffs. Its finding that plaintiffs had no right or easement in the alley necessarily applies only to the portion of the alley which was found to be the property of the defendants, and not to the portion that was found to be the property of plaintiffs. Any other construction of the findings would render them inconsistent.

From the fact that the eaves of plaintiffs' house extended over the land in dispute since 1909, and from the further fact that during the time defendants claim to have occupied said strip adversely by reason of having used the same as an alleyway, the plaintiffs and their predecessors used this alleyway jointly with the defendants. It clearly appears that the occupancy of the defendants of said strip was never an exclusive occupancy. Exclusiveness is one of the elements necessary to an adverse occupancy in order that it may ripen into a title. Hart v. All Persons, etc., 26 Cal. App. 664, 666, 673, 675, 148 Pac. 236; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100.

We are therefore of the opinion that the trial court was correct in its holding that the claim of title by adverse possession was without merit.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

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50 Cal. App. 645

ALLEN v. FREEAR et al. (Civ. 3656.)

(District Court of Appeal, First District, Division 1, California. Dec. 27, 1920.)

1. Contracts 🔑187(3) — Unmentioned creditors beneficiaries under contract of transferee to pay transferor's indebtedness.

Where the consideration of a transfer of property is agreement of transferee to pay the transferor's indebtedness, creditors, though not mentioned, have a right to come in as being of a class for whose benefit the contract was made.

2. Subrogation 🔑32—Surety paying debt subrogated to principal's remedies.

By provision of Civ. Code, § 2848, a surety paying his principal's debt has right of subrogation to his remedies.

3. Assignments for benefit of creditors 🔑7—Trust arises on sale by transferee without applying proceeds as agreed.

On a transferee of property selling it without applying the proceeds, as agreed, to payment of transferor's indebtedness, a trust arises in favor of transferor's creditors.

4. Frauds, statute of 🔑119(2)—Not available in defense of fraud.

The statute of frauds is not available in defense of fraud of transferee of property in consideration of his oral agreement to pay the transferor's indebtedness, where he sells the property without so applying the proceeds.

5. Limitation of actions 🔑103(2) — Statute does not run till repudiation of trust and knowledge thereof.

The trust arising from transfer of property on oral agreement of the transferee to pay the transferor's indebtedness being a positive one, though resting in parol, the statute of limitations does not run against action to establish and enforce the trust till after repudiation and knowledge thereof.

6. Limitation of actions 🔑172 — Cannot be pleaded by one agreeing to pay another's debt.

The transferee of property who has agreed to pay indebtedness of the transferor and who has not repudiated the agreement, cannot plead limitations against the transferor's debt.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by T. F. Allen against Charles H. Freear and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

E. A. Klein, of Bakersfield, for appellant.

T. F. Allen, of Bakersfield, in pro. per.

Chas. A. Barnhart, of Bakersfield, for respondent Stephenson.

KERRIGAN, J. This action was brought to have a trust declared in certain property. The substance of the facts as disclosed by the findings show that on the 18th day of April, 1914, L. L. Bateman was the owner and in possession of certain personal property described as all the stock in trade, including groceries and general merchandise, in a certain store located in Kern county, the value of which was approximately $4,000. Bateman was financially involved, and on the day last mentioned he entered into an agreement with the defendant Freear to transfer the business over to him. Notice of his intention so to do was recorded, and pursuant to such notice a sale was subsequently made. The only consideration for this transfer was that Freear should take possession of the business, conduct the same, and pay off Bateman's indebtedness, upon the happening of which event Freear was to reconvey to Bateman a one-half interest in the property. At the time of the transfer Freear was familiar with the different claims against Bateman. Among these was one held by plaintiff and one of the defendants, Stephenson. Allen and Stephenson at the time of the transfer were guarantors on two promissory notes given by Bateman. These notes aggregated the sum of $1,500, and as such guarantors Allen and Stephenson were compeled to and did subsequently pay the same; Allen paying two-thirds and Stephenson one-third of the amount due thereon.

After acquiring the business in the manner indicated Freear conducted the same, but in violation of his agreement to pay off the indebtedness he retained the income arising therefrom, and finally sold the business to one Carlson. As part of the purchase price Carlson gave a note to Freear for the sum of $2,500, which note was secured by a mortgage upon certain real property. Before the maturity of this note Freear transferred the same to the Produce Savings Bank to secure his personal indebtedness. This mortgage was subsequently foreclosed by the bank. After the bank had satisfied its claim a surplus remained in its hands amounting to the sum of $866.50, which sum was ordered by the court to be deposited with the county treasurer to await such order as might be made in this action. The complaint herein prayed that this fund be adjudged to be held by defendant Freear in trust for the payment of the claims of plaintiff and other creditors of Bateman.

The trial court found in accordance with the prayer of the complaint and rendered judgment accordingly, and this is an appeal from such judgment.

[1-3] We are of the opinion that the judgment of the trial court was correct. Where property is held under the consideration, as here, that the purchaser is to pay off the indebtedness of the seller, the creditors, although not mentioned, have a right to come in as being those of a class for whose benefit such contract was made. Sherwood v. Gill, 36 Cal. App. 707, 173 Pac. 171.

Appellant concedes this to be the rule, but he claims that, as plaintiff was already obligated to pay by reason of the notes being outstanding, he was not put in the place of a creditor of Bateman to such an extent that he would be subrogated or substituted to the rights of the creditors that he paid off. We see no force in this contention. When a surety has paid the debt of his principal he has a right to be subrogated to the remedies and rights which the creditor had with whom he has settled. Civ. Code, § 2848; 37 Cyc. 415, 416. Here the only right that Freear had in the transferred property was his agreement that out of the proceeds of its management he was to pay the debts of Bateman. The claim of plaintiff was one he had knowledge of and was bound to pay. By making the sale without paying the debts Freear violated his agreement, from which act a trust arose in favor of those for whose benefit the transfer was made. The contract involved was an oral one, and appellant pleads the statute of frauds and the statute of limitations to defeat the action, and he relies on these statutes for a reversal.

[4] With reference to the statute of frauds, it is sufficient to say that such statute was never intended to operate as a shield in defense of fraud. Civ. Code, § 2794. As above indicated, the property received by Freear under the arrangement was held by him under a trust. The statute cannot be availed of to invalidate a relation which the law thus creates. Valentine v. Richardt, 126 N. Y. 272, 27 N. E. 255; 1 Perry on Trusts, § 79. To hold otherwise would permit the statute to aid Freear in the betrayal of the trust imposed upon him by preventing the fulfillment of the legal and moral obligation he was bound to perform. The statute was never enacted for such a purpose. This defense therefore can avail Freear nothing.

[5, 6] The same may be said with reference to the statute of limitations. The arrangement was entered into in April, 1914, and suit was brought thereon in December, 1916. It is conceded that if this were an action upon Freear's verbal promise it would be barred under the provisions of section 339 of the Code of Civil Procedure. Here, however, the trust being a positive one, though resting in parol, the statute could not run until after a repudiation and knowledge thereof. Nougues v. Newlands, 118 Cal. 102, 50 Pac. 386; Odell v. Moss, 130 Cal. 352, 62 Pac. 555; Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88. Moreover, Freear having received the property under the express agreement to pay the debts of Bateman, and there being no repudiation thereof, it does not lie in his mouth to plead the statute as against Bateman's creditors. He cannot be heard to say that while the debt is due from the person with whom he contracted, that the statute has intervened. This is no concern of his. Washer v. Independent, etc., 142 Cal. 702, 76 Pac. 654; Williams v. Naftzger, 103 Cal. 440, 37 Pac. 411; Davis v. Davis, 19 Cal. App. 797, 127 Pac. 1051.

And finally it is contended that plaintiff acted in bad faith in procuring the contract, and that Freear was never informed of the plaintiff's claim. The evidence shows that Bateman himself fully informed Freear of all the outstanding claims against him, including those here involved.

For the reasons given, the judgment is affirmed.

We concur: SEAWELL, Presiding Justice pro tem.; RICHARDS, J.

50 Cal. App. 364

L. W. BLINN LUMBER CO. v. PIONEER DRAINAGE DIST. et al. (Civ. 3237.)

(District Court of Appeal, Second District, Division 2, California. Dec. 13, 1920.)

1. Equity 🔑41—May grant legal relief on denial of equitable relief if suit was bona fide.

Where suit is erroneously brought in good faith on the equity side of the court to foreclose a lien, the court was not without jurisdiction to grant legal relief as to defendants, against whom a money judgment was rendered.

2. Mechanics' liens 🔑303(1)—Court may render a personal judgment where equitable relief is denied.

Though a claimant sought to foreclose a mechanic's lien for less than $300, after service of stop notice under Code Civ. Proc. § 1184, and such equitable relief is denied, the superior court is not without jurisdiction to render a personal judgment.

3. Appeal and error 🔑1071(5)—No reversal for findings outside issue not prejudicial.

In a proceeding to establish and foreclose a lien on a drainage district ditch, if findings of plaintiff's good faith are outside the issues made by the pleadings, still, no prejudice being shown, a reversal does not necessarily follow, particularly where nothing indicates that plaintiff was not acting in good faith, so that the lower court must be *held* to have acted within its jurisdiction.

4. Drains 🔑49—Facts presented held to show equity jurisdiction in suit to foreclose lien for material, regardless of amount involved.

In an action by party furnishing materials to a subcontractor to establish and foreclose a lien on a drainage district ditch, evidence that the directors of the district had knowledge of stop notices issued under Code Civ. Proc. § 1184, and deliberately and intentionally ignored them, *held* to present facts giving a court of equity jurisdiction on the merits, regardless of the amount involved, for the notices being an "equitable garnishment," the right to recover the money was a "cumulative remedy," not dependent on establishing the lien.

5. Drains 🔑49—Amount due from county drainage district held sufficient fund for equitable jurisdiction in suit to foreclose lien for material.

Where stop notices were served, the money in the hands of the county treasurer subject to order of the trustees of the drainage district was a sufficient fund to extend the arm of equity, in a proceeding against the drainage district for lumber furnished where such notices were ignored because contractor had previously fully paid subcontractor who ordered the lumber.

6. Drains 🔑49—Directors of drainage district personally liable for violation of stop notices served by materialman.

Although Code Civ. Proc. § 1184, fastens liability for violation of stop notices issued thereunder upon "the owner or person who contracted with the contractor," yet directors of a drainage district, which owns a ditch on which a lien by plaintiff materialman is sought, are personally liable where ignoring the stop notices.

7. Drains 🔑49—Lumber consumed in constructing a ditch held a part thereof.

Under Code Civ. Proc. § 1183, as amended by Laws 1911, p. 1313, lumber consumed in and which contributed to the construction of a ditch or canal became in legal contemplation a permanent part of the ditch, notwithstanding it may have been used for "skids" and ground to splinters by the dredger.

8. Drains 🔑49—Drainage district directors held personally liable for paying contractor after stop notices from materialman.

Where a materialman served stop notices on the directors of a drainage ditch district for material for which a subcontractor had failed to pay, and the directors, because contractor had already paid the subcontractor, ignored the notices by paying the contractor, they are personally liable.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by the L. W. Blinn Lumber Company against the Pioneer Drainage District and others. Judgment for the defendants Drainage District and J. W. McAllister, Sr., and plaintiff obtained a personal judgment against the defendants Edward Pine and others, directors of the defendant Drainage District, and they appeal. Affirmed.

Donald Barker and James M. O'Brien, both of Los Angeles, for appellants.

E. S. Williams, of Los Angeles, for respondent.

THOMAS, J. As claimed by appellants, this action is brought to establish and foreclose a lien, and for the recovery of the sum of $241.19.

The defendant drainage district, a public corporation, entered into a contract with one J. W. McAllister, Sr., for the construction of a drainage ditch, the construction work being thereafter sublet by McAllister to A. H. Hobart, one of the defendants here. Plaintiff, between the dates of September 2, 1913, and October 30, 1913, furnished lumber to Hobart to be used—and part of it was so used—in the construction of a bridge over the ditch, the same becoming a permanent part of the ditch as planned. The balance of the lumber so furnished was used for "skids" over which the dredger which was employed in digging the ditch was moved and rolled in such a manner that this portion of the lumber was wholly consumed, being "reduced to splinters in the operation." The value of the lumber so furnished and used was $235.86, which indebtedness Hobart has not liquidated.

In January and May, both of the year 1914, plaintiff served upon the defendant corporation, by delivery to its president, documents purporting to be the usual stop notices, in an attempt to comply with the provisions of section 1184 of the Code of Civil Procedure, setting forth the fact that the amount above stated was still unpaid, *and notifying the corporation to withhold sufficient money due or to become due to the original contractor, J. W. McAllister, Sr., with which to pay the same.* The notice served in May, 1914, was not only served upon the defendant corporation and McAllister, Sr., but also upon the auditor and treasurer, respectively, of the county of San Bernardino, who, it is claimed, were ex officio officials of the Pioneer Drainage District, the defendant corporation. These officers, however, were not served, nor did they appear, in the action. Defendants J. W. McAllister, Jr., Edward Pine, and James W. Pate were the directors of the defendant drainage district, and familiar with all the facts above set forth. At the times of the service of the "stop notices" above referred to, the board of directors of the defendant corporation held the sum of $1,700, an unpaid balance of the contract price under the McAllister, Sr., contract, for which sum, notwithstanding the service of said notices, a warrant was issued by such board, and, by the county officials above named, approved and paid. It is alleged in the complaint that a claim of lien was, on June 1, 1914, duly verified and recorded, and thereafter, on August 28, 1914, the present action was commenced.

A special demurrer was interposed and by the court overruled. The answer, in addition to joining issue on the foregoing alleged facts, set up, by way of further defense, the fact that the court was without jurisdiction of the subject-matter, for the reason that the amount prayed for is less than $300; that the drainage district, being a public corporation, could not have its property, nor any part thereof, subjected to the lien sought to be impressed thereon; that in no event are the members of the board of trustees of the drainage district liable in their individual capacity; that there was no money due to the subcontractor, to whom plaintiff furnished the materials, at the time of the service of the "stop notices" in question, hence that the same are ineffectual; and that the attempt of plaintiff to establish such claim of lien was, and now is, made with full knowledge by plaintiff of the foregoing facts.

On the issues thus formed, the case was tried, and the court found for the plaintiff and against the defendants Edward Pine, J. W. McAllister, Jr., and James W. Pate—the directorate of the defendant corporation—for the sum prayed in the complaint. The judgment, however, expressly denied relief against J. W. McAllister, Sr., and the defendant drainage district. In denying the claim of lien, the court found:

> "That the claim of mechanics' lien as alleged in said complaint was filed and recorded, and this suit in and for the foreclosure of the same was brought by said plaintiff in good faith on the part of said plaintiff, and that said mechanics' lien was not asserted by said plaintiff in bad faith or as a fictitious claim."

It will be further noted that the judgment so entered was against the defendants named, not "as directors," but personally.

Four points are urged by appellants for reversal: (1) The superior court was without jurisdiction; (2) appellants are not liable in their individual capacities; (3) materials furnished by plaintiff were not shown to have been used or consumed in the improvement upon the district property; and (4) that there was no money due or to become due to the subcontractor, to whom plaintiff furnished the materials, at the time of the service of the stop notices, hence the latter were ineffectual as against intervening matured rights of the contractor.

[1] On the first point it is contended that, the defendant corporation being public in its nature and the purposes for which it was organized being essentially public, no mechanics' lien could be established or foreclosed upon property belonging to the drainage district. Respondent, on the other hand, contends:

> "That this ditch was subject to a mechanics' lien for the reason * * * that there are two kinds of public uses: * * * (1) Those things which are acknowledged to be public because 'used by the public'; and (2) those things which are held to be public uses because they promote the public interest by developing the natural resources or wealth of the country."

It is argued that the things within this second class are declared to be public uses, so that the right of condemnation may be exercised in their behalf (section 16, Stats. 1903, p. 295), that the ditch referred to here was of this class, and that but for this reason the ditch in question is nothing more nor less than a private enterprise—while those within the first classification are of a wholly different character. Respondent concedes that no such lien could be sustained as to any such "public property," but contends that the decision of the trial court holding that *no such lien could be sustained against this ditch*, being acquiesced in by all parties to the suit and having become final, is now the law of this case, even if erroneous. The point is adverted to by respondent "to convince this court that he was in absolute good faith in contending that the ditch is subject to such lien," and we have no difficulty whatever in sustaining the trial judge on this phase of the case; that is, we are satisfied that plaintiff, erroneously, but in good faith, brought the action on the equity side of the court.

[2] The next question with which we are

confronted is: Does the fact that plaintiff sought equitable relief in the court below, notwithstanding the amount claimed to be secured by the alleged lien attempted to be foreclosed is less than $300, and notwithstanding a denial of such relief, confer jurisdiction upon that court? In our opinion this query, as applied to the instant case, must be answered in the affirmative.

It is admitted by appellants that plaintiff sought the establishment and foreclosure of a mechanics' lien, but it is claimed that—

> "Under no possible interpretation of the law could such a lien have been established or foreclosed on property held in trust by a public corporation for public use."

In Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983, the court says:

> "* * * The true doctrine is that when the superior court acquires jurisdiction by the filing of a suit to enforce a lien of mechanics and others, *under the statute relating to such liens*, it has jurisdiction to render a personal judgment for the amount claimed, although the right to a lien is denied and the amount claimed is less than $300."

If we substitute for the words which we have italicized above, or add thereto the words "or under section 1184, Code of Civil Procedure, relating to stop notices," we think that language applicable here. As we have seen, practically all of appellants' argument on this point urges upon us their conclusion, i. e., that no lien could be had "under the law" in this case, and that there was no issue presented as to respondent's good faith in filing said "lien" and in afterwards seeking to establish and foreclose the same. In our opinion it is not a question of good or bad faith, but, rather, whether the evidence here presents facts which, under the law, confer jurisdiction upon the court. We think it does.

[3] Conceding, without so holding, that the findings of good faith are entirely outside the issues as made by the pleadings, still, no prejudice being shown, a reversal of the judgment does not necessarily follow. Collins v. Gray, 154 Cal. 131, 97 Pac. 142. With the exception of Miller v. Carlisle, 127 Cal. 327, 59 Pac. 785 (since overruled by the Supreme Court in several cases), we consider no case cited by appellants in point on the question now under consideration. In Becker v. Superior Court, 151 Cal. 313, 90 Pac. 689, the court says:

> "We have no doubt that an action at law in which the actual demand amounts to less than $300 cannot be brought and retained within the jurisdiction of the superior court by adding a fictitious claim for a larger sum, or by making a fictitious showing as a basis for a purported prayer for equitable relief. But no such question is presented here. There is nothing to indicate that the Glenwood Lumber Company was not seeking, in good faith, to foreclose a lien claimed by it. It follows that the lower court must be held to have acted within its jurisdiction in rendering the judgment complained of."

If we substitute the name of the plaintiff in the instant case for that of the lumber company in the Becker Case, the language just quoted is applicable here.

[4] Appellants' argument on the question of the lower court's jurisdiction is directed toward the "lien" sought to be established and foreclosed, but apparently ignores the "stop notices" under section 1184, supra. Regardless of the amount involved or claim that no lien could be had here, we think the stop notices, as already set forth, together with the evidence showing that all the directors had knowledge thereof and that they were deliberately and intentionally ignored, present the existence of facts of which a court of equity will take cognizance and retain jurisdiction to decide on the merits. This we think should follow here, even though the stop notices were served and the court had found that the "lien" was not filed in good faith. The stop notices served as an "equitable garnishment"—a form of "equitable subrogation regulated by statute"; hence, we think, it follows that the right to a recovery of the money so garnisheed, being a "cumulative remedy," does not depend upon the establishment of a lien. Diamond Match Co. v. Silberstein, 165 Cal. 282, 131 Pac. 874; Weldon v. Superior Court, 138 Cal. 427, 71 Pac. 502.

[5] It also is contended that there is no "fund" here, because of which the equity arm of the court could be invoked. With this contention we are unable to agree. Without an extended discussion of the matter, our opinion is that the $1,700 held by the county treasurer subject to the order of the board of trustees of the drainage district, under all the facts disclosed by the record here, constitutes such fund. It was out of this fund that the payment of the $235.86, found by the court to be due plaintiff, was sought. As already seen, facts were shown which developed that the court had jurisdiction of the money which, because of the service of the stop notices, should have been held, and not by the said directors paid to another. In such case and on such showing we do not hesitate to say that equity had jurisdiction to enforce the remedy here sought, from which it follows that the action of the trial court was entirely proper.

[6] The next point urged is that appellants are not individually liable. It is contended that the statute (section 1184, supra) fastens the liability for its violation upon "the owner or person who contracted with the contractor"; i. e., that in this case it requires the "owner" to withhold the money; that the "owner" in the instant case is the drainage district; that "if there is any liability at

all for failure to withhold this fund that liability is upon the district"; and that there is no privity between these appealing defendants and the plaintiff, the former being simply agents of the district, hence no right to grant plaintiff relief against them exists, but that such right, if any exists, must be against the district. The argument is false. Though the drainage district is the "owner," it could only act through its board of directors, and the directors, when they wilfully disregarded their clear duty under the law and refused to withhold the money as they lawfully should have done, became personally liable to the person injured thereby. Amy v. Barkholder, 11 Wall. 136, 20 L. Ed. 101; Mock v. City of Santa Rosa, 126 Cal. 330, 344, 58 Pac. 826; Payne v. Baehr, 153 Cal. 441, 95 Pac. 895.

It is admitted that the execution and delivery of the warrant drawn on the county treasurer for the balance owing to the contractor was authorized by these appealing defendants acting as a board of directors, and not as individuals, and that all this was done after the service of the stop notices, as hereinbefore set forth; but, in an attempted justification of their action, appellants say this was done "because the board knew that the subcontractor had been fully paid by the contractor *for all the work which he had done.*" From this they argue that "the injustice of making the contractor *pay for materials* the second time appealed to them very strongly." This was a matter which was not for their consideration. When the notices were served upon the drainage district, there was but one thing for them as directors to do, i. e., to "withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim." Section 1184, supra. This one thing they did not do; but, on the contrary, and with actual knowledge that the notices had been served, they deliberately and intentionally disregarded the same. This conclusion is amply supported by the evidence, for one of the directors of the drainage district, McAllister, Jr., testified as follows:

> "We [the directors] knew that notices had been served by plaintiff as already stated. * * * We intended to disregard the notices that had been served for we knew that A. H. Hobart had been paid in full for all the work he had done."

The argument of appellants is hypertechnical. The testimony does not pretend to show that Hobart had been paid anything for *materials* which had been furnished to him. There was no discretion vested in these appealing defendants, either individually or as a board. At the meeting on June 29, 1914, when acting as such board with knowledge of the notices, appellants ordered and drew up a warrant for $1,700 in favor of the original contractor, delivering the same to him, they acted at their peril. Having done so, they cannot now, we think, be heard to complain. Whether they acted in good faith in such action is immaterial, for the result is the same as would have followed a like action in bad faith, namely, the deliberate destruction of plaintiff's right to the remedy sought. One cannot act to the detriment of another, and in open defiance of that other's rights, and escape liability for his action. In our opinion there is no question of the liability of appellants individually, as was found by the learned trial judge.

[7] In the face of the record before us, we fail to discover any merit in the third point urged. The court found that all the lumber furnished by plaintiff to Hobart, the subcontractor (excepting a certain part of the value of $5.33), was actually used in the digging or dredging of the ditch or canal; that the portion not wholly destroyed became a permanent part thereof; and that the value of the lumber so used was $235.86. The evidence supports this finding. It is contended by appellants that the portion of the lumber so furnished which was used as "skids," and which was destroyed by the action of the dredger, was not incorporated in the structure of the ditch, and hence remained the property of the contractor and not the district. With this contention we cannot agree. The statute provides that—

> "Materialmen * * * furnishing materials to be used *or consumed* in * * * the construction * * * of any ditch * * * shall have a lien," etc. (Italics ours.)

In our opinion this section (1183, Code Civ. Proc.) contemplated just such a condition as is here presented. A most cursory perusal of the history of this section will, we think, disclose the fact that appellants' argument is based upon the premise that the law is as set forth in the cases cited by them to support their contention; while the fact is that none of the cases so cited was decided since the amendment of the section in 1911 (Laws 1911, p. 1313), an amendment which reversed the policy theretofore followed by the courts of this state, to the end that our policy thenceforth might conform to "that of Nevada and other Pacific Coast states." Under the section as it now reads, there is no doubt that the lumber *consumed in*, and which, as found by the court, "*actually contributed to the construction of said ditch or canal*" and was "*entirely consumed in said construction*," became, in legal contemplation, a permanent part of the ditch. Olson-Mahoney L. Co. v. Dunne Inv. Co., 30 Cal. App. 332, 159 Pac. 178; Consolidated Lbr. Co. v. Bosworth, Inc., 40 Cal. App. 80, 180 Pac. 60.

[8] On the fourth point urged, i. e., that "there was no money due or to become due to the subcontractor, to whom the plaintiff furnished the materials, at the time of the

service of the stop notices, and therefore those notices were ineffectual as against the intervening matured rights of the contractor," we are also unable to agree with appellants. So far as the latter are concerned, it is wholly immaterial whether the original contractor had settled in full with Hobart or not. Los Angeles, etc., Brick Co. v. Los Angeles, etc., Dev. Co., 7 Cal. App. 460, 94 Pac. 775; In re Snell, 16 Cal. App. 253, 116 Pac. 699; United Materials Co. v. Loughery, 22 Cal. App. 1, 133 Pac. 18. To concede appellants' contention upon this point would be, in our opinion, to open the floodgates of fraud, deceit, and double dealing, and to make legally possible a conspiracy between original contractors and the members of boards of directors, where the facts are as we find them here. This cannot be permitted. Appellants cite the case of Miles v. Ryan, 172 Cal. 205, 157 Pac. 5, as supporting their contention here. In that case prior rights had intervened before the service of the stop notice; in the instant case there are no intervening rights. Under the cases last cited, we think the point now under consideration devoid of merit.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

(184 Cal. 658)

PRESTON v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (L. A. 6775.)

(Supreme Court of California. Jan. 17, 1921. Rehearing Denied Feb. 14, 1921.

1. Prohibition ⚷3(1)—Receiver's right to maintain action should be determined in the action, and not by prohibition.

The right of a plaintiff to maintain an action in the capacity of a receiver must be determined in that action subject to review on appeal, and the proceeding will not be restrained by a writ of prohibition which lies only to restrain acts in excess of jurisdiction.

On Rehearing.

2. Prohibition ⚷29—Case held proper for application of court rule for submitting on brief without argument.

A proceeding to prohibit the superior court from proceeding with trial, where it obviously had jurisdiction of subject-matter and parties, and the matter complained of as constituting excess of jurisdiction was simply one of the issues to be determined in the cause, is a proper case for the application of court rule 30, subd. 5 (183 Pac. viii), providing for submitting matters for decision on the briefs on file, without affording further opportunity for argument.

3. Prohibition ⚷3(1)—Will not lie against receiver's maintenance of action.

That action by an alleged receiver is in the superior court of the county wherein he claims to have been appointed does not affect the fact that his right to sue must be settled in his suit, and not by prohibition.

4. Prohibition ⚷5(1)—Will not be granted against receiver, where it could not be granted against the court.

The rule that prohibition will not be refused against a receiver when joined with a judge, because the receiver does not exercise judicial functions, is no reason for granting prohibition against a receiver when sued alone, where the court in which it is sought to prohibit his proceeding would not exceed its jurisdiction in entertaining the receiver's suit.

In Bank.

Application by William H. F. Preston for a writ of prohibition directed to the Superior Court of the State of California in and for Los Angeles County, L. H. Valentine, Judge, and another, to restrain further proceedings under an order appointing receiver. Writ denied.

Henry J. Stevens, Norman A. Bailie, and John T. Jones, all of Los Angeles, for petitioner.

Alfred H. McAdoo, of Los Angeles, for respondents.

ANGELLOTTI, C. J. [1] Petitioner seeks a writ of prohibition enjoining the superior court of Los Angeles county from proceeding with the trial of an action instituted against him therein for the recovery of money alleged to be due from him and others to a corporation by one who sues as the receiver of the property of the corporation appointed by the superior court in another action, in which such corporation was the defendant, and also to enjoin such receiver from further acting under the order of appointment. [In so far as the writ is sought against the alleged receiver, it will not lie, as he is not exercising judicial functions.] [1] As to the superior court, petitioner's claim here is that the superior court had no power in such action to appoint a receiver, with the result that the order of appointment is a nullity. If we assume this to be true, it does not follow that there is any excess of jurisdiction on the part of the superior court in entertaining and determining the action brought against petitioner. That the superior court has full and complete jurisdiction to hear and determine that action cannot be doubted. The question of the right of the plaintiff therein to maintain the action in the capacity in which he sues is a question that must be determined in such action exactly as where one sues as the administrator of the estate of a deceased person, any question as to his right to sue in that capacity must be determined in the action itself. If, in the determination of such a question, the trial court errs, it is error in the exercise of jurisdiction, and the aggrieved party's remedy is an appeal from the judgment given in the action. Prohibition lies only to restrain acts in excess of jurisdiction, and the petition in this matter fails utterly to state a case in this behalf.

We express no opinion as to the validity of the order appointing a receiver, as that question is not here involved.

The application for a writ of prohibition is denied.

We concur: SHAW, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; OLNEY, J.

On Rehearing.

PER CURIAM. [2] In view of certain claims earnestly pressed in the petition for rehearing filed herein, we deem it proper to state that our order submitting the matter for decision in this court upon the briefs on file, and without affording further opportunity for argument by the parties, was in accord with the provisions of subdivision 5 of rule 30 of this court (in effect September 15, 1919, 183 Pac. viii), which is as follows:

> "When a cause is transferred for determination to the Supreme Court after decision by a District Court of Appeal, the Supreme Court, if it deems such course proper in the particular cause, may order the same forthwith submitted for decision upon the briefs on file, without entertaining further argument, oral or otherwise."

Upon the record before us we deemed this to be the proper course in this proceeding. If in any matter in which this practice has been adopted it is made to appear on application for a rehearing that the doing of substantial justice demands that a further hearing should have been afforded, we would unhesitatingly grant such a rehearing. The rule appeared to us and still appears to be peculiarly applicable in this proceeding, wherein it was sought to prohibit a superior court from proceeding with the trial of a cause pending therein, in which it was obvious that the court had jurisdiction both of the subject-matter and of the parties, and that the matter complained of as constituting an excess of jurisdiction on the part of the court was simply one of the issues in said cause to be determined therein. The rule is in the interest of a more speedy disposition of litigation and will be followed in such cases as appear to warrant its application.

[3] On the merits, petitioner's whole grievance lies in the fact that an action has been instituted and is pending against him for the recovery of money alleged to be due from him to a corporation, by one who alleges himself to be the lawfully appointed receiver for such corporation. His claim here is that such plaintiff is not the lawfully appointed receiver of such corporation, and on that claim he seeks to prohibit the superior court from entertaining and determining the pending action, wherein it has full jurisdiction of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Bracketed matter stricken out on rehearing.

both subject-matter and person, and the consequent right to determine, subject to review on appeal, the issue as to the validity of the plaintiff's appointment as receiver. That he cannot do this seemed too clear to us to admit of question. It may be that any different view on the part of learned counsel for petitioner is due to the fact that the action in which the appointment of a receiver was made is one also pending in the superior court of Los Angeles county. If the action sought to be restrained had been commenced and was pending in another county, as might lawfully have been the situation if the defendant, who is petitioner here, had been a resident of such other county, the correctness of our view would probably be more clearly apparent. We are satisfied that it must be apparent on reflection that it is altogether immaterial in this connection whether the action instituted by the alleged receiver is in the superior court of the county wherein he claims to have been appointed, or in the superior court of some other county. In either case, the court in which it is pending has full and complete jurisdiction of the action.

[4] It is suggested that the statement in the opinion, that "in so far as the writ is sought against the alleged receiver it will not lie, as he is not exercising judicial functions," is at variance with the views enunciated in Havemeyer v. Superior Court, 84 Cal. 389, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192. We did not mean to intimate that the receiver may not be properly joined with the superior court under whose appointment he is acting as a respondent, and that where excess of jurisdiction on the part of the respondent superior court for which he is acting is shown the writ may not run against him to effectuate the complete relief against judicial action to which a party is entitled. As said in the Havemeyer Case, "the writ runs to the court, and operates directly upon the court, but indirectly upon the receiver." But if the court is not, in the respect in which it is assailed (in this matter, in entertaining and determining the pending action), acting in excess of its jurisdiction, there is no foundation for prohibition against the receiver alone, and the proceeding must also fail as to him. The statement referred to, contained in the opinion, is susceptible of misconstruction, and is not at all necessary to the decision in view of what we have here said.

It is ordered that the statement referred to be and the same is stricken from the opinion, and that the petition for rehearing be and the same is denied.

ANGELLOTTI, C. J., and SHAW, OLNEY, WILBUR, LAWLOR, LENNON, and SLOANE, JJ., concur.

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185 Cal. 27

In re SWEETMAN'S ESTATE.

GRIFFITHS et al. v. JOHNSON.

(S. F. 9046.)

(Supreme Court of California. Feb. 4, 1921.)

1. Wills ⚷290—Will not found after testator's death presumed to have been destroyed by him.

A will, last seen and known to have been in the possession of the decedent, which cannot be found after his death will be presumed to have been destroyed by him with the intention of revoking it.

2. Wills ⚷306 — Evidence held sufficient to overcome presumption that will had been revoked.

Evidence as to declarations of testatrix *held* sufficient to overcome presumption that will, last seen in possession of testatrix, and not found after her death, had been destroyed by her with the intention of revoking it.

3. Wills ⚷289 — Will in existence 75 days prior to death presumed to exist at time of death.

Under Code Civ. Proc. § 1963, subd. 32, will, proved to have existed 75 days prior to testatrix's death, will be presumed to have been in existence at time of her death.

Olney, J., Angellotti, C. J., and Lawlor, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

In the matter of the estate of Delia M. Sweetman, deceased. From an order admitting on petition of Walter Johnson, will to probate as a lost or destroyed will, W. A. Griffiths and another appeal. Affirmed.

F. A. Berlin, of Oakland, for appellants.

Decoto & Calkins, of Oakland, and R. E. Hoyt, of Los Angeles, for respondent.

WILBUR, J. [1] This is an appeal from an order admitting a will of Delia M. Sweetman, deceased, to probate, as a lost or destroyed will. The main question at issue in the case is whether or not the will was in existence at the time of the death of the testatrix. The will was last seen in the possession of the testatrix in November, 1916, 2½ months previous to her death. The proponent of the will relies upon declarations made by the testatrix during that period to establish its continued existence, to overcome the presumption of its destruction with intent to revoke, arising from the possession of the will by the testatrix and the inability to find it after her death. The rule is thus stated in the Encyclopedia of Evidence:

"A will last seen and known to have been in the possession of the decedent, which cannot be found after his death, will be presumed to have been destroyed by him with the intention of revoking it, since the law always presumes in favor of the innocence of an act, and any other inference would involve a finding of a wrongful or fraudulent destruction of the will by a third person." 14 Ency. of Evidence, 440.

See, also, Matter of Cunnion, 201 N. Y. 123, 126, 94 N. E. 648, Ann. Cas. 1912A, 834; In re Keene's Estate, 189 Mich. 97, 155 N. W. 514, Ann. Cas. 1918E, 367; In re Miller's Will, 49 Or. 452, 90 Pac. 1002, 1004, 124 Am. St. Rep. 1051, 14 Ann. Cas. 277; Van Dyke v. Mack, 139 Ark. 524, 214 S. W. 23, 31; Rape v. Cochran (Tex. Civ. App.) 217 S. W. 250, 40 Cyc. 1281. The admissibility of such testimony is conceded by both parties, for each relies in part upon her declarations to support their respective claims. The proponent of the lost or destroyed will, which we will hereafter call the Johnson will, sought to prove that the will had been destroyed after the death of the testatrix by F. A. Berlin, the attorney who proposed an earlier will of testatrix for probate, which we will hereafter refer to as the Berlin will. The latter contended that all the evidence with relation to the execution and existence of the Johnson will is a pure fabrication. The trial court found that the Johnson will was properly executed, and that it continued in existence up to the time of the death of the testatrix, and that it revoked the Berlin will by implication, as it disposed of all the property of testatrix. The court also found that F. A. Berlin did not destroy the Johnson will after the death of the testatrix. The court also specifically found that the allegation of the proponents of the Johnson will that the Johnson will was destroyed by a person or persons unknown to the Johnsons prior to the death of the testatrix was not true. There is no dispute as to the execution of the Berlin will, and it is conceded that the will produced in court was executed by the testatrix, but it was denied probate because not her last will. The Berlin will was executed on the 10th day of May, 1915. It was drawn by Mr. F. A. Berlin, who, for some 20 years had been the attorney for and employer of, the husband of the testatrix. By the terms of this will all the property of the deceased was left to her husband with the exception of a set of mahogany furniture, which was bequeathed to Mr. Berlin. The husband was named as the executor thereof.

According to the testimony offered in behalf of the proponent of the Johnson will, the decedent came to the office of Walter S. Johnson, an attorney, 10 days later, and requested that he draw a will for her. This he did, and by the terms of this will, as first drawn, all of the property of the decedent was given to Mr. Johnson, his brother and sisters, and they were charged with the obligation of supporting the husband of the testatrix during his life. Five or six days later this draft was superseded by another, whereby the husband was given a life estate and Mr. Johnson, his brother and sisters were given the remainder of the entire property, subject to that life estate. Walter S. Johnson was made the executor. This will was executed by the testatrix August 9, 1915. The testatrix, however, instead of destroying the Berlin will, kept the two wills together underneath a drawer in one of the upstairs rooms of her home, where they were frequently seen together. In June, 1916, the Johnsons moved into the home of the deceased, and remained there until the latter part of November, 1916. Mrs. Sweetman was asked why she kept the Berlin will, and she stated it was because she had therein bequeathed the set of mahogany furniture to Mr. Berlin, which she wanted him to have. The Johnson will was last seen by Walter S. Johnson, together with the Berlin will, in the upstairs room, on the floor where they had apparently dropped from underneath the drawer. Without calling the attention of the testatrix to the fact that the wills were out on the floor, he suggested to her that they ought to be put in a safe place. The testatrix promised him that she would place them with Mr. Green of the Oakland Savings Bank, where she had an account. Instead of this, however, and without the knowledge of any of the Johnsons, Mrs. Sweetman delivered a small package to her friend, Mrs. Kammer, with the request that it be placed in the safe in a butcher shop in Oakland. This was done, and subsequently, at the request of Mrs. Sweetman, the package was returned to her for her inspection. After examining them she returned the package to Mrs. Kammer to be replaced in the safe. There they remained until the day of her death, when Mrs. Kammer, acting under the previous directions given her by the testatrix, got the package and delivered it to Mr. Berlin, who opened it in the presence of his wife, and, as they testified, found only the Berlin will.

The declarations of the deceased:

There are two distinct lines of opposing declarations introduced in evidence. Those introduced on behalf of the proponents of the Johnson will are to the effect that at numerous times during the 2½ months before her death Mrs. Sweetman stated that the will was still in existence and acceptable to her, while the testimony on behalf of the proponents of the Berlin will was that she had stated that she had destroyed the will purposely; that she did not desire the Johnsons to have any of her property; and that she had intentionally deceived them into believing that the will was still in existence.

The exact nature of the declarations will more clearly appear from the following statement of the evidence:

Walter S. Johnson testified: That 2 or 3 days before her death he told the testatrix that he had asked Mr. Green at the Oakland Bank of Savings if he had the will, and that Mr. Green said he did not have it. That the will was not upstairs. That he asked her where it was, and she, after thinking quite a while, said, "Then you go and see Mr. Berlin about it." That after that he had several conversations with Mrs. Sweetman about it. That "she said something about to keep on looking for the will, that I would find it. She said that I would find it all right. I think she told me twice to ask Mr. Berlin about it, and I did finally go down and ask Mr. Berlin about the wills." That at another time she stated to him, "'Now, you have no fear about that will, you will find the will all right.' She rather laughed at my even questioning its whereabouts—'it will be handed to you. If anything happens to me it will be handed to you immediately.' She said I didn't need to have any fear about the will; that as soon as she got well she would get it, and she would show it to me, and then she was going to put it away again." This was three days before her death. On that day, according to the testimony of Mrs. Brooks, the mother-in-law of Mrs. Johnson, the decedent was questioned as follows:

> "Q. I suppose you want Mr. Berlin to have that set of furniture. She said, 'Yes.' She says, 'That will is with the other one.' She says, 'They are both together, Sam.'"

Mrs. Brooks also testified as follows:

> "We asked her one day if she felt able to sign a copy of that original will, so that my son might have something to show in court, she said no, that she didn't think she felt able, thought it wouldn't be right, and 'it is not necessary.' At that time she knew that we were not able to find the will, but she did not consider that it was lost. She did not tell us where it was."

This also occurred only a few days before her death. She further testified to a conversation with the testatrix 3 days before her death, as follows:

> "I told her that he was unable to find the will which she had given him, and we spoke of that several times, and she said—my son had told her that he was unable to find this will, and that they had an understanding about it, and I asked her about it, and she told me very explicitly that—she said 'Just as sure as I am lying here, and just as sure as I hope to be in Heaven, Sam will have that will at the proper time.' She said, 'I don't give one anxious thought, and I don't want Sam to.'"

In answer to the following questions this witness gave the following answers:

> "Q. What did she say on this last occasion that you were speaking of the will? A. Well, she said this that I have just repeated to you, that 'Sam will find the will, or it will be handed to him at the proper time, and I do not give it one anxious thought, and I don't want him to.' * * * Q. Did she ever say anything about looking for the will? A. The last thing she said to me that was intelligible—her articulation was very poor—was, 'Mrs. Brooks, never give up about that will; search for it; never give up.'"

Pete Balengat, a witness for appellant, testified that the day before the death of Mrs. Sweetman he asked if her affairs were in shape, and she replied that they were; "that everything was all right. She said that she had some wills, and that they were in the safe. She didn't say what safe. She said all she wanted done would be in some safe, I don't know where. She never mentioned the place."

Cornelia C. Gruenhagen, a sister of Mr. Johnson, a legatee under the will, testified as follows:

> "She never told me where the wills were. I asked her on her deathbed. I had never worried about the will, but when I found nobody could find out where the will was—she had great confidence in me, and I asked her where the will was, and she said, 'Why, it is all right; it is all right. What's all this fuss about?' I didn't probe it because she was very ill, and I didn't like to. That is all I ever talked to her about the wills. She never told me where the will was, neither of them."

On the other hand, the nurse who attended Mrs. Sweetman during her last illness, Mrs. Martha Bergendahl, testified for appellant that on the Wednesday before her death (the very day of one of the conversations testified to by Mrs. Brooks, the mother-in-law of Walter Johnson), the deceased said to her:

> "'They think they are smart,' referring to the Johnson children, 'but I will fool them.' She said this several times in the last week before she passed away. * * * She said she had destroyed all wills except one man that had a will that was high up in office. That was her last statement she gave to me. * * * She said she had destroyed the Johnson will, burned it. She did not want them to get anything, she said. She told me that Wednesday before she passed away at night, the last time she told me."

She further testified that in the presence of Pete Balengat, decedent stated that the Johnson will had been destroyed. That witness, however, stated that he did not hear her say anything about burning up any will. On cross-examination, however, he testified:

> "She said straight that she was not going to leave her property to the Johnsons. She says, 'they think they are smart, but I will fool them.'"

Daisy A. Adams testified that in January, 1917, Mrs. Sweetman told her that she did not want the Johnsons to have anything, and that she had burned up everything, all the papers.

Annie Ayhens testified that Mrs. Sweetman, two weeks before she died, told her that she was going to send for Mr. Berlin to have him make her will. Another witness named Kelly testified that testatrix said shortly before her death that she was going to make a new will, and drop the Johnsons out, about two weeks before her death.

Mrs. Kammer also testified that arrangements were being secretly made by Mrs. Sweetman to have Mr. Berlin come on Monday, January 29, 1917, to draw a new will for the deceased, who died Saturday, February 3, 1917. Mr. Sweetman had predeceased her in June, 1916.

[2] If the foregoing declarations of the deceased were established by competent testimony, the problem presented for consideration would be quite different from the one that confronts us, for we must assume that the trial judge disbelieved the testimony hostile to the Johnson will. We have therefore the simple question as to whether or not the declarations of the deceased that the will was in existence, repeated in the most solemn fashion only 3 days before her death, was sufficient to support the finding of the trial court that the will was in existence at the time of her death. It seems clear that these declarations of the testatrix at least had the effect of overcoming the presumption that the will had been destroyed by her with the intention of revoking the same.

[3] With this presumption thus eliminated we have then the fact that the will was in existence 2½ months before her death. The law presumes that a thing once shown to be in existence continues in existence as long as things of that nature usually exist. Code Civ. Proc. § 1963, subd. 32.

If we apply that presumption to the will under consideration, it is evident that without the intervention of some unusual agency it would not cease to exist in 75 days. There was no proof that any such agency destroyed the will. The trial court was therefore justified in its findings to that effect.

Order affirmed.

We concur: SLOANE, J; SHAW, J.; LENNON, J.

OLNEY, J. I dissent. The Code provides that no will shall be proved as a lost or destroyed will unless either (1) "the same is proved to have been in existence at the time of the death of the testator," or (2) is shown to have been destroyed in his lifetime fraudulently or by public calamity. Section 1339, Code Civ. Proc. The findings of the trial court negative the second alternative. The probate of the will in this case therefore depended on its being proved that it was in existence at the time of the testatrix's death. No one was produced who saw the will at or after her death. It had, in fact, disappeared some time before, and had been searched for and not found. Its disappearance is in no way accounted for. It was attempted to account for it by the contention that one Berlin destroyed it, but this contention the trial court expressly finds against. The only testimony relied upon to show its existence at the testatrix's death was testimony of declarations by her, from which the inference might be drawn that she believed it to be still in existence. How declarations of this character can be taken as proof that it was in existence some days later, when she died, I am wholly unable to see. They do not even show that it was in existence when they were made. They were not declarations that she had the will, or knew its whereabouts, or knew that it was still in existence, but were merely expressions of a belief that it would be found if searched for. Why she so believed does not appear. She may have had good reasons or she may not. The facts that do appear are that the will had disappeared some months before the testatrix's death, and was not seen thereafter, so far as shown, either by the testatrix or anybody else, although its disappearance was rather persistently brought to the testatrix's attention and she urged searching for it, which was done without avail. Yet, although these are all the real facts shown, except such as are negatived by the court's other findings, it is held that they are sufficient to meet the requirement of the Code that it affirmatively appear that the will was in existence when the testatrix died. To my mind, if there is any inference whatever to be drawn from them, it is just to the contrary.

The reasoning of the main opinion is that it having been shown that the will was in existence some time before the death of the testatrix, the presumption operates that a thing once shown to exist continues in existence as long as things of that nature usually do. But the very purpose of the requirement of the statute that proof be made of the existence of the will "at the time of the death of the testator" is not to permit the presumption to operate, to make it impossible to probate an unproduced will by proof that it was in existence prior to the testator's death eked out by any presumption that it continued to exist until he died. If it can reasonably be inferred from the facts in evidence that it was in existence when the testator died, that is another matter, and quite different from presuming, as a matter of law, that it was then in existence because it was shown to have once existed. In this case no such inference from the facts in evidence can reasonably be drawn.

The opinion also goes on the proposition that the declarations of the testatrix show that the will was not destroyed by her animo revocandi. But suppose they do, what difference does it make? The fact still remains that the will disappeared 2½ months before the testatrix's death, and was not seen afterwards. The opinion seems to be based upon the assumption that, unless the will was destroyed animo revocandi, it would still operate. This is not the law. It must be in existence at the time of the testator's death; that is, must not have been destroyed, except where it was destroyed fraudulently or by public calamity. That is the explicit requirement of the statute. If the will were destroyed by the testatrix ignorantly or accidentally, or by some one else, but without fraudulent intent, it was not only destroyed physically but legally as well. The requirement is that it be in existence when she dies, and that that fact be affirmatively proven. Is it a sufficient compliance with this requirement that it be proven that she once made a will, that it disappeared some months before she died, but that she did not destroy it animo revocandi, and believed that it would be found? Yet, when the evidence is examined that, and only that, is the proof in this case.

It should, perhaps, be observed that in many jurisdictions the question presented in case of an attempt to probate a lost will or destroyed will, which is shown to have once existed, is purely a question as to its revocation by the testator. The presumption from its disappearance is that it was revoked, and this presumption must be overcome. Proof that the will was in existence after his death goes, of course, directly to show that it was not revoked, and this is the point of such evidence in those jurisdictions. On the other hand, it is not material that the will was not in existence when the testator died, provided it appeared that it was not destroyed by him for the purpose of revoking it, or that he did not know of its destruction in some other manner and acquiesce, as it were. But this is not the rule under our statute. Proof of nonrevocation is not sufficient. The proof must be that the will was in existence when the testator died, or else that it was destroyed fraudulently or by public calamity. This appears, not only from the language of the statute, but from our decisions. Estate of Johnson, 134 Cal. 662, 66 Pac. 847; Estate of Patterson, 155 Cal. 626, 102 Pac. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625. It may be that the declarations of the testatrix in this case were sufficient, if the evidence for the proponents alone be believed, to show that the will was never revoked. But that they were sufficient to show that the will was in existence when the declarant later died is a very different thing.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.

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MOONEY v. CYRIACKS. (L. A. 6041.)

(Supreme Court of California. Feb. 14, 1921.)

1. Principal and agent 🔑123(7) — Evidence held to show agent's authority to make representations.

In action for rescission of sale of automobile, evidence held to show that defendant's agent had full authority to negotiate the sale, and bind defendant by his representations.

2. Appeal and error 🔑204(3)—Objection to oral evidence as to contract cannot be first made on appeal.

Objection to the admission of oral evidence concerning a written sale agreement cannot be made for the first time on appeal.

3. Evidence 🔑434(11)—Parol evidence admissible to prove fraud in sale contract.

Parol evidence is always admissible to prove fraud, and the fact that the sale of an automobile is evidenced by a written contract reciting that all the conditions and representations are embodied therein will not prevent the purchaser from proving by parol that the sale was induced by false and fraudulent representations.

4. Evidence 🔑434(1) — Statutory provisions held not to exclude oral evidence of fraud.

Code Civ. Proc. § 1856, providing that when the terms of an agreement have been reduced to writing it is to be considered as containing all the terms, and Civ. Code, § 1625, providing that the execution of a contract supersedes all prior negotiations or stipulations, do not prevent the admission of oral evidence in an action for rescission on the ground of fraud.

5. Sales 🔑52(7)—Evidence held to show representations as to automobile false and fraudulent.

Evidence held to show that representations inducing purchase of automobile by plaintiff, a woman not versed in machines, concerning the mechanical condition of the automobile and the distance it had been run, were false and fraudulently made.

6. Sales 🔑38(7)—Showing car and instructing buyer's daughters held not a "demonstration," precluding reliance on representations.

In buyer's action to rescind automobile purchase for fraud, the car being described in the written agreement of sale as in present good condition "as demonstrated," the buyer, who was uninformed as to automobiles, was not precluded from claiming reliance upon representations by the words "as demonstrated," where the seller showed the car to the buyer and she sent it back immediately to have seat covers put on, and it was returned four days later, and on three occasions in the following week the seller instructed the buyer's daughters in its operation; for such acts could hardly be called a "demonstration."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Demonstration.]

7. Sales 🔑52(7)—Evidence held to show buyer relied on fraudulent representations by seller's agent.

In an action for rescission of a sale of an automobile, evidence *held* to show that plaintiff buyer did not rely upon an independent investigation, but upon oral representations as to the use of the car and its condition, made by the seller's agent.

8. Sales 🔑130(3)—In action for rescission evidence held to show buyer had restored goods to seller.

In action to rescind automobile purchase for fraud, evidence *held* to show that plaintiff buyer had restored the automobile to the seller.

9. Sales 🔑38(3)—Representations of defendant's agent held not mere opinion.

In an action for rescission of automobile purchase false representations of defendant seller's agent as to the value of extra equipment, the mileage the machine had been run, etc., *held* not mere statements of opinion but material statements of fact, in view of the agent's statement that the car had been gone over in defendant's shop and the testimony of defendant himself that he knew its mechanical condition and that the car was in A-1 condition; he being a mechanical engineer.

Department 1.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Mary E. Mooney against F. R. Cyriacks. Judgment for plaintiff, a new trial was denied, and defendant appeals. Affirmed.

Frederick H. Griffith, of Phœnix, Ariz., and Ernest C. Griffith, of Los Angeles, for appellant.

Perry F. Backus and Wm. J. Carr, both of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the defendant, F. R. Cyriacks, from a judgment in favor of plaintiff, Mary E. Mooney, in an action for the rescission of a written agreement of sale, on the ground of fraud, for the purchase and sale of an automobile, and to recover the sum of $532.15, alleged to have been paid out by plaintiff on account of said agreement of sale. The case was tried by the court sitting without a jury, and findings of fact and conclusions of law were made. A motion for a new trial was interposed and denied. The defendant appeals.

Respondent and appellant, the latter represented by J. H. Graves, his salesman, entered into a written agreement of sale which is dated August 20, 1918, whereby respondent agreed to purchase and appellant agreed to sell a Buick automobile for $1,835, of which $500 was paid on account; the balance of the purchase price remaining unpaid. Respondent also disbursed $26.75 for insurance premium on the car and $5.40 for a certificate of registration.

According to the testimony of respondent:

She approached J. H. Graves about August 15, 1918, and stated she desired to buy a Buick automobile. On August 20th Graves called her on the telephone and said: "If you want to buy a car we have a wonderful bargain in a car, which is new, with the exception of 918 miles." That Graves further told her that accessories to the value of $350 were on the car; that there were no more seven-passenger Buicks in Southern California for sale; "the company is not making any more now; they are going into the employ of the government * * * it is a great bargain." That she "talked it over with a few people whom I thought would be good counsel, and I called Mr. Graves up again and asked him if he would bring the car to my house and let me see it, which he did." In the company of her three daughters she viewed the car, and then said to Mr. Graves: "It looks very nice, but I know nothing about a car. If it drives well and looks well that's all I know, and I have to depend entirely on you;" to which Graves replied, "This is a fine car and it is in fine condition." Graves stated to her that appellant purchased the car from a young man who was called in the draft. Respondent concluded this conversation by saying, "If the car is as you represent it, I will take it." Graves then went back to the shop with the automobile.

Respondent continued:

"While we were talking to him I spoke about the top looking a little bit peculiar; all marked up. He said, 'You know that could all happen coming over the desert. * * *' And I said, 'I believe I'll have the seats covered; the leather don't look very nice. * * *' We talked about the cost of that, and later he called me up and said it would be $85. I said I believed I would be willing to give that much and more; and I said, 'How soon can you have the car out?' He said, 'On Saturday afternoon; I will rush it through. * * * The car was delivered Saturday afternoon about 4 o'clock." The seat covers had been put on and Graves called three times in the following week to teach respondent's daughters how to drive, and "within a day or two we went out for a ride and the car rattled and squeaked and the engine made so much noise I was really worried—I was afraid something was wrong, and I didn't know whether we would get home or not. We stopped at Mr. Cyriacks' store, and I said to Mr. Cyriacks, 'This engine makes so much noise, and there are so many squawks, I don't know what's the matter with it.' He said, 'All new cars do that, and after you ride a little while it will be all right; or maybe the engine needs a little greasing.'"

Respondent said:

That her daughters told appellant the brakes would not work and he requested them to send the car over the next morning; that the car was sent to the shop several times for repairs, which did not prove satisfactory. "Within four days I found the car wasn't what it was represented, and then was the time I saw Mr. Cyriacks himself. The time the car was left to have the brakes fixed, it was brought back within an hour or two by my daughter. Then he took it over to fix the curtains; kept it most all day, and then he brought it back and the curtains didn't fit then. Upon investigation of a very capable automobile man, the car was all wrong; it was not what it was represented to be at all." She testified she found the right front fender had been broken and repaired; that the top was composed of two or three different materials; that there was a hole in the top, the leather part, as large as a dime—a piece of leather had been pasted over it, which fell out when she pulled the braces a little bit; that the curtains didn't fit; the front had been broken; that a part of the hood had been refinished; the tires on the car were all worn, worn smooth; that "I found 'For Rent' and 'For Hire,' two different signs, like you see on cars on the street for hire, in the pocket, and two different guidebooks of Los Angeles city and surrounding country, and a number of apartment houses. The hinge which was to support the lid to the rear seat box, which raises, was broken off. The rear seat box cover was all to pieces, and when you took it up the boards all fell in all directions. They were nothing but a bunch of slats. I noticed the speedometer at the time I first looked at the car. It registered 918 miles. There was a hole in the linoleum on the floor of the car. I called Mr. Graves' attention to it. After I saw these different things I called Mr. Graves up and told him I wanted to bring the car back; that it was not as represented; that it was not a new car, and I had found out many defects; and I said, 'I didn't ask you for a car that was used. You told me this was a new car, and it is not a new car.' He came down to the house and we went out to the car, and I pointed out these defects. I was very indignant, and he said, 'Well, we will do anything that is reasonable. We will put on a new running board and fix the top.' He said they would do anything I wanted them to do. I said, 'I don't want you to do anything, because I don't want a car that is patched up. When I want a car I want a new car. I don't want one that I have to excuse to my friends about its appearance.' He said, 'We will do what we can about the car. I will tell Mr. Cyriacks.' I said, 'You tell Mr. Cyriacks I won't have this car.' He went back and presently called me up and said 'We will take that car back and put it in perfect running condition, and we will do anything that is within reason; but we won't give you back your money.' I said, 'All right, Mr. Graves, we will determine that later; but I won't have this car;' and that ended my conversation with him. My daughters were present while I was talking with him, and when I was talking over the phone.

"I went to see Mr. Cyriacks on Thursday evening [August 29th]. My daughter was with me. I said to him, 'I want to know what you will do about this car Mr. Graves sold me.' He said, 'I don't know anything about the car.' I said, 'Do you mean to tell me that you allow cars to go out of your storeroom and don't know anything about them?' He said, 'I don't know anything about the car, I told you.' I said, 'Well, you simply have to know something about it, because, I said, I won't be imposed on like this,' and Mr. Cyriacks said, 'I'll tell you what I'll do; I will talk this over with Mr. Graves, and you come back next Tuesday, Monday being Labor Day [September 3d]. Tuesday morning at 11 o'clock I called at his request, and two of my daughters were with me. I said, 'Mr. Cyriacks, what do you intend to do about this car?' He said, 'I won't do anything. Mr. Graves has talked this case over with me and I find he has told you nothing that is not true.' I said, 'That is the stand you take?' He said, 'Yes; Mr. Graves has not misrepresented it.' I said, 'All right, Mr. Cyriacks, I will put this into the hands of my lawyers.'"

Ralph E. Ruble, an automobile driver who formerly dealt in automobiles, was called by respondent and testified:

That, accompanied by Mr. Graves, he visited the shop where the seat covers were being made for the car on "Friday or Saturday, August 23d or 24th"; that he went there at the instance of Mrs. Mooney. He told Graves he "had come down to look over the car that Mrs. Mooney was figuring on. * * * I looked at the car and said, 'Well, it looks pretty good. * * * The rubber seems to be pretty good. * * * I mean the tires by that.' I said, 'It is a special top, isn't it?' He says, 'A different top from the top the car is equipped with from the factory.' * * * I looked at the speedometer and I think it had 948 miles on. * * * The lineoleum on the floor was worn through to the wood. I think I made a remark about it in my estimation 9,000 was better than 900."

This witness testified that after he had driven around in the car three or four blocks he said to Graves:

"'The machine seems to be in fair shape mechanically.' He said, 'Yes; the car has been in our shop and gone all over.'"

Ruble testified further:

That he told Graves the price of $1,750 "seems to be kind of high, doesn't it?" "I said, 'Has Mrs. Mooney bought the car?' He said, 'Yes; a substantial payment has been made.' 'Then,' I said, 'my report doesn't make any difference one way or the other.' He said, 'No; not necessarily.'"

Ruble gave as his opinion that the car had run at least 5,000 miles and that it is a simple matter to turn a speedometer back. He also made the report of his examination to Mrs. Mooney, and told her he thought she was paying too much money for the car.

Within the next four days, Frank E. Wellens, salesman for the Howard Automobile Company, who had been an automobile mechanic for 15 years, testified:

He "found the left front fender had been dented; it had been straightened and the right front fender was broken at the step of the running board; the right rear fender was cracked. * * * The right rear hubcap was badly dented; the moulding on the right running board was torn badly; there was a hole about the size of your little finger in the top over the center bow; the car squeaked and rattled, and No. 5 wrist pin in the engine was loose. No. 3 cylinder's connecting rod was loose. I noticed that the boards, the slats that acted as a lid to the rear seat box, were all shattered, all torn loose. The brake pedals showed as though they had been worn from long riding, and the floor board showed where the heel had

> worn, cut clear through the lineoleum on the floor. The foot accelerator showed considerable wear. The tires had all been retreaded. The extra tire had gone about 6,500 miles. In my opinion, from my examination, the car had been run since leaving the factory about 10,000 miles. The denting and straightening out of the fenders had been done before the car was refinished. * * * Q. What would you say at that time was the reasonable value of that car? A. $1,300.' "

This witness also testified that a new Buick of the same model and equipment as the car in question was worth $1,850 at that time.

Miss Mary Margaret Mooney corroborated the testimony of her mother as to the conversations between the latter and Graves and appellant.

J. H. Graves testified:

> That he had known respondent since the middle of August; that the first time he met her "I told her it was a mighty good bargain; that the car had only been driven 900 miles and was in A-1 condition, and really in better condition than a new car, mechanically; * * * there was nothing that showed any wear on the car any more than could be worn in 900 miles—I mean except the tires.
>
> "Q. Are you able to explain the condition of the tires? A. Yes; I talked quite a while with Smail, who owned the car; I think I was about the first one there, before Mr. Cyriacks saw it even. * * * The tires on the car at the time Mrs. Mooney bought it were not the same tires that it was equipped with at the factory. * * * I think it had been refinished, but don't know about the paint. * * *"

The witness testified to certain imperfections in the car, and continued:

> "I drove the car probably three or four times before selling it to Mrs. Mooney, about 5 or 6 miles. * * * I inspected the car in company with an expert on behalf of Mrs. Mooney; the expert [Ruble] that testified this morning. Mrs. Mooney told me he was sent down by her brother to inspect the car to see whether she made a good buy or not; * * *" that he told Ruble respondent had made a deposit on the machine and that she would take it unless his report was unfavorable; that he personally had handled ten second hand cars a month during the preceding ten months; and that he had talked to appellant about the car the same day he saw respondent and went into it thoroughly with him.

Appellant testified to the condition of the machine and said further:

> "I know Mary E. Mooney, but didn't meet her at the time the car was sold. I am entirely familiar with the automoble my firm sold her. * * * In addition to my business of selling automobiles, I am by profession a mechanical engineer. At the time I bought that automobile, I made an examination of it; * * * looked the car over carefully, and found the car to be in A-1 condition. * * *
>
> "Q. Will you state the value of that car at the time you sold it to Mrs. Mooney? A. In the neighborhood of $1,800. * * * I had a conversation with Mrs. Mooney on or about the 1st of September, 1918. She said, 'There is something wrong about the car.' I said, 'If you will bring the car back tomorrow, if there is anything to be done, we will surely be pleased to fix it up. I will give the order to my foreman to fix the car up, whatever needs to be done to it.' * * * The next time I saw her, she said, 'There's some things about the car that have been misrepresented to me.' I said, 'I'm awful sorry that you take that view about it, because I can't understand why you say that, because Mr. Graves has been working for me a long time and he wouldn't do that.' * * * The next time Mrs. Mooney came into the office and asked me what I was going to do about it and I said, 'Well, I would like to straighten out the matter for you, but Mr. Graves has not misrepresented anything."

Under date of September 4th, respondent, through her attorney, sent a written notice of rescission to appellant, in which she demanded return of the $500 paid on account of the agreement of sale, and stated his agent Graves had, through fraud, deceit, and false representations as to material facts concerning the age, usage, and condition of the car, induced her to enter into the agreement of sale; that the representations were false in fact and known by Graves at the time to be false; that she relied upon the truth of said representations and would not have become a party to the agreement of sale in the absence thereof; and that she had just discovered said fraud and the falsity of said representations. Appellant's attorney, under date of September 6th, in a written response to the notice of rescission, stated that—

> "Apparently the communication is rigged up as the foundation for an action at law; but you may rest assured that Mr. Cyriacks will not, for any such reasons assigned, which are false and untrue, permit your client * * * to repudiate her contract. I am satisfied that if you gentlemen will investigate the matter further the fact will develop that Mrs. Mooney has no grounds for complaint. You may consider this as indicating definitely Mr. Cyriacks' position and your course may be guided accordingly."

On September 16th the car was returned by respondent to appellant, accompanied by a demand for the return of the $500 which she paid on August 24th, and a notice that unless it was refunded within three days an action would be brought to enforce payment. The complaint was filed on September 20th.

The court found, among other things, that on August 20, 1918, appellant represented to respondent the car was better than a new automobile of the same make and description; that said automobile had been run only 918 miles; that said automobile was worth in value more than $300 over and above the price of a new machine of the same make and style at said date; that said automobile was in perfect mechanical condition and was in all respects worth the sum of $1,835; that respondent was uninformed and unskilled in the use, condition, and price of automobiles, and had never driven or owned one theretofore, and that she informed appellant that she would rely solely upon the representations made to her by him and his agent in the matter of the purchase and sale of the automobile; that the representations were false and untrue and were known by the appellant to be false and untrue at the time they were made; that the payments made by respondent were made in reliance upon the said statements and representations, and that the said statements and representations were false and untrue at the time they were made to her; that within a reasonable time after August 20th respondent discovered that the representations and statements were false and untrue, and that she thereupon returned to appellant the automobile and each and everything of value received by her from him and thereupon demanded of appellant the return of the $500; and that appellant has failed, neglected, and refused to refund the said amount; that by reason of the false and fraudulent statements and representations respondent is damaged in the sum of $500; that on August 20th the automobile had been run for more than 5,000 miles; that within a reasonable time after discovering this the respondent restored to appellant everything of value which she had received from him under the said agreement, and that within a reasonable time after the discovery of the falsity of the statements and representations made to her by appellant she rescinded the agreement of sale, and that by reason of such rescission appellant is indebted to respondent in the sum of $532.15.

Appellant urges four grounds for reversal of the judgment:

I. The oral representations of appellant's agent were not competent or legally sufficient to vary the terms of the written agreement subsequently entered into, nor to bind appellant nor to sustain the findings;

II. That the independent investigation made by plaintiff estops her from now attempting to say that she relied upon the representations made at the time of the purchase, when it is apparent from the evidence that she did not in fact rely upon them;

III. There was no complete restoration, or offer thereof, upon the attempted rescission by plaintiff, and hence no rescission; and

IV. The representations as to mileage and as to the value of the extra equipment constitute mere statements of opinion, and the defects claimed were not material.

I. The executory agreement of sale is in the usual form; it was dated August 20, 1918; time was made the essence of the agreement; plaintiff paid down $500 in addition to $32.15 for the license fee and insurance premium, and the balance $1,335, was to be paid in monthly installments. On final payment being made appellant was to execute a bill of sale, respondent to have no interest in or title to the car until the full consideration was paid.

[1] Under the first head, appellant quotes the following provisions of the agreement of sale:

> "Property being a used Buick touring car, model E 49, motor No. 438625, frame No. 422422, in present good condition *as demonstrated.*
>
> "It is expressly understood and agreed that no statements, agreements, understandings or representations of any kind or nature have been made, or exist, other than those in this agreement contained."

As we understand this statement of appellant's first contention, it is that because the oral representations were made by his agent he is not bound by them; that, the agreement of sale having been reduced to writing, it is to be deemed to contain all the terms, and hence the writing itself is the only admissible evidence upon the issue of fraud, and that as the findings of fraud rest upon parol they cannot be held. As to the question of agency, it is sufficient to point out that the evidence we have set forth shows that Graves had full authority to negotiate the sale for his principal. When respondent first spoke to appellant about the car he said he knew nothing about it and that he would take up the matter with Graves. Appellant did not, in his interviews with respondent, take the position that Graves did not have complete authority to bind him in the transaction, nor did either appellant or Graves claim that she was foreclosed by the agreement of sale to rely upon the oral representations. It must be presumed that in the interval between Thursday, August 29th, and Tuesday, September 3d, when appellant canvassed with Graves the representations that he made to respondent, Graves detailed the facts of the transaction faithfully to him. In any event, he did not disclaim responsibility for Graves' action in the premises, but, passing on the merits of his version, told respondent the car had not been misrepresented, and that while willing to put it into condition, he would not return the money. In view of the findings of fraud, which, as we shall presently show, are fully supported by the evidence, appellant will not now be heard to question the authority of Graves.

[2, 3] As to the remaining contention, it is proper to mention that appellant made no objection to the admission of the oral evidence. The objection to its consideration is made for the first time on appeal. But, apart from this, the contention ignores the well-established rule of law that—

> "Parol evidence is always admissible to prove fraud." Berry on Automobiles, § 814; Huddy on Automobiles, § 1059; Pomeroy's Equity Ju-

risprudence (4th Ed.) § 858; Jones on Evidence, § 435; Smith on the Law of Fraud, § 265; Elliott on Contracts, §§ 1650, 1651; sections 1566, 1567, 1568, 1572, 1709, 1710, Civ. Code; Johnson v. Powers, 65 Cal. 179, 3 Pac. 625; Hick v. Thomas, 90 Cal. 289, 27 Pac. 208, 376; Newman v. Smith, 77 Cal. 22, 18 Pac. 791; Maxson v. Llewelyn, 122 Cal. 195, 199, 54 Pac. 732; Langley v. Rodriguez, 122 Cal. 581, 55 Pac. 406, 68 Am. St. Rep. 70; Hays v. Gloster, 88 Cal. 560, 26 Pac. 367; Tiffany v. Automobile Co., 168 Mo. App. 729, 154 S. W. 865; Case Threshing Machine Co. v. Webb (Tex. Civ. App.) 181 S. W. 853; Avery Co. v. Staples, 183 S. W. (Tex. Civ. App.) 43.

"Hence the fact that the sale of an automobile is evidenced by a written contract, which recites that all conditions and representations are embodied therein, will not prevent the purchaser from proving by parol evidence that the sale was induced by fraud." Berry on Automobiles, supra; Huddy on Automobiles, supra; 9 Ency. of Ev., supra; Tiffany v. Automobile Co., supra; Case Threshing Machine Co. v. Webb, supra.

[4] It follows that in actions for rescission on the ground of fraud the statutory provisions that when the terms of an agreement have been reduced to writing it is to be considered as containing all of the terms (section 1856, Code Civ. Proc.), and that the execution of a contract supersedes all prior negotiations or stipulations (section 1625, Civ. Code), do not control. Appellant has cited certain authorities on this point: Kullman, Salz Co. v. Sugar, etc., Co., 153 Cal. 725, 96 Pac. 369, was an action for rescission based, not on fraudulent representations, but on the alleged failure of a machine to meet the requirements of a warranty expressed in the written contract. This clearly is not in point. Munn v. Anthony, 36 Cal. App. 312, 171 Pac. 1082, was an action for damages. It was alleged by plaintiff that defendant made certain false representations touching the model number of the car, which indicated the year of manufacture. The trial court found in favor of plaintiff on this issue, and the finding was not disturbed on appeal. Two other points were considered in the appellate court: First, that plaintiff resorted to an independent investigation before purchasing the car, which point was declared to be without merit; and, second, that having finally entered into a written contract of sale containing, as here, a limiting clause, "the claim that false representations had been made by way of inducement could furnish no ground for a cause of action." The appellate court, referring to a limiting clause such as the one here, and citing section 1625 of the Civil Code, sustained the contention of the appellant notwithstanding the allegations and findings of fraud, and reversed the judgment, saying:

"It cannot be sustained because of the condition of the contract by which plaintiff waived the representations made previous to the execution thereof."

The vendee in that case elected to sue for damages under the contract for the alleged fraud, but so far as the question we are considering is concerned the form of remedy is not material. The decision therefore is opposed to the authorities we have cited, and hence cannot be followed.

The next authority upon which appellant relies is Tockstein v. Pacific, etc., Co., 33 Cal. App. 262, 164 Pac. 906. It is, however, not in point. The alleged fraudulent misrepresentations in that case were as to what the seller (the defendant) would guarantee in respect to the car which was the subject of the sale. But the plaintiff actually bought the car under a written contract which did not contain these guaranties which it had been represented to the plaintiff would be made, and which also expressly provided that there were no guaranties other than those set forth. The case was one, therefore, where the alleged fraudulent misrepresentations went to the character of the contract which the plaintiff was to receive. She very evidently could not recover in such a case unless she had been deceived into accepting the contract which she did receive in lieu of that which she expected to receive, and this is all that the case decides. This is apparent from the following quotation:

"The plaintiff does not pretend to state that she did not sign these writings knowingly and freely, or that any fraud, deceit, or concealment as to their terms and effect existed as an inducing cause for her execution of them; nor has the plaintiff shown in the proofs in this case that any of the terms of the express and limited warranty of the manufacturer and seller of the car set forth in detail in the written agreement were violated by the defendant or by its principal, the Ford Motor Company."

[5] We shall next consider whether the evidence was sufficient to support the findings of fraud. Upon these findings we must assume the existence of every fact necessary to their support which the trial court might have inferred from the evidence. The testimony of respondent and her daughter as to the representations made by Graves is that the 918 miles which the machine had run improved its condition mechanically; that the addition of the accessories had increased the value of the car $300 over the original price; that it was a wonderful bargain and a good buy; and that respondent told him she knew nothing about automobiles and would rely entirely on him in the transaction. Appellant's answer was a general denial, but the testimony of respondent and her daughter that the above representations were made was not contradicted, and consequently the findings thereon cannot be questioned. And we think it is clear that evidence is amply sufficient to sustain the findings as to the

falsity of the representations upon which respondent relied. The testimony as to the car's mileage varied from 5,000 to 10,000 miles, the finding being more than 5,000 miles. It also appears that both Graves and appellant were well versed in automobiles; that the car had been in the shop for some time prior to this transaction; that when the machine first came in it was given a careful examination by appellant; that it had been revarnished if not repainted; that the tires then on the automobile had run more than 6,500 miles. The evidence is overwhelming that the car had greatly exceeded the mileage stated by Graves; for instance, Ruble remarking to him, "9,000 was better than 900!" Ruble said Graves told him the machine had been gone all over before it was offered to respondent. After she received the car, it was repeatedly taken to the shop, apparently without any satisfactory results; it had been roughly handled; showed heavy wear and tear; and that it had been run out of condition. Appellant and Graves were dealing with a woman who was not versed in machines, and yet she was induced by the latter to sign the agreement whose sole warranty is that the car was "in present good condition, as demonstrated," and endeavored afterwards to reconcile her to the sale by promises to put it in shape. There would seem to be no escape from the conclusion that upon the evidence the findings that the representations were false and fraudulently made in order to induce respondent to enter into the agreement must be sustained.

[6] Appellant has italicized the words "as demonstrated" in the warranty we have just quoted. The car was first shown to respondent on August 20th, when it was sent to have the seat covers put on, and was returned to her on the 24th. On three occasions in the following week Graves instructed respondent's daughters in the operation of the machine. Showing the car to the respondent on August 20th, and thereafter instructing her daughters, can hardly be called a demonstration, especially in view of the findings that respondent "was uninformed and unskilled in the use, condition and price of automobiles," that the representations were fraudulent, and that respondent relied on them.

[7] II. The next question is whether respondent made and relied upon an independent investigation and not on the oral representations in entering into the agreement of sale. This has reference to the visit made to the shop by Ruble with Graves to look over the automobile. There is some question whether this meeting occurred before or after the agreement was made. There is no finding on this point. The car was first shown to respondent on August 20th, the same day it was sent to have the seat covers put on. There is testimony that $50 was paid by respondent at that time, her daughter saying that it was on account of the seat covers. The purpose for which the $50 was made would not alter the situation, for the reason that the seat covers were included in the purchase price of $1,835. Graves testified:

> "I don't remember the details, whether there was a $50 deposit and the balance of $500 was paid at the signing of the contract or not; anyway the deposit and payment were made; * * * *the expert that examined the car for Mrs. Mooney came after she had made a deposit* [italics ours]; * * * before Mrs. Mooney signed up the contract she had the seat covers put on."

Ruble says that when he asked Graves whether respondent had bought the car, the latter answered, "Yes; a substantial payment had been made." The indorsement on the agreement indicates that $500 was paid on August 24th, the day the car was returned. If two payments were made, it is not likely they were made at the same time, and it is fairly clear the court reached the conclusion there were two payments; the first being made on August 20th.

We shall, however, consider the point on its merits. Appellant cites the following from section 892, Pomeroy's Equity Jurisprudence, as to the effect of an independent investigation:

> "(1) When before entering into a contract or other transaction he actually resorts to the proper means of ascertaining the truth and verifying the statement.
>
> "(2) When, having the opportunity of making such an examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence.
>
> "(3) When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties."

Referring to the first two paragraphs the author says:

> "They are the ones which present by far the greatest practical difficulties in the administration of justice. If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, *and actually learns the real facts,* he cannot claim to have relied upon the misrepresentation and to have been misled by it." (Italics ours.)

This text is quoted approvingly in Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931.

The view of the court probably was that respondent asked Ruble to see the car in order to ascertain whether, as he put it, "she *had* made a good buy or not." It does not seem likely the court believed Ruble looked the car over for the purpose of enabling respondent to decide whether she would enter into the agreement; the italicized word "had" in his testimony suggesting that he thought the agreement was then in force. His judgment was plainly adverse; for he estimated that the car had run at least 5,000 miles, and in his report to respondent he told her she was paying too much for the car. This is the only criticism he made to her. The court made no specific finding on this evidence, but in the state of the record the finding that respondent relied solely on Graves' representations is fully sustained. Taking this view of the evidence, it will not be necessary to consider the cases cited by appellant on this point.

[8] III. Appellant claims that respondent failed to present any evidence under the issue of restoration raised by his general denial. This is not true. The witness Wellens testified that he saw the car in Hollywood on September 16th, and "it was practically in the same condition as when I first saw it." September 16th was the day the machine was finally returned to appellant.

[9] IV. Under this head appellant's claims are twofold: that the representations as to mileage and the value of the extra equipment were mere statements of opinion, and that the defects claimed were not material. The second proposition is sufficiently answered by what we have already said touching the general condition of the car. We cannot say from the evidence that the trial court did not conclude that every defect shown was material. Respondent was induced to buy a new car that was represented to have run 918 miles, which mileage, it was claimed, only improved its condition. As to the first proposition, it is idle to assert that the representations made by Graves were mere opinions and not statements of fact. From the tenor of his testimony respondent was justified in assuming that he was speaking from personal knowledge of the car's condition, or that he desired respondent to believe that he was. His statement to Ruble that "the car had been in our shop and gone all over," coupled with his knowledge of and experience with automobiles, put him in a position to speak advisedly as to the car, and to impress respondent with his statements concerning it. Moreover, appellant, by profession a mechanical engineer, testified that he was familiar with the car; that when he bought it he made a careful examination of it, and that the machine was in A-1 condition.

Judgment affirmed.

We concur: SHAW, J.; OLNEY, J.

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50 Cal. App. 743

JUDD v. WEBSTER. (Civ. 3645.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1920.)

1. Trial 🔑260(1) — Refusal of instructions covered by those given is not error.

The refusal of instructions covered by those given is not error.

2. Highways 🔑175(2)—Cyclist entitled to the right of way must nevertheless use ordinary care.

Though plaintiff, a cyclist, on turning to the left into an intersecting road, was entitled to the right of way over a motor vehicle approaching in his direction, and could rely on the assumption that the motorist would yield the right of way, the assumption will not excuse him from exercising care which an ordinarily prudent man would exercise under the circumstances, for the rights of travelers are reciprocal, and all are bound to use reasonable care to look and listen to avoid collisions with others exercising the common privilege.

3. Highways 🔑175(2)—Traveler should look and listen for vehicles though he has right of way.

Where plaintiff, who, when some distance from an intersecting road, noticed motorcars approaching from his left, turned into the road, he was bound in the exercise of ordinary care to look for cars to the left, notwithstanding he had the right of way over them and was bound to look out for traffic on his own right.

4. Appeal and error 🔑1066—Instruction unsupported by evidence harmless.

Where plaintiff's instruction that it was the duty of defendant to travel on the right-hand side of the road at a street intersection was qualified by an addition provided that there was no obstruction, the addition was harmless, as it was a conceded fact that there was no obstruction.

5. Appeal and error 🔑1067—Refusal of a requested instruction as to defendant's negligence in operating motor vehicle harmless.

Where plaintiff did not apparently rely on the averments of his complaint that defendant was unskillful in the operation of his automobile, and the only evidence on that score was brought out by defendant to the effect that, though suffering from a physical disability, he was a competent and qualified driver, the refusal of a requested instruction that, if the accident occurred by reason of the unskillfulness of defendant, whether due to inexperience or physical disability, etc., was not harmful.

Appeal from Superior Court, Monterey County; Pat R. Parker, Judge.

Action by Hugh W. Judd against Alex. Webster. From a judgment for defendant, plaintiff appeals. Affirmed.

Wyckoff & Gardner, of Watsonville, and Rea, Cassin & Caldwell, of San Jose, for appellant.

Webster & Lyon, of Paso Robles, for respondent.

KERRIGAN, J. This is an appeal by plaintiff from a judgment in favor of the defendant in an action for damages for personal injuries received by plaintiff in a collision with an automobile owned and driven by the defendant.

The questions to be determined relate to the refusal of the trial court to give certain requested instructions to the jury.

A brief outline of the facts of the case will be of advantage in arriving at that determination. The collision occurred on July 30, 1918, at the intersection of two public highways in the county of Monterey, namely, the San Juan road and the Castroville road, the former running east and west and the latter north and south. The plaintiff was mounted on a bicycle and was proceeding along the Castroville road in a northerly direction, pursuing his course on the easterly or right-hand side thereof. He reached the San Juan road and crossed to its northerly side, turning his bicycle gradually to the west. At the same time the defendant, driving an automobile along the San Juan road, approached from the west the intersection of the two highways. The automobile and bicycle came into collision at some point in said intersection north of the medial line of San Juan road and near the medial line of its intersecting thoroughfare.

The complaint alleged that the defendant was driving his automobile at a high rate of speed and on the wrong side of the road; that he did not yield the right of way to plaintiff; that he failed to look for or to see traffic approaching from his right; and that by reason of his inexperience as a driver and of a physical infirmity he was unskilled in the operation of his car, which matters the plaintiff alleges to be the proximate cause of the collision in question. The defendant denied these allegations and in his turn charged the plaintiff with contributory negligence in that he proceeded to cross the San Juan road without first ascertaining the condition of traffic thereon and without looking where he was going, and from the time he started to cross said road until a moment before the collision the plaintiff was looking to his right.

Our examination of the record discloses that there was no evidence that at the moment of or just before the collision the defendant was traveling at an unlawful rate of speed, or in fact, faster than about 10 or 15 miles an hour; nor is there any satisfactory evidence that he was traveling on the wrong side of the road. It is admitted, however, that the impact occurred on the northerly side of the San Juan road; but defendant's claim in this regard is that he turned to that part of the road from its southerly side, upon which he was traveling, in an attempt to avoid the collision. As to the alleged unskillfulness of the defendant in the operation of his car, it appears that he had been driving an automobile for about four months, covering in that period about 3,000 miles. It also appeared that, while he was lame and could not use his right leg for the manipulation of the footbrake of his car, he had had a lever attached to said brake by means of which he experienced no difficulty in its prompt and effectual use.

[1, 2] The plaintiff relies chiefly for a reversal of the judgment in favor of the defendant upon the refusal of the court to instruct the jury as follows:

> "The plaintiff, Judd, at the time he entered into the San Juan road from the Castroville road was not bound to assume that the defendant would abandon any reasonable precaution or violate any obligation imposed upon him by the laws of the land. The plaintiff was authorized in this case to assume that the defendant and all other persons using the road would do so with ordinary care, and would observe the rules of the road as established by law. In other words, the plaintiff, Judd, when entering upon the San Juan road, was entitled to assume that the defendant, Webster, would comply with the requirements of the Motor Vehicle Act that he travel on the right-hand side of the San Juan road and yield the right of way to a vehicle approaching from the right."

This instruction, while laying down a correct proposition of law generally, would, we think, under the circumstances of this case, have had a tendency to mislead the jury. The testimony on the part of both plaintiff and defendant showed that the plaintiff entered the intersection where the collision occurred without looking to his left, confining his attention to the right, until a moment just before the accident when too late to do anything himself to avoid it. During the trial it was contended by the appellant that the law cast no obligation upon him to look to the left, and that he might cross an intersecting road or street consciously oblivious to what might be happening on his left. The court construed this proffered instruction of the plaintiff as drawn upon that theory; and hence liable to mislead the jury. But, in refusing to give this instruction as requested, it did instruct the jury upon this phase of the case. It advised them substantially that, while the plaintiff had a right at the time he approached the intersection in question to assume that the defendant would obey the law and yield to him the right of way, still this assumption would not excuse the plaintiff from exercising at the same time the care which an ordinarily prudent man would exercise under the particular circumstances; in other words, that the right to assume that a fellow user of a public highway would obey the law was not absolute, and to be indulged in regardless of all other considerations. The instruction given by the court upon this phase of the case sufficiently advised the jury of the plaintiff's rights; and he is therefore in no position to complain of the court's refusal to instruct the jury in the language proposed by him. In the case of Scott v. San Bernardino V. T. Co., 152 Cal. 604, 93 Pac. 677, it is said:

> "It is the law that one walking or driving in a public street is bound to use reasonable care to look and listen as he goes, so as to be able to avoid collisions with others exer-

cising the common privilege of using the street. This duty is not confined to persons driving or about to drive upon a street car track. * * * The rights and obligations of all persons using a public street are, in this respect, reciprocal. Each may rightfully expect that the other will, at the proper time, discharge his proper duty toward others. He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the particular situation demands of him. But he frequently must, to some extent, depend on others in such situations, and his conduct must be considered in view of that fact in determining whether or not it is negligent. His care, or want of care, in such cases is generally a matter to be determined by the jury from all the circumstances surrounding him at the time."

[3] In the instant case the plaintiff, when about 50 feet from the intersection of the San Juan and Castroville roads, observed two automobiles approaching from the left at a distance of about 200 feet, and yet he proceeded to cross the intersection without again looking to the left. He testified that he was concerned with ascertaining the condition of the traffic on his right, from which direction, however, no vehicles were approaching; but this preoccupation cannot excuse a disregard of ordinary care, which required that he should also look to ascertain traffic conditions on his left. The jury evidently believed that under the circumstances of the case the plaintiff was guilty of contributory negligence in neglecting so to do. Sheldon v. James, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493; Mayer v. Anderson, 36 Cal. App. 740, 173 Pac. 174.

[4] Plaintiff also complains of the court's modification of his proposed instruction No. 9. The pertinent part of the requested instruction is as follows:

> "In driving easterly on the San Juan road it was the duty of the defendant to travel on the right-hand side of that road while crossing the intersection of the Castroville road. If he failed so to do, that fact in itself constituted negligence, and no further proof of negligence is necessary."

To this instruction the court added:

> "Provided there was no obstruction or other sufficient cause closing to travel the right-hand side."

We think this modification did not add to the burden of plaintiff in establshing a prima facie case. It is true that, if there had been an obstruction on the road, the modification introduced by the court would have been more apposite; but, as it is a conceded fact that there was no obstruction on San Juan road, we are at a loss to understand how it can be reasonably contended that the instruction as given was prejudicial to the plaintiff.

[5] The only other point raised is as to the refusal of the court to give plaintiff's proposed instruction No. 14. The text of the instruction as it appears in the record is not clear, doubtless due to errors in transcribing; but it in effect states that, if the jury believed from the evidence that the plaintiff was injured by the unskillfulness of the defendant in the operation of his car, whether such unskillfulness was due to inexperience in driving or to his physical condition, plaintiff was entitled to a verdict in his favor at the hands of the jury.

The plaintiff does not appear to have relied much upon his allegation of unskillfulness on the part of the defendant in the operation of his automobile; the only evidence upon that issue having been brought out by the defendant when being cross-examined by his counsel over the objection of the plaintiff. Such evidence was to the effect, as before stated, that the defendant had driven his car for four months, covering in that time about 3,000 miles, and that while he could not operate the foot brake in the usual manner, he could and did operate it by hand, having provided a suitable attachment to the braking mechanism which permitted its effectual operation in that manner. Under these circumstances, and under the general instructions as to what constitutes ordinary care and negligence, we cannot say that the refusal to give the proposed instruction was prejudicial error.

We are of opinion, after a careful examination of the court's instructions as a whole, that they were full, fair, and impartial.

The judgment is affirmed.

We concur: BARDIN, Presiding Justice pro tem.; RICHARDS, J.

51 Cal. App. 7

BIRCH et al. v. ORANGE COUNTY.

(Civ. 3626.)

(District Court of Appeal, First District, Division 1, California. Jan. 5, 1921. Hearing Denied by Supreme Court March 3, 1921.)

Venue 🔑49(2) — Fact that the judge was counsel in litigation against principal plaintiff held not to show prejudice.

The fact that the judge was counsel in litigation by minority stockholders of a corporation against one of the plaintiffs, then a majority stockholder, who had acquired an option on their shares, in which it was asserted that plaintiff was guilty of fraud, will not in subsequent litigation show a prejudice against plaintiff on the part of the judge, who had since been elevated to the bench, and warrant change of venue of an action against the county to recover taxes paid on lands which had been the property of the corporation; it not appearing that in the prior litigation the judge entertained any actual prejudice, or any wise exceeded the duties of an attorney.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by A. Otis Birch and others, copartners doing business under the firm names and style of the Birch Oil Company, against the County of Orange. From an order of the superior court denying a motion for change of venue, plaintiffs appeal. Affirmed.

Woodruff & Shoemaker, of Los Angeles, for appellants.

L. A. West, Dist. Atty., of Santa Ana, W. F. Menton, Deputy Dist. Atty., of Santa Ana, and Alex P. Nelson, Deputy Dist. Atty., of Los Angeles, for respondent.

SEAWELL, Presiding Justice pro tem. This is an appeal from an order made by Hon. R. Y. Williams, judge of the superior court of the county of Orange, denying the application of plaintiffs for a change of the place of trial of said action from the superior court of said Orange county to the superior court of the county of Los Angeles.

The application was made on the ground that said judge, before whom the said cause was pending and set for trial, being the same judge who heard and denied said motion, was disqualified to sit or act by reason of the prejudice or bias that he held against plaintiffs, particularly plaintiff A. Otis Birch, and that plaintiffs could not therefore have a fair and impartial trial by reason of said bias. Section 170, Code Civ. Proc.

It was the stipulation of counsel that if Hon. R. Y. Williams should be proven to be disqualified, then there would have been no judge of said county qualified to sit, inasmuch as the only other judge for said county had deemed himself disqualified.

The main action out of which this proceeding springs was brought by A. Otis Birch and his copartners against the county of Orange to recover from said county the sum of $9,222.85, paid to said county by plaintiffs under protest on account of taxes assessed against said copartnership's oil lands for the year 1917. Said property, consisting of 20.16 acres, was assessed on a valuation basis of $408,975, and plaintiffs seek to have declared void all of said amount in excess of a valuation of $30,240.

The action was commenced on June 3, 1918. On December 28, 1918, defendant answered. The cause had been set for trial for May 5, 1919. On April 30, 1919, five days prior to trial day, plaintiffs filed a notice of their motion for a change of the place of trial, urging as a reason therefor the ground heretofore stated.

In support of said motion A. Otis Birch, manager of said copartnership, filed an affidavit, setting out at great length and in minute detail the history of previous litigation in which he was an active litigant and the opposing interests were represented by Hon. R. Y. Williams, then a practicing attorney and a member of the firm of Williams & Rutan, Hon. Oscar A. Trippet (now United States District Judge for the Southern District of California), H. C. Head, Esq., and Clyde Bishop, Esq.

The main facts to be gathered from the affidavit of A. Otis Birch by which the prejudice and bias of the trial judge are attempted to be demonstrated are substantially as follows:

Prior to 1911 said oil lands were owned by the Menges Oil Company, a corporation. A majority of the capital stock of said corporation was owned by plaintiffs, of whom A. Otis Birch was the active and dominant head. A group of other persons, 13 in number, who may be denominated minority stock owners, held the balance of said capital stock. Early in 1911, A. Otis Birch secured options to purchase on all the stock of said corporation, and later exercised said option and became the owner thereof. Prior to this acquisition the corporation had drilled and completed four oil wells. A fifth well, known as Well No. 5, had been in the process of drilling and development for a period of two years before said A. Otis Birch had secured said option on the stock held by the minority stock owners. Subsequent to securing said option and before he exercised it Well No. 5 began to produce oil and gas in almost fabulous quantities. It is the averment of A. Otis Birch that for several years after its completion it continued to produce in large quantities, and "had the reputation of being the most profitable well in Orange county or elsewhere in the state of California."

The 13 minority stockholders who had contracted their stock for sale under said option, upon subsequently learning of the extraordinary productiveness of said Well No. 5, and within three years thereafter, commenced separate actions to recover damages in the sum of $1,500,000 from said A. Otis Birch on the grounds that he had fraudulently suppressed and withheld from them important facts and information existent within his knowledge at the time he was negotiating said option concerning the wealth of said Well No. 5 in oil and gas and by false representations and by the employment of methods deceitful induced each of said minority stockholders to dispose of their stock to him at the paltry sum of $2 per share, when, in fact, said stock was of a value of at least $50 per share.

Prior to the commencement of said actions, 13 in number, against said Birch, some of said former minority stockholders had employed H. C. Head, Esq.; some had employed Hon. Oscar A. Trippet; some had employed Clyde Bishop, Esq.; and others had employed Hon. R. Y. Williams. As the several causes of action must necessarily have been similar in many if not all respects, it was agreed by said attorneys that all would join in signing the several complaints and become associated in the prosecution of said actions.

The complaints were filed in April, 1914. In January, 1915, an order was made sustaining the demurrer to a second amended complaint without leave to amend. The litigation was finally disposed of by decision of the Supreme Court affirming the order of the lower court sustaining said demurrer. Thomas v. Birch, 178 Cal. 483, 173 Pac. 1102.

The affidavit of said A. Otis Birch is the only one offered by plaintiffs herein. It is based almost wholly upon the allegations found in the several complaints charging fraud and deceit. It surely does not go beyond the issues or outside of the proceedings had in said trial and Supreme Courts. There is no single act shown to have been committed, or declaration, statement, or expression shown to have been made by said Hon. R. Y. Williams before, during, or since the litigation ceased that has the slightest tendency to show hostility or even unfriendliness on his part for the said A. Otis Birch. The allegations of said pleadings, which form the basis and main support of the only affidavit made in behalf of the moving parties, are but the usual and necessary allegations employed in framing a pleading in which fraud is the principal issue. In fact, the allegations are as temperate and the language employed to state fraud is as well chosen as would fittingly become any member of the bar whose broad sense of universal justice and high regard for legal ethics may not be easily prostituted to personal advantage or at all sacrificed to consuming malice.

We have searched the record with some degree of pains and with a view of uncovering some hidden or veiled evidence of personal hostility exhibited in some form or in some manner by the said Hon. R. Y. Williams and his associates, but have failed in the search. It is not to be found in the record.

Bitter complaint is made because certain of the complaints, verified by certain litigants in said former actions, charged A. Otis Birch with a refusal to give certain requested information concerning the development of said oil well to said plaintiffs, and that he made certain false, equivocal, and misleading statements to them. Several of such instances, rendered unimportant, however, so far as the issue before this court is concerned because of the direct allegations made in the complaint, were developed upon the taking of a number of depositions at the instance of A. Otis Birch in the said suits. The truth of the matter is, according to the affidavits made by Hon. R. Y. Williams and attorney Clyde Bishop, the original complaints were dictated and prepared in the law office of said Clyde Bishop by him. The causes of actions being practically identical, the complaints were prepared in blanket form. Certain matters alleged as existing within the knowledge of certain deponents proved upon the taking of said depositions to be incorrect. In other words, matters within the knowledge of one or more did not in each instance prove to be within the knowledge of all. More care might have been exercised in this respect, but in the stress of the practice of the law such a circumstance furnishes a very weak support to sustain specific charges of prejudice and bias. As soon as the inaccuracies were discovered the complaints were immediately amended to correspond with the knowledge of each particular litigant. Other grounds urged in support of plaintiffs' motion are:

That said R. Y. Williams personally verified one of the second amended complaints; that he was through a "mass" of litigation extending over a period of five years; that seven of the complaints were verified by him as a notary public; that he and other attorneys were employed on a contingency fee basis; that meetings of counsel and clients were held at the law offices of Williams & Rutan to hear preliminary reports and make necessary investigations; that said Hon. R. Y. Williams was a leading attorney in the cause; that certain stationery upon which pleadings were prepared bore his name; that he gave to the plaintiffs in the corporation suits their first information constituting grounds of the action.

The foregoing acts upon which bias and prejudice are predicated are but the ordinary incidents to the preparation of an action for trial. There is not one among the enumerated acts urged for disqualification that should have had a tendency to produce prejudice in a well-balanced mind. The accused did all that every attorney should do to protect his clients' interests and nothing more. An attorney should be active, diligent, zealous to a reasonable degree, and generally useful to those who employ him. Said affidavit nowhere contains an averment that the allegations of the complaints filed in the former cases were wantonly or maliciously or even falsely made, or that they were not reasonably justified by existing facts.

By no process of reasoning may legal bias be presumed from the facts as presented by the record. It would be contrary to the rules of inferences and abhorrent to the laws of human conduct to conclude upon the showing made that any or all of the attorneys connected with the case became so obsessed by implacable hatred for plaintiff A. Otis Birch as to compass his financial undoing.

Almost a year had intervened from the day the Supreme Court decision ended all litigation and the trial day of said action. Four years had passed since all activity had ceased in the superior court of Orange county. The causes had long awaited a hearing. Said causes were never before any court except on the presentation of questions of law, and while in numbers there were many, in substance there was but one action, and a decision of one was decisive of all. Certain excerpts, taken from the brief of plaintiffs filed in the Supreme Court upon appeal, have been severely criticized, but said excerpts contain but the very familiar language usually employed in the presentation of questions of fraud. The counter affidavits aver that the Hon. R. Y. Williams was not the author of the language complained of, and that the criticized portions of the argument were written by one of his associates.

The issues raised by the pleadings in the respective causes have no point of similarity. Here no question of fraud is involved. Plaintiff seeks by this action to recover the sum of $9,222.85 from the county of Orange on account of taxes paid to it under protest. The proceeding was doubtless brought under the provisions of section 3819 of the Political Code. The fact that one of the plaintiffs, A. Otis Birch, who was a stockholder in the litigant corporation in the former action, is also a member of the litigant copartnership in the present action, and that the land about which controversy was formerly waged is the same land upon which the disputed taxes were levied by the county assessor of Orange county neither shows similarity of situation nor similarity of interests so far as the question may relate to or affect the question of the disqualification of the trial judge.

Notwithstanding the apparent insufficiency of the affidavit offered to sustain a demand for a change of the place of trial, Hon. R. Y. Williams, H. C. Head, Esq., and Clyde Bishop, Esq., filed counter affidavits, rebutting many of the averments of said A. Otis Birch. Nothing material is left untraversed. Said Hon. R. Y. Williams avers that he was not the leading counsel in said former actions but that Hon. Oscar A. Trippet was the counsel to whom all others deferred; that he did not prepare the original complaints in said action, but is informed and believes that the same were prepared by Clyde Bishop, Esq.; that the allegations of the original complaints were made and based upon statements of fact made to said Clyde Bishop by the plaintiffs and by persons who would be witnesses; that he did not personally interview more than two witnesses as to what said witnesses would testify relative to the issues; that upon information received by him he wrote but one letter of inquiry to one person to obtain knowledge and information concerning the drilling of Well No. 5. He denies unusual or unwarranted activity on the part of himself or others. He further avers that he believed that plaintiffs had sufficient cause to justify them to institute said action, and that he represented his clients only in conformity to the duty that an attorney owes to his clients, and that he is not now, nor has he ever been, hostile to or prejudiced or biased against said A. Otis Birch or any member of his family or any of the plaintiffs. He further avers that he does not know any of said plaintiffs except said A. Otis Birch; that he can and will give said Birch and all the plaintiffs a fair and impartial trial on the issues, and will weigh the evidence of each by the same rules of evidence fixed by law to be applied to the testimony of any other witness in said action.

Other counter affidavits corroborative of the foregoing were filed, and were sufficient to meet all the averments of a contrary character.

No authorities need be cited in support of the suggestions repeatedly made by plaintiffs that it is the duty of judges to remove even from the minds of the disappointed, if reasonably possible, all imputations of unfairness and partiality. The confidence and respect that the people of a democracy hold for the fairness and impartiality of its judiciary are the most hopeful tokens of national existence. The books are full of helpful admonitions and the judiciary is mindful of them. But, on the other hand, a judge is not to be driven from the performance of judicial duty by vehement and menacing cries of "prejudice and bias" when none in fact exists.

No doubt the moving parties have fully persuaded themselves of the truth of the charges they have made. But because a person may reason himself into a false notion affords no justification for the triumph of wrong over right to the end that he may be relieved from the embarrassment of his folly.

The trial judge has not been shown to be legally disqualified. The propriety of hearing said cause or withdrawing from the trial is a matter for his determination. Whichever way conscience may direct him is beyond the control of this court.

The order appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(50 Cal. App. 629)

SIME et al. v. HUNTER. (Civ. 3491.)

(District Court of Appeal, First District, Division 2, California. Dec. 27, 1920. Hearing Denied by Supreme Court Feb. 24, 1921.)

1. Executors and administrators 🔑429—Suit on claim not yet due may be maintained when rejected by representatives.

When claim not yet due, such as a promissory note, has been rejected by the representatives of the estate of a decedent without cause, the court may, on a showing of necessity therefor, entertain a suit in equity to establish the claim and sequester sufficient funds of the estate to meet the payment when it becomes due, in view of Code Civ. Proc. § 1648.

2. Executors and administrators 🔑481 — Claim, allowed and paid without affidavit, allowable on final settlement.

Claims, paid by the representative of a decedent without the affidavit attached required by Code Civ. Proc. § 1494, must be allowed by the court in the settlement of the case, if shown to be justly due and paid in good faith.

3. Executors and administrators 🔑227(1) — All members of partnership filing claim need not make affidavit.

All members of a copartnership or association of persons filing a claim against an estate of a deceased person need not make the affidavit required by Code Civ. Proc. § 1494, since under Civ. Code, § 2429, a partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, including the power to collect for the partnership interest a partnership debt, and one or more partners may make the affidavit in behalf of all of them.

4. Evidence 🔑71 — Administratrix presumed to have received mailed claim.

Where mailing of letter to administratrix containing a claim against estate was admitted by administratrix in her answer, it must be presumed that she received it in the regular course, under Code Civ. Proc. § 1963, subd. 24.

5. Executors and administrators 🔑429 — In suit in equity, it is immaterial on which of several claims filed action is brought.

In a suit in equity to establish the rights of holders of notes as against the estate of a decedent, plaintiffs were not required to rely upon any particular claim which they filed, having filed several which were rejected; such a suit not being an action upon any particular claim.

6. Executors and administrators 🔑227(1) — Claim against estate need not be in name of individual members of a partnership.

The form of a claim against the estate of a deceased person is not required to meet the rigid rules of pleading applied to a complaint, and may be made in the name of a partnership, instead of in the name of the individual members thereof.

7. Affidavits 🔑9—Test of sufficiency is that it would sustain perjury charge.

A test of sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false.

8. Partnership 🔑64—A suit maintainable on a contract made under fictitious name prior to compliance with statute.

Where partnership complied with Civ. Code, §§ 2466, 2468, it could sue on a prior contract or transaction had under the fictitious name; compliance with such provisions of the Code being sufficient if prior to trial.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by A. Sime and others against Mary A. Hunter, as administratrix. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wallace M. Pence, of San Miguel, for appellant.

Hugh R. Osburn, of King City, for respondents.

NOURSE, J. Plaintiffs commenced this action in equity against the defendant as administratrix of the estate of her deceased husband to procure a judgment establishing their claim against said estate, based upon two promissory notes not then due, and to impound and sequester sufficient funds of said estate in order that said claim might be paid in due course of administration when due. The amended complaint alleged that two promissory notes in the sum of $600 each, with interest, were executed and delivered by deceased and his minor son, who disaffirmed his liability thereon; that one of said notes was payable on July 1, 1919, and the other on July 1, 1920; that both were made payable to Norm W. Thompson, or order, and were sold, assigned, indorsed and delivered to plaintiffs; that a contingent claim based upon said notes was presented to defendant as such administratrix within due time, and that the same was rejected by her; that the said administratrix was proceeding to defeat said claim when due by dissipating the property of the estate so far as was within her power by having set aside to her as exempt from execution all the farming implements and personal property, which was greatly in excess of $1,000 in value, by obtaining a family allowance of $100 a month, which was unnecessary, by selling other personal property belonging to the estate and failing to account therefor or to pay claims against the estate with the proceeds, and by continuing the farming operations upon the estate for a period of two years without accounting to the court, and in such negligent manner as to dissipate the entire estate; that claims against said estate aggregating $22,000 had been approved, but that none of such claims had been paid; also that claims aggregating $5,200 had been presented against said estate and rejected. As to the presentation of plaintiff's claim, it was alleged that within the time allowed by law, and pursuant to notice to creditors, the plaintiffs presented their claim based upon said promissory notes, and attached thereto a full, true, and correct copy of said notes, together with all indorsements thereon; that said claim was rejected by defendant as not in proper form; that thereafter and within due time another claim on said promissory notes, setting forth all particulars thereof, and containing a full, true, and correct copy of said notes and all indorsements thereon, was presented to defendant by mail, but that she claimed she had not received it; that thereafter and within due time the plaintiffs again presented their claim based upon the same notes, with a full, true, and correct copy of the notes attached and a statement of the indorsements thereon; that said claim was also rejected by defendant. It was then alleged that plaintiffs were a copartnership or association of persons doing business under the firm name and style of Laton Percheron Horse Association, and that they were desirous of proving their claim so that they could compel the defendant to make some provision for securing it and have standing in the probate court as a creditor of said estate for the purpose of protecting their interests.

All the material allegations of the amended complaint upon which the plaintiffs' prayer for equitable relief was based were admitted by the answer. The defendant did, however, deny the allegations of the partnership relation of plaintiffs, and by way of abatement set up that the provisions of sections 2466 and 2468 of the Civil Code had not been complied with. By way of special defense the defendant alleged that the claim presented by plaintiffs did not contain a copy of the indorsements upon said promissory notes or a statement thereof, and also that said claim was not supported by the affidavit of the claimants, or either of them, or by the affidavit of some other person in their behalf.

The trial court found that the plaintiffs had entered into an agreement of partnership or association; that they had not complied with the provisions of sections 2466 and 2468 of the Civil Code at the time of their association, but that they had done so prior to the commencement of this action; that within due time they presented their claim to the defendant as administratrix of said estate, duly and regularly verified by one of said claimants for said association, and that said claim set forth all the particulars required, including full, true, and correct copies of the promissory notes and a full and complete statement of the indorsements thereon; that each of said notes had upon the back thereof the words "Without Recourse. Norm W. Thompson"—and that said words were not stated to have been indorsed thereon in the last claim presented, but said claim did contain a statement of the sale and assignment of said notes by the payee thereof to plaintiffs, and also a statement of the payments of interest which had been made by decedent. The court also found that prior to the time of presenting the claim last mentioned plaintiffs had furnished defendant with a full, true, and correct copy of each of said promissory notes showing all the indorsements thereon, together with the payments of interest made, and that defendant had these copies of the notes and the indorsements in her possession at the time of the presentation of the last claim. Judgment followed on these findings in favor of plaintiffs, establishing their claim as a good and valid claim against the estate payable in due course of administration.

Defendant has appealed from this judgment, assigning various technical grounds of attack, those requiring consideration being enumerated as follows: (1) Can an action be brought in any instance in our state upon a claim against an estate upon a promissory note not yet due? (2) Can a claim against an estate made by two or three persons be supported by the affidavit of one of the claimants without stating why it is not made by all? (3) Can a claim against an estate on a promissory note omit a statement of the indorsements, especially of the name of the payee on the note? (4) Was the failure of plaintiffs to comply with sections 2466 and 2468, Civil Code, within six months after they entered into the partnership fatal to their maintenance of this cause of action?

[1] 1. Section 1498, Code of Civil Procedure, provides that when a claim is rejected the holder must bring suit within three months after the service of notice of rejection, if due, or within two months after it becomes due, otherwise the claim shall be forever barred. By a long line of decisions interpreting this section of the Code it has been held that, though it is perfectly proper to present a contingent claim before it becomes due, an action thereon may not be maintained until after the claim becomes due. However, in the case of Miller v. Miller, 171 Cal. 269, 152 Pac. 728, it is clearly intimated that, in a suit in equity setting forth the condition of the estate, the ability of the personal representatives to provide for future payments, and the necessity of creating a fund to meet the demands of the claimant, the court may, in accordance with section 1648, Code of Civil Procedure, create a fund to meet the demand if the claim is established as one absolute excepting only as to time of payment. The case presented upon this appeal is such a case. The allegations relating to the condition of the estate and the actions of the administratrix, all of which show the necessity of creating a fund to meet the payments of the claim when due, are all admitted in the answer. It may be that the judgment should have expressly provided for the creation of such a fund rather than the

payment of the claim in due course of administration, but this point is not raised on this appeal, and as from the record it clearly appears that both notes have long since become due, no prejudice has resulted to appellant from the form of the judgment. It would seem, therefore, that the answer to appellant's first query is that, when a claim not yet due has been rejected by the representatives of the estate without cause, the court may, upon a showing of necessity therefor, entertain a suit in equity to establish the claim and sequester sufficient funds of the estate to meet the payment when it becomes due.

[2, 3] 2. Section 1494, Code of Civil Procedure, provides that every claim which is due when presented must be supported by the affidavit of the claimant, or some one in his behalf, to the effect that the amount is justly due. But "if the claim be not due when filed or presented, or be contingent, the particulars of such claim must be stated." From the wording of the section it would appear that the affidavit is essential only in the case of a claim which is due. In any event, it is a matter which may be waived, and claims paid without the affidavit attached must be allowed by the court in the settlement of the case if shown to be justly due and paid in good faith. Assuming that the section requires the affidavit in the case of a claim which is not due, it is absurd to say that all members of a copartnership or association of persons must make the affidavit. Under section 2429 of the Civil Code a partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner. That this authority includes the power to collect for the partnership interest a partnership debt cannot be doubted. It is sufficient, therefore, when an affidavit is required to be attached to a claim against an estate, that such affidavit be made by one of two or more partners on behalf of himself and those associated with him.

[4-7] 3. Section 1497, Code of Civil Procedure, provides that, if a claim be founded on a note or other instrument, the original need not be filed or presented "but a copy of such instrument with all indorsements must be attached to the statement of the claim and filed therewith." Technically, under the provisions of this section a claim based upon a promissory note, not accompanied by the original, should contain a copy of the instrument with all indorsements. The first claim which was presented to the administratrix on behalf of the Laton Percheron Horse Association fully complied with the demands of this section. This claim was rejected on August 6, 1918. Thereafter another claim, also meeting these requirements, was sent to the administratrix by mail. This was admitted in the answer. The mailing of the letter having been admitted, the administratrix is presumed to have received it in the regular course. Section 1963, subd. 24, Code Civ. Proc. No evidence was offered to overcome this presumption, and the court found that prior to the time of presenting the last claim plaintiffs "furnished defendant with a full, true, and correct copy of each of said promissory notes, showing the indorsement of the above-mentioned words and payments thereon, which defendant had in her possession at the time of the presentment of said claim, and which she retained for a long time thereafter." This finding is not attacked. The situation is therefore that the administratrix had in her possession true copies of both notes with all indorsements thereon attached to a claim which was filed in due time and which was rejected without cause on August 6, 1918, and prior to the presentation of the claim, which was rejected on December 13, 1918. It is said in argument that the first claim filed was rejected because not in due form, but wherein it failed to comply with the statute has not been pointed out. Inasmuch as this is not an action upon a claim, but a suit in equity to establish the rights of respondents as evidenced by the promissory notes, they are not required to rely upon any particular claim which was filed. If the objection to the first claim be upon the ground that it was made in the name of the partnership and not in the name of all the individual members thereof, the objection is not well taken. The form of a claim against an estate is not required to meet the rigid rules of pleading applied to a complaint. Thompson v. Koeller, 191 Pac. 927; Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 196, 135 Pac. 496; Doolittle v. McConnell, 178 Cal. 697, 705, 174 Pac. 305; Elizalde v. Murphy, 163 Cal. 681, 689, 126 Pac. 978. Accepting the rule of this state to be as outlined in the foregoing decisions that the purpose of presenting a claim to an estate is to so advise the executor and the court of its nature that they may act advisedly upon it, the claim first presented in this case meets these requirements. The copies of the notes which were attached showed that they were indorsed by the payee without recourse, and they were therefore accordingly payable to bearer. They showed upon their face that they were not yet due. The affidavit, if one was required by section 1494, Code of Civil Procedure, was made by the secretary of the association, and fully complied with the statute. "A test of the sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false." Gee Chong Pong v. Harris, 38 Cal. App. 214, 175 Pac. 806. In the same case the following language from 2 Corpus Juris 325, was quoted with approval:

> "An affidavit on behalf of a partnership, therefore, should be sworn to by one of the

partners, and where it appears in the body of the affidavit that it was sworn to by one of the partners it is sufficient, although signed with the firm name."

If the administratrix had any doubt as to the ownership of the notes or the effect of the indorsements thereon, she had the right under section 1494, Code of Civil Procedure, to require additional vouchers or proofs to be produced in support of the claim.

[8] 4. The trial court found that prior to the commencement of the action plaintiffs complied with the provisions of sections 2466 and 2468 of the Civil Code. Assuming for the purpose of appellant's argument that this action is one based upon a contract or transaction had under the fictitious name, it is well settled that compliance with these provisions of the Civil Code prior to trial is sufficient. Henning v. Clark, 189 Pac. 714; Ward Land Co. v. Mapes, 147 Cal. 747, 752, 82 Pac. 426; Roullard v. Gray, 38 Cal. App. 79, 81, 175 Pac. 479; Rudneck v. Southern Cal. M. & R. Co., 193 Pac. 775.

Other points raised by appellant are all of the same technical character as those heretofore discussed. The obligation of the estate upon the notes has never been denied. The dissipation of the assets of the estate is admitted, and the necessity of this action for equitable relief on the part of respondents is apparent from the record, which discloses a studied and vexatious effort on the part of appellant to avail herself of every technical advantage to escape payment of an admittedly valid obligation.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

51 Cal. App. 42

PEOPLE v. NEWSOME. (Cr. 540.)

(District Court of Appeal, Third District, California. Jan. 6, 1921.)

1. Homicide ⟹**250—Conviction of manslaughter supported by evidence.**

Evidence on prosecution for killing by peace officer in the course of an arrest of deceased *held* to support a conviction of manslaughter.

2. Criminal law ⟹**1159(2) — For appellate court to disturb conviction it must be without evidentiary support.**

A conviction can be set aside on appeal as unsupported by evidence only when it can be said as a proposition of law that it is without the necessary evidentiary support.

3. Homicide ⟹**105—To be justified in making arrest there must be real or apparent necessity.**

While a peace officer when attempting an arrest may use all necessary force to effect it, or may take the life of the supposed offender if necessary to save his own, there must be a real or apparent necessity to justify resort to such measure for his own safety or protection.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Edward T. Newsome was convicted of manslaughter, and appeals. Affirmed.

L. J. Maddux, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Under an information charging him with the crime of murder, the defendant was convicted of the crime of manslaughter in the superior court in and for the county of Stanislaus, and he appeals from the judgment and the order denying his motion for a new trial.

The single ground upon which the defendant attempts to sustain his appeal is that the evidence does not support the verdict. It is only necessary briefly to repeat herein some of the testimony received at the trial to show that the point relied upon by the defendant is entirely without merit.

The homicide occured at the town of Newman, in Stanislaus county, in the early morning of November 26, 1919, and the name of the party slain was Felix Van Vleet. The defendant, Newsome, at the time of the homicide, was a night policeman in the town of Newman, a position he had held for several years.

On the evening of November 25, 1919, at the hour of 6:30, the witness A. Swanson, who was then employed as a truck driver for a concern in Newman known as the Globe Dairy Products Company, having previously arranged to go to the ranch of a Mr. Azavedo, near Newman, to get some turkeys for use on Thanksgiving day, started for said ranch in an automobile, accompanied by the deceased and two other persons, named, respectively, Hansen and Michaels, the last named a lad about 16 years of age. After Swanson and his companion arrived at said ranch and the former had made his wants known to Azavedo, the latter proceeded to catch or gather the number of turkeys desired by Swanson. While Azavedo was so engaged, Swanson and the deceased went into the tank house on the Azavedo premises, filled two jugs with wine, and placed them in the automobile or truck used by Swanson in going to the ranch. The required number of turkeys was caught and placed in the truck, and thereupon the party started on the return home. On arriving at Newman the machine was stopped near a soft drink saloon owned and conducted by one Kilburn, and Swanson, deceased, and Hansen went into said saloon, Michaels remaining on the outside near the machine. Swanson testified that his object in stopping at and going into the Kilburn place was to leave a turkey there for a friend of his, a railroad conductor by the name of Brown. On the way from the Azavedo ranch to Newman each of the said men named drank freely of wine from the jugs. At Kilburn's Swanson, Hansen, and Van Vleet had several drinks of cider. While in the saloon word came to them that the turkeys were escaping from the truck, and Hansen thereupon went out to recapture them. He was shortly followed by Swanson and the deceased. Swanson was then feeling the effects of the wine to some extent. Just as he was about to "crank" his machine, preparatory to starting for his home, some one of the party called attention to the fact that Newsome was approaching, and Swanson, in a voice sufficiently loud to be heard by Newsome, made a very offensive remark relative to the latter. Newsome thereupon stepped from the sidewalk, delivered a blow on Swanson's head with a policeman's "billy," and was about to take him to jail, when one Morena, a cousin of Swanson, interceded for the latter and persuaded the officer to allow Swanson to proceed on home. After Swanson and his friends arrived at the former's house, they discovered that the two jugs of wine were missing. It was thereupon agreed between them that they would return, find Newsome, Swanson would apologize for the offensive reference he had made to the officer, and then undertake to persuade the latter to return to them the wine. Swanson and the deceased went back to the street where last they saw the defendant, and upon seeing the latter, who was walking along the street at some distance from them, called him in a loud voice, saying that they desired to see him. Newsome (now quoting from the testimony of Swanson)—

> "didn't pay any attention to me and kept on walking and then Van Vleet called to him, and he walked out in the middle of the street and stopped, and he said he wanted to see him a minute; and while he stopped he says, 'What do you want?' and I says, 'Mr. Newsome,' I says, 'I came back to apologize to you for how I addressed you on the other side of the street about a half an hour or so ago;' and he says—I started to apologize to him about the trouble we had and the words I remarked about him, and I told him that I didn't want to have no trouble; and he says 'All right,' he says, 'that's all right,' he says, 'I don't want to have any trouble; would not be any trouble; it was all right;' so then I asked him if I might have that jug of wine that he had taken out of my truck for Thanksgiving dinner, and I told him I would like to get it. And he says, 'No,' he says, 'you can't have that,' he says, 'I have got it locked up,' he says, 'I want it for myself.' He says, 'You can't have it,' and Mr. Van Vleet says, 'Well,' he says, 'we are going home now; give us the wine, will you,' and just about that time why the way he said it why we kind of laughed at him and he pulled out his gun, and he struck at Mr. Van Vleet or struck at me, we were pretty close together, and I kind of ducked the blow, and he hit Mr. Van Vleet in the head and knocked him down."

Swanson, proceeding, said that the first blow delivered by the defendant on the head of the deceased knocked the latter to the ground, he falling on his knees towards defendant, and that while on the ground deceased grabbed the defendant by the left wrist; that defendant also went down on his knees; that defendant, while deceased was on his knees, beat him (deceased) on the head seven or eight times with his gun.

Continuing, Swanson testified:

> "I told Mr. Newsome, 'We didn't come up here for any trouble,' and I says, 'We don't want any trouble,' and he asked me to help him, and I says, 'All right,' and so I got hold of Mr. Van Vleet's arm and pulled it out from him, and started to raise him up, and when he asked me to help him he says, 'Let go,' and Van Vleet says, 'No,' he says, 'I won't let go,' and he says, 'If you don't let go,' he says, 'I will kill you,' and Van Vleet says, 'Go ahead and kill me if you want to,' and so I started to raise him up, and just as soon as I got him off his knees he began to shoot, and he shot three times. Q. Well, now, was there a handcuff exhibited there during the time? A. Yes; he put one handcuff on Van Vleet. Q. When did he do that? A. When he beat him over the head the first time and had him on his knees, you know, he beat him over the head and then he reached around and put one handcuff on him. Q. Which hand did he put that handcuff on? A. Well, he—I think it was his left hand—left wrist. Q. Did Van Vleet have the handcuff on when you—when you say you took hold of him to raise him up? A. Yes."

Swanson further testified that, when Newsome first struck deceased, the latter was standing with his hands in his pockets; that, when defendant fired the first shot, the deceased was in the act of getting up from the ground, to which he previously had been knocked by Newsome; that immediately following the first shot the other two were fired in rapid succession. The witness positively testified that he saw no club or other article in the hands of the deceased, and that he would probably have seen it if a club or other article had been in either hand of deceased. The witness continued to say that, while Van Vleet was lying on the sidewalk, Newsome ran up to him (witness) and said to the latter; "Give me that club," to which witness replied, "I have got no club;" that thereupon defendant reached down and picked up a club or had it in his hand; that at about that time one Hazelbecker appeared on the scene, and defendant turned to him and said, showing Hazelbecker the club he held in his hand: "You see that; you see that; that's evidence enough."

Hazelbecker, also an employee of the Globe Dairy Products Company and who at the time of the homicide was working on the "night shift," testified that while he was on his way home and when near the point where the shooting took place, he first heard and his attention was arrested by some loud talking, which was followed within a brief time by three gunshots, which succeeded each other without any appreciable space of time between them. The shooting having ceased, he started toward the part of the street where it occurred, when he saw the deceased, in a "fast staggering walk," going towards the sidewalk, reaching which he fell to the curbing. The witness corroborated Swanson as to the fact that a handcuff was on the left wrist of deceased, and testified, as did Swanson, that he saw no club or other article which might be regarded as a weapon in the possession of the deceased or until defendant called his attention to a "billy" under the hat of deceased in the street. The witness said that Swanson, after fruitlessly attempting to get Van Vleet to speak while the latter was lying on the sidewalk, addressed defendant, saying, "Damn it, Ed., you shot this man," and that defendant replied, "Well, I had to, the damn s—n of a b—tch."

Dr. Armistead, the physician who was called to attend Van Vleet while the latter was yet lying on the sidewalk, and who later conducted an autoptical examination of the deceased, testified that, in response to a telephone call from the defendant, he went to the scene of the shooting and found that Van Vleet had expired; his body lying in the position as described by the witness Swanson and Hazelbecker. The physician, upon examination, found a bruise on the side of the head and over the left ear, three incised cuts on the scalp, and a bruise on the chin, of the deceased. At the post mortem examination, the autopsy revealed three gunshot wounds in the body of the deceased, to wit, one which entered and passed through the chest, a necessarily fatal wound, one which entered and passed through the abdomen, cutting the intestines in five different places, and entering into and passing through the bladder, thence into the pelvic bone, in which the bullet was imbedded, and one in the wrist.

[1] It is not necessary to reproduce here more of the testimony received at the trial in support of the information than that of which the above is in substance a full statement; for it is clear that what has already been given sufficiently shows that the verdict, even if in fact it was not justified (a proposition which it is not for this court to attempt to solve) is nevertheless amply supported. In fact, it is idle to argue that the above testimony does not show at least a clear case of manslaughter, of which crime the defendant was convicted. Indeed, an examination of the evidence as it is presented before us would, in our opinion, justify the conviction in any fair and impartial mind that there was no valid reason or any real necessity for the slaying of Van Vleet by the defendant. It is true that the latter made the claim, and so testified at the trial, that he was only doing his duty as a peace officer when undertaking to subdue and arrest the deceased, that the latter struck at him with a club or "billy," and that he was in fear that Swanson would join the deceased in an assault upon him; the inference from that testimony being that the shooting became necessary for the protection or defense of himself against personal injury or perhaps the loss of his life. But even from the testimony of defendant, considered in its entirety, it is not clear that the taking of Van Vleet's life was necessary. The defendant appeared to have the better of the deceased at all times, having knocked him to the ground several times and succeeded in putting a handcuff on one of his wrists; and the defendant's testimony does not clearly show that Swanson at any time made any serious demonstration or movement indicating an intention or purpose to assist the deceased in resisting or assaulting the defendant. But, however this all may be, the testimony for the people certainly shows that the killing of Van Vleet was not at all necessary; that, indeed, there was even no apparent necessity for it. It further clearly shows that Newsome was bent upon killing the deceased, for he fired the three shots in rapid succession, if the testimony for the people speaks the truth. But it was, of course, for the jury to say from the whole evidence whether the killing of Van Vleet was or was not committed with malice, and their verdict evidences their conclusion that, while unlawful, the homicide was not the direct result of malice aforethought in the slayer.

[2] There is, as must be conceded, a sharp conflict in the evidence as to some of the important facts and circumstances attending the killing. It is also made to appear that Swanson and Hazelbecker, the principal witnesses for the people, added to their testimony at the trial a few facts and circumstances, more or less damaging to the accused, to which they did not testify at the coroner's inquest and the preliminary examination of the charge. They sought to excuse their omission to testify previously as fully as they testified at the trial by explaining that they were not at the inquest or at the preliminary hearing before the magistrate asked any specific questions as to the particular facts and circumstances which they added to their later stories of the homicide. But these were all considerations going to the weight of the evidence and entirely for the jury to solve. There is nothing in the fact of the conflict in the evidence, or in the fact that the witnesses named stated facts in giving their testimony at the trial relative to the homicide that they did not state in testimony previously given by them,

which renders the evidence for the people or the testimony of said witnesses inherently improbable. This court can interfere and so set aside verdicts in criminal cases only when it can be justly declared, as a proposition of law, that the verdict is without the necessary evidentiary support. We cannot say that in this case. To the contrary, the conclusion to which we are forced by the careful examination we have given the evidence is that the verdict appears to be impregnably fortified, evidentially, if not, indeed, characterized by a much more liberal measure of leniency than was actually warranted.

[3] It may, in conclusion, be added that a peace officer, when attempting to arrest a person charged with a public crime, who has committed a public offense in the presence of the officer, or who the officer has probable cause for believing has committed a crime, may use all necessary force to effect the arrest, or may take the life of the purported offender if it becomes necessary to save or preserve his own, but there must be a real or apparent necessity to justify the resort by the officer to such an extreme measure for his own safety or protection. The testimony, especially that produced by the people, does not show that such a necessity, either real or apparent, arose in this case. However, for the reasons given, the judgment and the order appealed from should be affirmed; and it is so ordered.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

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50 Cal. App. 622

POTTS v. MEHRMANN et al. (Civ. 3522.)

(District Court of Appeal, First District, Division 1, California. Dec. 24, 1920. Hearing Denied by Supreme Court Feb. 10, 1921.)

1. Fraudulent conveyances 🔑206(2)—Plaintiff held "existing creditor" at time of conveyance.

Where life tenant and remainderman entered into agreement whereby life tenant was to paint and repair the property, and the remainderman was to insure and pay taxes on the property, *held*, that the remainderman was an existing creditor of the life tenant at the time of a conveyance by her of her property under Civ. Code, §§ 3429, 3430, defining debtor and creditor.

2. Executors and administrators 🔑241—Allowance of claim prima facie evidence of debt.

Allowance of a claim against an estate of a decedent by the judge of the superior court has the same force as a judgment of the court, and is prima facie evidence of claimant's debt, and the burden was upon the estate to show that the claim was not properly allowed.

3. Trial 🔑165—Every inference considered in favor of plaintiff on motion for nonsuit.

On a motion for nonsuit every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as evidence in favor of plaintiff, while all contradictory evidence must be disregarded.

4. Fraudulent conveyances 🔑80—As to transfer in consideration of future support actual fraudulent intent unnecessary.

Transfers of property in consideration of future support are upon the same plane as voluntary transfers under Civ. Code, § 3442, and an actual intent on the part of one transferring all of his property in consideration of future support is unnecessary to render the transfer void as to creditors.

5. Fraudulent conveyances 🔑80 — Extent of validity of conveyance in consideration of future support stated.

Where the consideration for a conveyance is an agreement for the future support of the grantor, the transaction is fraudulent in law as to the creditors to the extent which the value of the property is in excess of the support furnished.

6. Appeal and error 🔑174 — Objection as to right to sue not raised below not considered.

In an action to set aside fraudulent conveyance, a claim made for the first time on appeal that appellant, a simple creditor of the estate, had no right to prosecute the action, and that the exclusive remedy is to be found in Code Civ. Proc. § 1589, giving the administrator or executor authority to prosecute like actions, will not be considered, where motion of appellee defendants for nonsuit, which was granted, did not specify any failure of evidence to make such proof.

7. Appeal and error 🔑232(1)—Only grounds stated in motion for nonsuit considered on appeal.

No grounds other than those stated in a motion for a nonsuit can be considered on an appeal from judgment of nonsuit; the reason for requiring the grounds to be stated being to afford the plaintiff an opportunity to correct any defects in the pleading or proof which admit of correction.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by James A. Potts against H. B. Mehrmann, as administratrix of the estate of Mary Potts, deceased, and the Oakland Bank of Savings. Judgment for defendants, and plaintiff appeals. Reversed.

R. Clarence Ogden, of San Francisco, for appellant.

Abe P. Leach, of Oakland, for respondent Mehrmann.

McKee, Tasheira & Wahrhaftig, for respondent Oakland Bank of Savings.

WOOD, Presiding Justice pro tem. This is an appeal from a judgment of nonsuit. The action was brought to set aside, as a fraud upon creditors, a trust executed voluntarily by the decedent, Mary Potts, in her lifetime, to the defendant Oakland Bank of Savings. By the terms of the writing she transferred to the bank the sum of $3,245, and made provision therein for medical attention and medicines during her life, for the payment of the expenses of her last illness and funeral, and for the disposition after her death of the remainder of the fund among certain of her relatives. There was also a provision for the payment during her life to her niece, Mrs. Hottel, of the sum of $40 per month. This amount, it seems, was for the support of Mrs. Potts, and it was collected monthly by the niece, and paid to, or for the benefit of, the trustor.

At the time of the transfer of the moneys to the bank, Mrs. Potts was well advanced in years, had reached a state where she could not be left alone, and the neighbors had suggested that she go to an old ladies home. She, however, wanted her niece to take care of her, and, apparently the better to secure proper care and treatment, made her the sole beneficiary of the trust fund upon the death of Mrs. Potts, if the latter did not die within five years after the date of the trust. The demise of Mrs. Potts occurred, however, on April, 1, 1908, or 15 months after executing the transfer to the bank.

Other than this money that went into the trust fund, Mrs. Potts had no property except some household furniture appraised at $50, and a life estate in a lot upon which there was a small four-room dwelling in which she lived for many years prior to and up to the time of her death. It is because of the obligations imposed upon the owner of this life estate that this litigation ensues.

Mrs. Potts acquired the life interest in the property in this wise: By the last will of Thomas Potts he devised the dwelling and lot to the appellant herein, who was his son by a former marriage. This devise was subject to the said life estate to his widow, the said Mary Potts. Pending the administration of the estate of Thomas Potts, the appellant James A. Potts and the said Mary Potts, executed an agreement, by the terms of which Mary Potts agreed to keep the improvements in reasonable and ordinary repair during the life estate, and to paint them at reasonable intervals; while upon his part appellant agreed to pay the taxes upon said property at all times, and to keep the improvements insured in the sum of $1,000 for the benefit of himself and the life tenant. The decree of distribution in the estate of Thomas Potts was in strict accordance with this agreement, and was made on June 16, 1902.

After the death of Mrs. Potts, appellant presented to the defendant Mehrmann, as administrator, a claim which was thereafter duly allowed by the court, against the estate of Mary Potts, in the sum of $716 for moneys expended, as appellant claimed, to place the improvements upon the lot in reasonable repair on account of waste and depreciation of of said premises suffered and permitted by Mary Potts during her life tenancy. The claim included moneys expended for plumbing, tinning the roof, shingling, repairs to woodword, painting, and papering.

[1] The motion for a nonsuit, which was granted by the trial judge was made upon the following grounds: (1) That the evidence did not prove that there was an existing creditor at the time of the conveyance; (2) that it had not been shown that there was a debt in existence at the date of the conveyance; (3) that it was not shown that a fraudulent intent existed or had been shown. As to the first ground, reference has already been had to the covenant upon the part of Mrs. Potts to keep the improvements in reasonable and ordinary repair and to paint them at reasonable intervals during her life estate; and all that is necessary in order to show that appellant was a creditor of Mrs. Potts at the time of the conveyance is to refer to the definitions of debtor and creditor as given in the Civil Code, which are:

> "Sec. 3429. A debtor, within the meaning of this title, is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent."
>
> "Sec. 3430. A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money."

Further than this, in 20 Cyc. 454, it is said:

> "A person who is bound by a contract upon which he may become liable for the payment of money is indebted, although his liability is contingent as in the case of an indorser of a note."

And in 12 R. C. L. at page 492, it is stated:

> "Claims that arise from contract are in force from the date of the agreement. The liability arises at that time, although no demand accrues until afterward. * * * Whoever has a claim or demand on a contract in existence at the time when a fraudulent conveyance is made is a creditor within the meaning of the statute, and the holder of a contingent claim is as fully protected by the statute as one that is absolute."

[2] As to the contention "that it was not shown that there was a debt in existence at the date of the conveyance," there was in evidence the claim we have mentioned, in the sum of $716, which had been duly allowed and approved by the judge of the superior court. This had the same force as a judgment of the court. It was prima facie evidence of plaintiff's debt, and the burden was upon the defendant to show that the claim was not properly allowed. Shiels v. Nathan, 12 Cal. App. 608, 108 Pac. 34, and cases there referred to. It was not neces-

sary that the claim disclose that there was an actual indebtedness to appellant at the time of the execution of the trust, for it was not disputed that at the time of such execution there was this subsisting obligation, upon the part of Mrs. Potts, to keep the improvements in reasonable and ordinary repair, and this constituted the appellant a creditor within the meaning of the law.

[3, 4] Did the evidence fail to show that a fraudulent intent existed? The rule is well settled in this state that upon a motion for a nonsuit every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as evidence in favor of plaintiff, while all contradictory evidence must be disregarded. Estate of Arnold, 147 Cal. 583, and cases there cited, at page 586, 82 Pac. 252. It was not necessary to prove an actual intent on the part of Mrs. Potts to defraud any creditor. Indeed, she may have been, and probably was, entirely ignorant of a default in the performance of any obligation on her part to the appellant. Section 3442 of the Civil Code provides, however:

> "That any transfer * * * made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

The authorities place transfers of property in consideration of the future support of the grantor upon the same plane as voluntary transfers referred to in section 3442, supra, at least to the extent which the value of the property is in excess of the support furnished. In Baxter v. Baxter, 19 Cal. App. 239, 125 Pac. 360, it is said:

> "As against existing creditors, one cannot transfer all his property in consideration of future support and thus defeat the creditor in enforcing his claim. Under such circumstances the law presumes the act to be done with fraudulent intent to hinder and delay the creditor in the collection of his debt."

This rule is sustained by a citation of authorities, and a petition for a hearing of that case in the Supreme Court was denied.

[5] The claim is made that there was no evidence that the trust agreement was made without a valuable consideration. No mention was made in the motion for nonsuit of the lack of evidence in this particular, but, assuming that the question may be raised under the ground stated that there was no fraudulent intent shown, we think that the oral evidence introduced, taken in connection with the trust agreement, shows that there could have been no consideration moving from any person other than Mrs. Hottel, who appears to have cared for Mrs. Potts and supported her out of the $40 per month, and who, at the utmost, was entitled to a sum not exceeding $1,000, if Mrs. Potts died, as she did, within five years after the date of the trust. But this would not preclude appellant from a recovery, for, as was said in Harris v. Brink, 100 Iowa 366, 69 N. W. 684, 62 Am. St. Rep. 578:

> "Where the consideration for a conveyance is an agreement for the future support of the grantor, the transaction is fraudulent in law as to the creditors, to the extent which the value of the property is in excess of the support furnished."

[6] It is claimed that appellant, a simple creditor of the estate, has no right to prosecute this action, and that the exclusive remedy is to be found in section 1589 of the Code of Civil Procedure, which gives the executor or administrator authority to prosecute like actions when there is a deficiency of assets. Respondents rely upon Emmons v. Barton, 109 Cal. 662, 42 Pac. 303, in support of this proposition. Whether that case was intended to overrule Hills v. Sherwood, 48 Cal. 386, and Ohm v. Superior Court, 85 Cal. 547, 26 Pac. 244, 20 Am. St. Rep. 245, need not be here considered; for in that case the right of the creditor to bring such an action was sustained, and it was held that such action did lie where the creditor had exhausted all means to procure such action to be brought by the executor or administrator. The motion for nonsuit did not specify any failure of evidence to make such proof, and it is too late to raise the point now.

It is urged that the evidence is insufficient to show that Mary Potts became insolvent upon the making of the transfer to the bank, inasmuch as she owned the life estate in the house and improvements referred to, and that this life estate was of some value. There was no evidence of the value of the house or improvements or of the life estate. It seems to have been conceded at the trial that the transfer to the bank left Mrs. Potts without sufficient property to pay her debts. There was proof of a search for property by the administrator, and the niece, Mrs. Hottel, who lived with Mrs. Potts antecedent to the transfer to the bank and up to the time of her death, testified that Mrs. Potts had no property in the world other than this money in the bank. The evidence as to the condition of the premises at the time of the transfer indicated that the value of the life estate could scarcely equal that of appellant's claim.

But, notwithstanding all that has been said, it may be conceded that the action of the trial court in granting the nonsuit would have been correct and proper had the respondent in its motion specifically included as one of the grounds the failure of proof to show that Mrs. Potts was insolvent upon making the transfer to the bank.

[7] The rule is uniform, however, that no grounds other than those stated upon a motion for a nonsuit can be considered upon an appeal. The reason for requiring the grounds

to be stated is to afford the plaintiff an opportunity to correct any defects in the pleadings or proof which admit of correction. Daley v. Russ, 86 Cal. 117, 24 Pac. 867, and cases there cited; Christensen Lumber Co. v. Buckley, 17 Cal. App. 37, 118 Pac. 466.

For the reason stated, the judgment must be reversed; and it is so ordered.

We concur: RICHARDS, J.; KERRIGAN, J.

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50 Cal. App. 604

WOESTMAN et al. v. UNION TRUST & SAVINGS BANK OF PASADENA.

(Civ. 3241.)

(District Court of Appeal, Second District, Division 2, California. Dec. 24, 1920.)

1. Perpetuities 🔑6(2)—Trust held not to illegally suspend the power of alienation.

Trust for benefit of testatrix's sons to continue until they reach the age of 40 years *held* not to suspend the power of alienation for a longer period than during the continuance of lives in being, in violation of Civ. Code, § 715, since on death of survivor of the sons the trust would cease by operation of law.

2. Trusts 🔑61(1)—When trust may be terminated in equity.

A court of equity may terminate a trust prior to the expiration of the time fixed for its duration, when all the parties in interest are sui juris and join in a request for its dissolution, unless the trustor has placed an express limitation upon this power, or the trustee is vested with discretion as to the amount of income to be devoted to the use of the beneficiary, or a valid direction for accumulation is contained in the instrument creating the trust.

3. Wills 🔑686(1)—Trust not terminated in equity on application of beneficiaries, where children have contingent interest.

Where testatrix gave the residue of her estate to her two sons, "or if either should die without issue, then to the other," to be held by named trustee until the sons reached specified age, equity will not terminate the trust on application of the sons, since if one of them should die before the expiration of the trust period his children would take as members of a class designated by the will; such class having a contingent interest which the trustee and the court are in duty bound to protect.

4. Wills 🔑684(9)—Beneficiaries of trust held entitled to income of corpus of trust, and not merely allowance specified by will.

Where testatrix gave the residue to her sons to be held in trust by named trustee, with directions to give each of the sons a specified sum per month during the life of the trust without providing for accumulation of interest, the sons, on becoming of age, were entitled to the entire income of the corpus of the trust, and not merely the specified amount per month; they being entitled to the excess, as the persons presumptively entitled to the next eventual interest under Civ. Code, § 733.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Suit by Karl O. Woestman and another against the Union Trust & Savings Bank of Pasadena. Judgment for defendant, and plaintiffs appeal. Reversed, with permission to plaintiffs to amend complaint.

George P. Cary, of Pasadena, and Nathan Newby, of Los Angeles, for appellants.

Hahn & Hahn, of Pasadena, for respondent.

WELLER, J. Plaintiffs appeal from a judgment entered after a demurrer to the second amended complaint was sustained without leave to amend.

By their suit plaintiffs seek to terminate a trust created by the will of their deceased mother, Henrietta C. Woestman, in which the defendant is named as trustee. The relief is sought on two grounds: (1) That the trust was void in its inception because attempted to be created in violation of the statute prohibiting perpetuities; and (2) that all the parties in interest consent to its termination.

The provision of the will necessary to be considered reads as follows:

> "Sixth. I give and devise, and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, wherever situated, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, to my two boys, Walter E. Woestman and Karl O. Woestman, share and share alike, or if either should die without issue, then to the other, the same, however, to be held in trust by the 'Union Trust & Savings Bank of Pasadena,' a corporation, created and existing under the laws of the state of California, having its principal office in the city of Pasadena, county of Los Angeles, in said state, until my said boys reach the age of forty years. And I authorize my trustee to pay out of the said trust above created, to each of my said boys, the sum of fifty dollars ($50.00) per month, during the life of said trust."

In due course a decree of distribution was entered, containing the following clause:

> "* * * And all the rest of the property of said estate is distributed to the Union Trust & Savings Bank of Pasadena, as trustee, upon the trusts stated and declared in the will of said Henrietta C. Woestman, deceased, which will is on file and of record in the office of the clerk of this superior court."

The complaint alleges that, at the time of the distribution of the estate, plaintiffs were minors, and were not represented in the proceedings by counsel, but relied upon the defendant, the executor of their mother's will, to protect their interests, and that the defendant did not advise them of the invalidity of the trust attempted to be created by the will, but, on the contrary, informed them that it was a valid trust, and that the property should be distributed to the defendant as trustee. It further is alleged that on the hearing of the petition for distribution defendant's counsel represented to the judge that the will created a valid trust, and thereby induced the court to enter the decree under the influence of a mistake in law affecting the court, the defendant, and its attorney. Pursuant to the decree there was distributed to the defendant, as trustee, personal property to the value of about $180,000.

The plaintiffs are, respectively, 23 and 21 years of age, in poor health and unable to support themselves and their families according to their station in life, and the allowance of $50 per month from the trust is insufficient for their needs. Both claim to be fully capable of managing their shares of the estate without the intervention of a trustee, being of sound mind, good habits, and not spendthrifts, and are desirous of embarking in business while young, to familiarize themselves with the handling of their own money during the formative period of their business careers. At the time of the commencement of this action the accumulations of the income over and above the corpus of the trust estate, after deducting the expenses of administering the trust and the allowance to plaintiffs, amounted to $18,000, which is now in the possession of the trustee, and, according to the allegations of the complaint, could be paid to the beneficiaries without detriment to the estate, and greatly to the benefit of plaintiffs.

[1] 1. Appellants contend that the trust was void in its inception because it illegally suspended the power of alienation for an absolute period of years, in contravention of the provisions of section 715, Civil Code. If the suspension here under consideration is dependent upon, and measured by, the duration of designated lives in being, it cannot be said to violate the inhibition of the Code section. The trust by its terms is to continue "until my said boys reach the age of forty years." No definite term is fixed by the instrument. The duration of the trust is limited to the existence of the life of the survivor of the two beneficiaries named. If they should both die before reaching the age of 40 years, the trust would cease by operation of law. This case is analogous to Estate of Hendy, 118 Cal. 656, 50 Pac. 753, where our Supreme Court said:

> "But it matters not whether it be by express terms or by necessary construction that lives in being measure the duration of the trust. If it appear with certainty that the trust cannot longer continue, the law against perpetuities is not violated. Thus a trust in property to pay the income to A. until he arrives at the age of 40 years would not violate the law, for every trust of necessity ceases when there is no beneficiary, and in the case instanced it is obvious that A.'s life is the ultimate and determinative measure of duration. In no event can the trust continue longer than his life; upon his death before reaching the age of 40 years the trust determines for lack of a beneficiary."

See, also, Estate of Yates, 170 Cal. 254, 149 Pac. 555. We are of the opinion that the trust in question is not void as imposing an unlawful restraint on alienation.

[2] 2. A court of equity may terminate a trust, prior to the expiration of the time fixed for its duration, when all the parties in interest are sui juris and join in a request for its dissolution, unless the trustor has placed an express limitation upon this power, or the trustee is vested with discretion as to the amount of income to be devoted to the use of the beneficiary, or a valid direction for accumulation is contained in the instrument creating the trust. Fletcher v. Los Angeles Trust & Savings Bank (Sup.) 187 Pac. 425; Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566, 100 Am. St. Rep. 99. The first matter for determination is whether or not all of the interested parties are before the court invoking its equitable jurisdiction. The solution of this question depends upon a construction of the will by which the trust was created. This instrument leaves much to be desired in the way of specific directions. Inferences must be indulged in in order to give effect to the intention of the testator, as indicated by the meager provisions of the will. It clearly appears that it was intended to leave the estate to the two plaintiffs, provided they both lived to the age of 40 years, the property in the meantime to be held in trust by the defendant, with an allowance of $50 per month to each of the boys. Equally apparent is the desire that, in the event of the death of either without issue, the whole corpus of the trust shall go to the surviving son. Thus each is vested with a half interest in the property, subject to divestment should he die without issue prior to arriving at the age mentioned, and each has a contingent remainder in the interest of the other, conditioned upon his survival and the death of that other without issue. So much is definite and certain from the terms of the instrument.

[3] There is no express direction as to the disposition of the share of a decedent leaving issue. We must, perforce, endeavor to ascertain from the contents of the will what purpose actuated the mind of the trustor in inserting the provision with reference to issue. Obviously, she did not contemplate that the portion of a deceased son should lodge outside of his family, if any children survived him. In whose favor, then, was the limitation made? The natural and logical inference, we think, must necessarily be that it was made for the benefit of those whom the testator mentioned, namely, the issue. The specific reference to issue would imply an intention to provide for them in the event of

their father's death. Hull v. Holmes, 78 Conn. 362, 62 Atl. 705. The conclusion we have reached gives full force and effect to every clause of the will, and all reasonable deductions which may be drawn from its expressed and implied provisions. If one of the plaintiffs should die before the expiration of the trust period, his children would take as members of a class designated by the will, and not as heirs at law of their father. This class, indeterminable though it is, has a contingent interest in the trust property which the trustee and the court are in duty bound to protect. Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306. As all of the possible beneficiaries of the trust are not and cannot be before the court, equity has no power to terminate this trust.

[4] 3. Plaintiffs demand that the income of the corpus of the trust be paid to them, claiming that the accumulation beyond their majority is illegal. There is no provision whatever in the will for the accumulation of income. All that is disposed of by its terms is the allowance of $50 per month to each of the boys. The excess, therefore, would come within the provisions of section 733, Civil Code, and belong to the plaintiffs as the persons presumptively entitled to the next eventual interest. To this extent the court erred in sustaining the demurrer.

The judgment is reversed, with permission to the plaintiffs to amend their complaint, if so advised, to state a cause of action solely for the recovery of the accumulated income.

We concur: FINLAYSON, P. J.; THOMAS, J.

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50 Cal. App. 794

SARONI v. CHICAGO BONDING & SURETY CO. (Civ. 3647.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1920.)

1. Guaranty ⚷92(1)—Findings considered together held to establish guarantor's liability.

In an action on a written instrument whereby defendant undertook to guarantee to plaintiff payment of a loan made at the instance of defendant, findings, when considered together, *held* to show that the loan was made at the instance of defendant to the corporation designated, and not to third persons, and hence to support the judgment.

2. Appeal and error ⚷932(1) — Presumption in favor of trial court's finding as to amount of attorney's fees.

Where a surety contract provided for payment of attorney's fees in case of default, a finding by the trial court as to the amount of a reasonable attorney's fee will be upheld on appeal taken on the judgment roll alone, though attacked as excessive, on the presumption that there was evidence of sufficient strength to warrant the finding.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Louis Saroni against the Chicago Bonding & Surety Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Miller, Thornton, Miller & Watt, of San Francisco, for appellant.

Hugo K. Asher and Asher, Meyerstein & McNutt, all of San Francisco (Philip S. Ehrlich, of San Francisco, of counsel), for respondent.

BARDIN, Presiding Justice pro tem. This is an appeal from a judgment in favor of the plaintiff, taken on the judgment roll alone. The action was instituted to recover the sum of $5,000, with interest and attorney's fees, and was founded upon the alleged liability of the defendant upon a written instrument whereby the defendant, a corporation engaged in a general surety business, undertook to guarantee to plaintiff the payment of a loan in the sum of $5,000 made to Western Reclamation Company at the instance and request of the defendant. It was provided in the undertaking referred to that, if the debtor defaulted in the discharge of its obligation, the defendant would itself make the required payment to the plaintiff together with interest thereon, costs, attorney's fees, and such damages as the creditor, Louis Saroni might sustain.

The first point urged is that the judgment does not find proper support in the findings.

[1] By way of a separate defense to the action it was alleged by the defendant, in effect, that the Western Reclamation Company never at any time borrowed or received from the plaintiff the sum of $5,000 or any other sum, or promised to pay to plaintiff that sum or any other sum, and that the said sum of $5,000 was loaned by the plaintiff to certain individuals, naming them, for their sole and personal use and benefit, and that at the time said loan was made plaintiff received from the persons named their joint and several promissory note therefor.

Finding No. X, in response to the particular issues created by the above averments, in part is as follows:

"The sum mentioned in the complaint, and the whole thereof, was not loaned by plaintiff to Louis Saunders, Frank V. Wright, and Just Anderson for their sole and personal use and benefit; and plaintiff, at the time of making said loan to said Western Reclamation Company, did receive a joint and several promissory note, signed by Louis Saunders, Frank V. Wright, and Just Anderson, in the sum of $5,000, and at the time that plaintiff so received the said note it was to him stated by the defendant and by the signers of the said note, and plaintiff believed, and had reason to believe, that the said persons so signing the said note constituted the Western Reclamation Company."

It is claimed by the appellant that, inasmuch as the bond upon which this action is based stated that the consideration for its execution was a loan to be made to Western Reclamation Company, there can be no liability fastened upon the defendant in view of finding No. X, for the reason that there occurred such an alteration of the obligation of the principal as to exonerate it from any liability on the bond; or, in other words, that the obligation for which the appellant became responsible under the terms of the bond was the obligation of the Western Reclamation Company, while the obligation for which it is held under the judgment is to pay the join and several note of the three individuals already named.

Before following the thread of appellant's argument further, it will be well to consider portions of two other findings of the court. Finding No. V in part is as follows:

> "On the 31st day of March, 1914, at the time of the execution and delivery of the instrument hereinabove set out, plaintiff loaned to the Western Reclamation Company, named in said instrument and as therein set forth, and said Western Reclamation Company received from plaintiff, the sum of $5,000 in gold coin of the United States, and the said Western Reclamation Company then and there agreed to repay the same to the said plaintiff, Louis Saroni, five months thereafter, together with interest thereon. * * *"

And in finding No. IX we read the following:

> "Said Robert M. Ford (the agent of the defendant) did apply to plaintiff and request him to loan to the Western Reclamation Company the said sum of $5,000, and did promise that this defendant would execute and deliver to plaintiff as security for the repayment of said sum the bond hereinabove set forth and did so execute said bond. * * *"

We believe that, when all the findings relative to the point sought to be made by appellant are considered together, it must necessarily follow that appellant's contention in the behalf stated is entirely without merit. The court directly and unequivocally found that the plaintiff had, as stated in the bond sued upon, made a loan to the Western Reclamation Company, and this constituted the consideration for the execution of defendant's undertaking. In what manner the obligation of the debtor was evidenced is beside the question.

[2] Complaint is also made against that portion of the judgment awarding plaintiff the sum of $1,500 as and for an attorney's fee incurred in prosecuting the action, on the ground that the sum thus awarded is excessive. The court found as to the attorney's fee now complained of as follows:

> "By reason of the failure of the said defendant to pay said sum of $5,000 plaintiff has been obliged to employ attorneys to enforce the collecting of the said sum against the said defendant and to bring this action to enforce collection of said sum, and that the sum of $1,500 is a reasonable attorney's fee in this behalf by plaintiff incurred."

In the absence of a record showing the character and amount of work performed by plaintiff's attorneys, we cannot review this finding of the court. It must stand under the presumption that there was evidence of sufficient strength adduced at the trial to warrant the finding.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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50 Cal. App. 735

JOHNSTON v. ST. SURE, Judge. (Civ. 3690.)

(District Court of Appeal, First District, Division 2, California. Dec. 30, 1920. Hearing Denied by Supreme Court Feb. 28, 1921.)

Witnesses ⚷55—In action against husband and wife wherein husband disclaimed, wife could be examined as to her separate interests.

In an action to quiet title to an undivided half interest in realty brought against husband, wife, and others, wherein, by their joint answer, the wife alleged her husband was not a party in interest, and the husband expressly disclaimed any interest in the property, alleging the wife alone was the real party in interest, plaintiff was entitled, under Code Civ. Proc. § 2055, as added by St. 1917, p. 58, to examine the wife as if on cross-examination in taking her deposition, confining the inquiry to her separate property interests, despite section 1881, subd. 1, providing a wife cannot be examined for or against her husband without his consent.

Petition for mandamus by Grace A. Johnston against A. F. St. Sure, as Judge, etc., to require respondent to direct a witness to answer certain questions. Writ granted.

Hayes & Oliphant, of Oakland, for petitioner.

Edwin T. Cooper, of San Francisco, for respondent.

NOURSE, J. This is an original proceeding in mandamus to require the respondent, as judge of the superior court, to direct Carrie E. Bridge to answer questions propounded to her in the taking of her deposition in a proceeding pending in that court. The sole question at issue is whether the said witness, being jointly sued with her husband as a party defendant in said action, may be interrogated without his consent. The action is one to quiet title to an undivided one-half interest in certain real property situated in the county of Alameda, for an accounting of the rents, issues, and profits thereof, and to declare that the defendant Carrie E. Bridge, in whom the record title stands, holds such undivided one-half interest therein in trust for the plaintiff. Some 15 other persons were joined as defendants, some of whom it is said have been served and appeared in the action. The defendants Carrie E. Bridge and H. S. Bridge, her husband, filed their joint answer verified by the oath of said H. S. Bridge, in which they expressly denied the allegations of the complaint that said Carrie E. Bridge has no interest, right, title, or claim in and to said real property and that she holds the naked legal title thereto to the use or benefit of the defendant H. S. Bridge, or in trust for him. They also expressly denied that at any of the times mentioned in plaintiff's complaint the defendant H. S. Bridge was the owner of an undivided interest in the property, and expressly alleged that the defendant Carrie E. Bridge, at all the times in plaintiff's complaint referred to, "was and she now is the owner in fee of all the real property in plaintiff's complaint referred to and described, and of every interest therein, except those portions thereof which have been sold or contracted to be sold by her to certain persons named in this answer."

By this answer the defendant H. S. Bridge disclaimed all interest in the property involved in the action and made himself a nominal rather than a real party in interest. His wife joined with him in this disclaimer.

When she was cited to appear before a notary for the purpose of having her deposition taken by plaintiff she refused to answer any questions propounded to her, upon the ground that she was an incompetent witness under the provisions of subdivision 1, section 1881, of the Code of Civil Procedure. The provisions of this section, so far as material hereto, read:

> "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage."

It is freely conceded by petitioner that the last portion of the section just quoted prevents the examination of either a husband or a wife as to any communication made by one to the other during the marriage unless the consent of the other is given. No question of the violation of confidential communications made during the marital relation is involved, the sole question being whether the wife may be examined in this proceeding without her husband's consent so long as he is a party to the action.

Counsel concede that when the action is one for or against either a husband or wife alone, the other may not be examined as a witness in said action without the consent of the party, because necessarily the evidence so given must be either for or against the spouse who is a party to the action. Many cases of other jurisdictions are cited to this effect, but the rule in this state is clearly announced by the recent decision of the Supreme Court in Marple v. Jackson (Sup.) 193 Pac. 940. These authorities generally relate to a case wherein one spouse alone is a party and are of little assistance in a determination of the question herein presented. The case of Nicklaus v. Dahn, 63 Ind. 87, comes closest to the matter under discussion. Therein the Supreme Court of Indiana said:

> "The general rule is that neither husband nor wife can be a witness for or against each other; yet, when they jointly sue, or are jointly sued, and have separate interests, each is a competent witness—the husband for himself and the wife for herself."

In the present case, by the answer which the husband and wife have jointly filed, the wife is the only one of the two who is a real party to the suit. By the provisions of section 2055 of the Code of Civil Procedure, as added by St. 1917, p. 58, she may be called by the plaintiff as a witness as if under cross-examination. Having alleged that her husband is not a party in interest in the suit, she cannot now claim that he is a real party in interest so that her testimony would be either for or against him. On the other hand, the husband having expressly disclaimed any interest in this property, and having joined with his wife in the allegation that she alone was the real party in interest, he cannot now be heard to say that the testimony of his wife would be either for or against him.

As to the main issue in the case, to which all the questions included in the record were directed, both the husband and wife have removed themselves from the privileges of the statute by their joint answer, and have by the same answer waived the privilege. Thus the parties having by their joint answer made the witness the sole party in interest in the main issue of the suit, the plaintiff was entitled, under the provisions of section 2055, Code of Civil Procedure, to examine her as if upon cross-examination, confining the inquiry to her separate property interests. Furthermore, her testimony was admissible on the main issue of the case against the many other defendants who were joined as parties, because by the husband's own allegations such testimony could not be either for or against him.

Let the writ issue as prayed.

We concur: LANGDON, P. J.; BRITTAIN, J.

50 Cal. App. 738

BACON v. MESERVE. (Civ. 3477.)

(District Court of Appeal, First District, Division 2, California. Dec. 31, 1920.)

1. Appeal and error 🔑1078(1) — Appellate court will not search record for grounds for reversal.

The appellate court will not search the record for grounds for reversal, if any, on which counsel for appellant placed so little reliance as to fail to mention them in their brief.

2. Attorney and client 🔑166(1)—Finding that defendant assumed payment of $2,000 for fees incurred in transaction held supported by evidence.

In an action against an attorney on his note for $2,500, the attorney claiming a credit of $2,000 as a fee for certain legal services for which plaintiff assumed liability through his agent in the transaction in which the services were rendered, finding that plaintiff and the attorney agreed on the sum of $2,000 as a fee for the services, and finding that plaintiff agreed to pay the amount, *held* supported by the evidence.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Frank P. Bacon against Edwin A. Meserve. From an adverse judgment awarding him less than sued for, plaintiff appeals. Affirmed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellant.

Meserve & Meserve and Shirley E. Meserve, all of Los Angeles, for respondent.

BRITTAIN, J. [1] The plaintiff appeals from an adverse judgment awarding him $236.91 in a suit on a promissory note of the defendant for $2,500. He makes the single contention that under the evidence the trial court should not have allowed a certain credit of $2,000 which was claimed by the defendant as attorney's fees, among other credits, some of which were allowed and one of which was rejected by the court. While at the outset of the appellant's brief it is said this is the principal matter involved in the appeal, no other proposition is discussed. This court will not search the record for grounds for reversal, if there be such, on which counsel for appellant place so little reliance as to fail to mention them in their brief. The appellant makes no claim that the findings are not responsive to the pleadings, nor that they do not support the conclusions of law. The appeal, therefore, presents a single question of fact, or, more accurately, of mixed law and fact.

[2] The evidentiary facts are not controverted, and the only matters of law are those applicable to the evidentiary facts from which the single ultimate fact was deduced by the trial court. Stated in their chronological order, the evidentiary facts are as follows:

Plaintiff has some connection with a banking institution in Los Angeles and is interested in investments. W. N. Hamaker is connected with the same bank and has attended to much of the plaintiff's financial business. It is claimed on behalf of the plaintiff that in the particular matter Mr. Hamaker was the plaintiff's trustee. From further facts it will readily be seen that he was acting generally as the plaintiff's agent and the apparent scope of his authority was very broad. For several years, from time to time, acting for the plaintiff, Mr. Hamaker had retained the defendant as the plaintiff's attorney in separate matters. There was no general retainer. The arrangements made by Mr. Hamaker with the defendant were carried out by the plaintiff in his dealings with the defendant. Apparently, during this course of dealing carried on through Mr. Hamaker, the plaintiff never in any way questioned his authority.

On September 7, 1917, the defendant borrowed through Mr. Hamaker $2,500, which was admittedly the plaintiff's money. The note of the defendant was made payable to Hamaker, who thereupon indorsed a personal guaranty upon it and transferred it to the plaintiff. The plaintiff owned, or was at least interested in the ownership of a building known as the Metropolitan Building, in which Messrs. Lester Robinson, Fred P. Barman, the Leasehold Company, and others, had some interest by way of lease or equity. Mr. Hamaker was on friendly terms with the members of this group. They were indebted to the plaintiff, and Mr. Hamaker, for the plaintiff, undertook to bring about an adjustment of differences between them and the plaintiff. Just as he had done in former matters, he retained the defendant as the attorney. There were lengthy negotiations, and it was finally agreed that the Robinson group should transfer their interests in the Metropolitan Building to Mr. Hamaker for the plaintiff, and in satisfaction of the plaintiff's claim against them, upon being given what amounted to an option to repurchase the building or their interests in it, at any time before January 1, 1921, for the amount then agreed upon as due from them to the plaintiff and satisfied by their transaction. When the total amount of the items of their pre-existing indebtedness was computed, it aggregated in the neighborhood of $35,000. Before the transaction was closed, the question of attorney's fees was discussed between the defendant and Mr. Hamaker, then between Mr. Hamaker and Mr Robinson, and finally by the three.

Mr. Hamaker's testimony in regard to the employment of the defendant was not direct, but it appeared that it was Mr. Bacon's money that was involved in the transaction, and that upon its determination depended the loss or gain of Mr. Bacon. Mr. Hamaker was asked by the trial judge:

> "And when you went to Mr. Meserve did you expect to pay him or did you expect Mr. Bacon to pay him?"

In reply the witness stated:

> "Let me say this: That in that I was following a general rule which I followed for a great many years in the bank and out, in which in almost every instance I sought to saddle the expense on the other fellow; for instance, the banks do that as to attorney fees; and each note and every obligation sought to be collected was predicated upon a note which included attorney fees, so in the end the object was to seek to saddle the expense upon— The Court (interrupting): But the preliminary objection (obligation) to the attorney being directly when the person went to him, of course? A. I have always held them payable out of the proceeds of the—"

The primary obligation to the attorney, of course, is just what the trial judge indicated—that of the person who retained him—in this case of Mr. Bacon, on whose behalf Mr. Hamaker was acting. This primary obligation might have been shifted with the consent of both the attorney and the other parties, but in the present case it was not so shifted, or, if it was, it was reshifted to the plaintiff. In the first conversation between Mr. Hamaker and the defendant, the former, pursuant to his custom of shifting the burden to the other fellow, told the defendant in substance that the Robinson group should be made to pay the attorney's fees. The amount of the fees was then discussed. The settlement involved different claims, aggregating $35,000, and 10 per cent. of this amount, or $3,500, was suggested. Other amounts were discussed, and Hamaker and Meserve agreed that a fee of $2,000 was reasonable under all the circumstances. Hamaker then communicated with Robinson and returned with him to Meserve's office, where Robinson was told, in effect, that in addition to the option price of $35,000 for the repurchase, there would be added an attorney's fee of $2,000. Robinson made a "wry mouth" over the amount of the fee, but agreed that it should be added to the option purchase price, making it amount to $37,000 instead of $35,000, and thereupon the interests of the Robinson group were transferred to Hamaker nominally, but in fact for the plaintiff.

If the conversation between Hamaker, Robinson, and the defendant resulted in the shifting of the burden from Bacon to the Robinson group, in accordance with Hamaker's custom, that burden was satisfied when it was included in the settlement under which the Robinson group transferred the property to Hamaker for Bacon. The defendant was entitled to his fee. He could not, in any way, have maintained a claim for a fee against Robinson and his group after the transfer had been made, nor was Robinson and his group in any way obligated to pay any sum of money to the plaintiff or the defendant. If the Robinson group should never exercise the option of repurchase, they were freed of all obligations by the transfer, and the transfer inured solely to the benefit of the plaintiff. The plaintiff having received full satisfaction for his claims against the Robinson group, including the attorney's fee of $2,000, the primary obligation which Hamaker had tried to shift to the Robinson group again rested upon Bacon.

The contention on the part of the plaintiff that Mr. Hamaker was a mere trustee, that the title to the property in question had been transferred to him, and not to Bacon, is clearly evasive. The entire title vested in him as a trustee for Bacon and for Bacon's convenience. He signed no declaration of trust either to Bacon or the defendant. The defendant could not compel Hamaker to make any trust accounting to him, while Bacon could compel his agent to transfer the title directly to him. Having received the benefit both of the transaction and of the attorney's services, the finding to the effect that the plaintiff and defendant agreed upon the sum of $2,000 as a fee is supported by the evidence concerning the conversation between Hamaker and the defendant in view of the ostensible agency of Hamaker for Bacon, and the finding that the plaintiff agreed to pay this amount is supported by the evidence that the amount of it was included in the valuation of the property transferred to the plaintiff through the agency of the trusteeship of Hamaker. There is no other question involved in the appeal.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

50 Cal. App. 609

LAUMAN et al. v. CONCORDIA FIRE INS. CO. OF MILWAUKEE, WIS.

(Civ. 3208.)

(District Court of Appeal, Second District, Division 2, California. Dec. 24, 1920. Rehearing Denied Jan. 21, 1921. Hearing Denied by Supreme Court Feb. 21, 1921.)

1. Insurance 🔑229(3)—Brokers held without authority to accept notice of cancellation.

Persons engaged by the insured to place insurance on his property, whose custom it was to give notice of any cancellation and procure other insurance if possible, should be treated as mere brokers, and not authorized to accept notice of cancellation.

2. Insurance 🔑665(1)—Brokers placing insurance held not agents of insured to receive notice of cancellation.

In an action on a fire policy, where the insurer relied on notice of cancellation given to brokers employed by the insured to effect the insurance, evidence *held* wholly insufficient to show that they were ostensible agents within Civ. Code, § 2300, and as such entitled to accept notice of cancellation.

3. Insurance 🔑229(3)—Agents to procure insurance have no power to consent to cancellation.

An agent, employed to procure insurance, has no power to consent to cancellation or accept notice thereof; his authority terminating on delivery of the policy.

4. Insurance 🔑665(4)—Evidence held to sustain finding of amount of plaintiff's loss.

In an action on a fire policy insuring plaintiff's dry cleaning establishment to recover for clothing burned while under the care of plaintiff for the purpose of cleaning, evidence *held* sufficient to support a finding as to amount of plaintiff's loss.

5. Insurance 🔑560(3)—Objection to proof of loss solely on one ground held waiver of defense of lack of evidence of amount of loss.

Where policy of owner of dry cleaning establishment covered "property left * * * in trust or for repairs, or storage, or for which" insured "should have assumed liability," and also provided that the insurer "shall be deemed to have assented to the amount of loss claimed * * * in * * * preliminary proof of loss unless within 20 days * * * the company shall notify the insured * * * of its partial or total disagreement with the amount of loss claimed," the company assented to the amount claimed in the proof of loss of goods left with insured where it confined its objection to the proof of loss to the failure of insured to show ownership of or liability by law or by specific assumption for loss or damage to the goods.

6. Insurance 🔑560(2)—Insurer held bound to specify amount of loss admitted in order to contest amount of loss claimed.

Where policy of owner of dry cleaning establishment covered "property left * * * in trust or for repairs, or storage, or for which" insured "should have assumed liability," and also provided that the insurer "shall be deemed to have assented to the amount of loss claimed * * * in * * * preliminary proof of loss unless within 20 days * * * the company shall notify the insured * * * of its partial or total disagreement with the amount of loss claimed and * * * of the amount of loss, if any, the company admits on each of the different articles * * * set forth in the preliminary proof," and the proof of loss set forth in detail the items paid by insured to third persons for their goods destroyed in his keeping, the insurer, if it intended to contest the amount of any particular item, was required, under the policy terms, to specify the amount of loss it admitted on such item, otherwise it must be deemed to have assented to the amount of loss sustained on all items to which no specific objection was made, for a general denial of all liability would not meet the policy requirement to designate the different articles for which it disclaimed liability.

7. Evidence 🔑69 — There is a presumption that private transactions have been fair and regular.

The presumption is that private transactions have been fair and regular, and, if not controverted, such presumption is satisfactory.

8. Appeal and error 🔑204(1)—Objection to evidence must be made in trial court.

The question of competency of evidence must be raised during the trial, if it is to be reviewed upon appeal.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Roy R. Lauman and another against the Concordia Fire Insurance Company of Milwaukee, Wis. From a judgment for plaintiffs, the defendant appeals. Affirmed, superseding former opinion, 192 Pac. 128.

W. W. Hindman, of Los Angeles, for appellant.

Paul H. McPherrin and Chandler P. Ward, both of Los Angeles, for respondents.

THOMAS, J. The facts upon which this appeal is based are stated in our former opinion herein. The conclusions there reached as to items 1 and 3 of the policy in question are not questioned on this rehearing. We therefore adopt that opinion in part as follows:

"This is an action to recover on a fire insurance policy. Plaintiff Lauman was at all times referred to in this action engaged in the cleaning and dyeing business in the city of Los Angeles. His 'customers' were the owners of 'routes,' having their own wagons, etc., with which they solicited the patronage of their own patrons throughout various parts of the city. The articles so gathered such 'customers' would take to Lauman's place of business for cleaning or dyeing, after which they would, by the latter's 'customers,' be delivered to their own patrons, the owners thereof. In other words, Lauman had no dealings with the individual owners of the clothing and other articles so delivered to him for cleaning or dyeing; all his business was with the owners of the various 'routes.' The court found in favor of plaintiff, and judgment was entered accordingly.

"The policy upon which the action is based was issued to plaintiff by the defendant corporation through one C. P. Spinning, its duly and legally authorized agent. The policy covered three separate items, as follows: (1) 'One thousand dollars on office and other furniture and fixtures, machinery and equipment'; (2) one thousand dollars on merchandise of every description, specifically including property left with plaintiff in trust or for repairs, or storage, or for which he should have assumed liability'; and (3) 'five hundred dollars on one-story brick building, where the business was located, and as described in the policy of insurance.' As to the last item, there is attached to the policy a 'mortgage clause,' making the loss, if any, payable to the plaintiff H. R. Dodd.

"The policy was issued on May 16, 1917. On the 5th of June following, the property was damaged by fire. Thereafter, and within the time and in the manner required by such policy, Lauman notified the defendant company of the fire, and furnished and submitted to defendant company proof of loss in writing, later, at the request of defendant, submitting amendments thereto. In addition to this, and as late as September, 1917, in response to defendant's demand, Lauman personally submitted to an examination under oath, in compliance with the terms of the policy.

"Under date of July 11, 1917, the defendant corporation, through its special agent and adjuster, R. L. McCulloch, wrote Lauman a letter, which, omitting the formal parts, is in words and figures as follows: 'I am in receipt of a preliminary proof of loss under policy No. 30804 of the Concordia Fire Insurance Company of Milwaukee, Wisconsin, wherein you claim loss and damage by reason of a fire that occurred on the 5th day of June, 1917, at the premises No. 2190 East Eleventh street, Los Angeles, California. The Concordia Fire Insurance Company herewith disagrees with you as to the amount of loss claimed by you by reason of said fire under its policy No. 30804. The aforesaid Concordia Fire Insurance Company admits that the loss to the various articles covered under the first item of the form as attached to the policy is as set forth in the aforesaid proof of loss; and also that the loss to the building covered under the third item of the form as attached to the policy is as set forth in the aforesaid proof of loss. The aforesaid Concordia Fire Insurance Company disagrees with you as to the amount of the loss and damage claimed by you on any and all articles covered under the second item of the form as attached to the policy and described as "merchandise," and does not admit that you sustained any loss or damage under this item by reason of said fire, as you have failed to show that the goods destroyed or damaged were your property or that you were liable by law for any loss or damage to said goods, or that at any time prior to the date of the fire you had specifically assumed liability therefor, nor do you furnish any evidence as to your liability to others in event said goods were held by you in trust at the time of the fire.'

"Accompanying the proof of loss filed by Lauman and constituting a part thereof, relating in item 2, was a schedule of garments lost, together with the owners' names and the amounts claimed by each. We do not consider it necessary to set out this schedule here. Further reference thereto will be made when we come to consider appellant's second point.

"It appears that this class of insurance is exceedingly hazardous, and for that reason plaintiff had experienced considerable trouble in keeping his property insured, having had several policies issued to him by Horton & Son, an insurance firm with offices in Pasadena, as agent of various insurance companies. In our opinion no other reference to these 'other' policies is necessary.

"The policy under consideration contained the following provision: 'This policy may be canceled at any time, without tender of unearned portion of premium, by the company by giving five (5) days' written notice of cancellation *to the insured and to any mortgagee or other party to whom, with the written consent of the company, this policy is made payable,* in which case the company shall, upon surrender of the policy or relinquishment of liability thereunder, refund the excess of paid premium above the pro rata premium for the expired term.' (Italics ours.) On June 1, 1917, Horton & Son—not Spinning, the issuing agent—wrote Lauman as follows: 'Kindly return us Security policy No. 2064319 and the Concordia policy No. 30804, because both of these companies have ordered their policies canceled. Kindly give this matter prompt attention, as we wish to return these two policies back to the companies at once. * * * In our letter of the 29th we mentioned the National as one of the companies which had canceled off, but this was an error. We should have stated the Security and the Concordia.' This letter was mailed in Pasadena at 6:30 p. m., June 1, 1917, and delivered to Lauman the next day. As we have already seen, the fire occurred on June 5, 1917.

"On this appeal appellant contends: (1) That at the time of the fire the policy here involved had been canceled; and (2) that there was no proof of value as to the articles embraced in item 2 covered by the policy. To support the first contention, appellant argues that the firm of Horton & Son was the agent of plaintiff Lauman, 'with power to receive notice of cancellation.' If this be so, and such purported notice of cancellation was given within time, then on this phase of the case our decision must be for appellant. The question, therefore, resolves itself into two divisions: (1) Was Horton & Son the agent of plaintiff Lauman with power to receive notice of cancellation and to cancel the policy which is the basis of this suit; and (2), if so, was the purported notice given in time?

[1-3] "It will be borne in mind that the agent issuing this particular policy of insurance was not Horton & Son, but C. P. Spinning. The record here shows that under date of May 25, 1917, a special agent of the defendant company—R. L. McCulloch—wrote to Spinning as follows: 'Kindly cancel Concordia policy No. 30804, Roy A. Lauman, assured, covering on cleaning and dyeing establishment at No. 2190 East Eleventh Street, Los Angeles, California, and relieve the company of all liability there-

under within the time specified in the policy contract. I have already declined this risk four different times, and in order not to do the assured or your office an injustice I have made a reinspection to-day and find no change. I am sorry to disturb this line, and trust that it will cause you no inconvenience.' Upon receiving this letter Spinning showed it to Mr. A. T. Horton, of the firm of Horton & Son. Thereupon Horton stamped across the page of the 'Daily' containing entries with respect to the policy in question, the word 'Canceled.' The 'Daily' referred to in this case is an abbreviation of the phrase 'Daily Report,' as used in the parlance of insurance agents. The 'Daily Report' is a blank upon which the transactions, if any, that may have been had in connection with a given policy are entered. When a policy is written it is usually delivered to the assured, and a record thereof, together with all 'riders' attached thereto, is kept by the agent in a book known as the 'policy register.' The 'Daily Report' is a record of the same transaction, and theoretically, at least, is supposed to be mailed on the same day to the home office of the company. Such 'Daily' contains the report of that day for the one policy only, as issued, modified, or canceled, as the case may be. The 'Daily' in the transaction in question was not that of any company for which Horton's firm was acting as agent. Under these circumstances, by what authority did Horton perform this act? Other than the showing of the letter of May 25, 1917, to Horton, nothing was done by Spinning to bring notice of the cancellation of said policy to the plaintiff Lauman. The letter of June 1, 1917, was written and mailed by Horton & Son to, and received by, Lauman, as hereinbefore set forth. If we thought that Horton & Son had authority to receive notice of cancellation, and to cancel the policy, then we doubtless should hold that the letter of the special agent to Spinning, of date of May 25, 1917, and by Spinning shown to Horton, was a sufficient notice of cancellation, regardless of Horton & Son's letter of June 1, 1917, to plaintiff, just referred to.

"Appellant attempted to prove by the witness Spinning that at the time Horton placed the word 'Canceled' on the 'Daily' that he (Spinning) 'believed that Horton, or Horton & Son, had the right to receive notices of cancellation,' by asking him if he thought and was of the opinion or belief that Horton & Son had the right to cancel the policy of insurance,' and also if he 'believed that Horton & Son, or the Mr. Horton that put that cancellation there, had authority to cancel that policy'—to all of which questions objections were interposed and by the court sustained. Error is predicated upon each of such rulings.

"The record shows that Spinning was employed as a bookkeeper by Horton & Son, and that he was conversant with the practice and custom of the firm in the matter of the cancellation of insurance policies—which was, that *in every case* the assured was given notice of cancellation. Indeed, Mr. Horton himself corroborated Spinning in this regard, and goes somewhat further when he testifies: 'Our custom was first to protect the assured in some other company, and to notify him by either sending him a new policy or advising him that we could not replace it, and request the return of the other policy; and when the other policy came back, *or when the notice was duly given to him of the cancellation, then was the time that we stamped that "Canceled."*' (Italics ours.) Horton further testified that he maintained the foregoing practice *in every instance*. Under these circumstances Horton & Son were mere brokers, and, being such, were without authority to accept notice of cancellation. Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233. This record contains nothing which brings Horton & Son within the purview of section 2300 of the Civil Code. 'The fact that an agent was employed to place insurance does not make him an agent to cancel the policy on behalf of the owner of the property.' Cronenwett v. Iowa Underwriters, etc., 186 Pac. 824.

"It is contended by appellant that 'the facts proven conclusively show that Horton was the agent of plaintiff for the purpose of obtaining policies of insurance and to receive notices of and agree to cancellation of policies.' But with this we are not able to agree. When the plaintiff Lauman was being cross-examined by defendant's counsel he was asked the following questions and made the following answers: 'Q. Did you tell him, Horton, to what amount to keep the insurance up? A. I asked him to place $1,000 in garment insurance. Q. You told him to keep it insured to the extent of $2,500, didn't you? A. $1,500 on building and equipment and $1,000 garment insurance. Q. And you told him to keep you insured to that extent? A. Most assuredly, if he could; they cannot always keep it. They do it to the best of their ability, I presume, but policies are sometimes canceled, and it is hard to place insurance.' Standing alone, this might support the broad assertion of appellant, but, viewed in the light of the whole testimony, we do not feel at liberty to disturb the finding of the learned trial court that 'it is not true that on the 25th day of May, 1917, the defendant duly or regularly, or at all, notified the plaintiffs, or either of them, in writing, or at all, that all liability under said policy of insurance on behalf of the defendant to said plaintiffs would cease and determine within five days after the receipt of such notice,' and 'that it is not true that said, or any such notice, was received by the plaintiffs, or either of them, on May 27, 1917, or at all.'

"The facts in the case of Ferrar v. Western Assurance Co., 30 Cal. App. 489, 159 Pac. 609, 611, to which our attention is called, were very different from those in the case at bar, in that in the case cited there was nothing to cause a conflict of ideas or opinion on the question of authority of the insurance agent to keep up the insurance, etc., and the court there found that both the evidence and the 'course of dealing' supported the conclusion there reached. In the instant case the evidence, taken as a whole, amply supports the finding of the trial court, and there is no 'course of dealing' established, except that which is in direct conflict to the position taken by defendant, as we shall presently see.

"Under those conditions we fail to see any basis for the questions objected to. There is absolutely nothing upon which Spinning could base an opinion which would justify a conclusion on his part that Horton, or Horton & Son, had authority to receive notice of cancellation for plaintiff Lauman of any policy, except as provided by the terms of the policy and in accordance with the custom and practice of the office. Indeed, Horton's act in reference to the policy here involved was a *departure* from that custom; and certainly there is nothing in this record which can be construed as a 'course of dealing' to authorize such. The letter of June 1, 1917, referred to above, we think speaks in stentorian tones in support of plaintiff's contention, and is a mute witness which, in our opinion, corroborates the evidence of both Horton and Spinning on this point. Especially does it point to the fact that on that date Horton & Son did not themselves believe that they had any authority to receive notice of cancellation or to cancel the policy, except by following the usual custom of the office and according to the terms of the policy. It must be obvious that had Horton & Son believed that the firm, or any member thereof, possessed such authority, there was no occasion whatever for the writing of that letter.

"Another significant fact in this case is that defendant nowhere in this record makes any attempt to show an express or direct statement or action by plaintiff authorizing Horton, or Horton & Son, to accept notice of or to agree to a cancellation; and, as we have already seen, there is a complete absence of any evidence which would authorize the departure from the regular custom and practice of the office which was proven in this case. We think the court was correct on the rulings in question.

"The record further shows that Spinning, as regards the Concordia agency, was an independent operator, and that the firm of Horton & Son was acting as broker for him. As such brokers, Horton & Son had no authority, as we have seen, to issue or cancel any Concordia policy. Under such conditions, the mere act of placing the impression of a rubber stamp 'Canceled' upon Spinning's 'Daily' by Horton, as already referred to, was unavailing. As to both the Concordia Company and plaintiff Lauman, Horton, in a legal sense, was a mere meddler or interloper. We have looked in vain for any evidence to prove the authority, ostensible or otherwise, of Horton & Son to receive notice of cancellation or to cancel any policy of insurance, particularly with respect to the policy in question. Admittedly, the only thing Spinning did was to show Horton the letter of May 25, 1917, to which we have already adverted.

"If we assume that Horton & Son was in fact Lauman's agent, then we are confronted with the query: Was this letter which they mailed June 1, 1917, to Lauman, a compliance with the terms of the policy as a notice of cancellation? Manifestly not. As we understand it, the rule is 'that an agency to procure insurance is ended when the policy is procured and delivered to the principal, and the agent has no power after the policy is so delivered to consent to a cancellation, or to accept notice of an intended cancellation by the insurer; and evidence of a usage to give notice to a broker is inadmissible, where the policy requires notice to the insured.' 14 R. C. L. § 189; Farnum v. Phœnix Ins. Co., supra. For these reasons it follows, we think, that Horton, or Horton & Son, were not the agents, or agents with authority, to receive notice of cancellation, and, no such notice having ever been given to plaintiff, that the policy was in full force and effect at the time of the fire.

"It further occurs to us that the defense in this action—the claim that the policy was canceled, and hence void at the time of the fire—is clearly the result of an afterthought. In view of the recognition by the special agent of the company of the existence and vitality of the policy in question, admitting, as he did, the company's liability as to items 1 and 3 thereof, we cannot escape this conclusion. Had the company considered the policy canceled, then it doubtless would have taken the position that there was nothing to negotiate, and denied all liability. This it did not do."

[4-6] Upon a careful reconsideration of respondents' contentions (1) that there is evidence in the record to sustain the finding of the trial court as to item 2 of the covering clause of the policy, and (2) that the defendant company, by its failure specifically to disagree with the amount claimed by the assured under this item of the policy, is deemed to have assented thereto, we conclude that both should be sustained. Item 2 of the policy covers loss to the extent of $1,000 in merchandise of every description contained in the building, provided the insured shall be liable by law, for loss or damage thereto or shall have specifically assumed liability therefor. The court found that, under this item, the plaintiff paid or assumed claims of third persons, to whom he was responsible for goods destroyed by the fire, aggregating $1,000, the full amount of the insurance covered by item 2. Appellant contends that no proof of the value of the goods lost was submitted, and that therefore the finding is not justified by the evidence.

The policy contains the following provision:

"*Ascertainment of Amount of Loss.*—This company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him, and shall also notify the insured in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto."

After receiving the preliminary proof of loss, the adjuster for defendant wrote to Lauman as follows:

"The aforesaid Concordia Fire Insurance Company disagrees with you as to the amount of the loss and damage claimed by you on any and all articles covered under the second item of the form as attached to the policy and

> described as 'merchandise,' and does not admit that you sustained any loss or damage under this item by reason of said fire, as you have failed to show that the goods destroyed or damaged were your property or that you were liable by law for any loss or damage to said goods, or that at any time prior to the date of the fire you had specifically assumed liability therefor, nor do you furnish any evidence as to your liability to others in event said goods were held by you in trust at the time of the fire."

Thus, the insurance company confined its objection to the payment of loss under this item to the specific reasons set forth in the letter, namely, the failure of the insured to show that the goods destroyed or damaged were his property, or that he was liable by law for any loss or damage to the goods, or that he had specifically assumed liability therefor. No objection is made in the letter to the amount of any loss, but is based solely on the reasons stated. Proof was made that the plaintiff had assumed liability for the goods destroyed, and no contention is urged against the sufficiency of the evidence to support the court's finding to that effect. The proof of loss set forth in detail the items paid by plaintiff to third persons; and if the insurance company intended to contest the amount of any particular item, it was required, under the terms of the policy, to specify the amount of loss it admitted on such item, otherwise it must be deemed to have assented to the amount of the loss sustained on all items to which no specific objection was made. A general denial of all liability would not meet the requirements of its obligation under the policy to designate the different articles for which it disclaimed liability. Victoria Park Co. v. Continental Insurance Co., 39 Cal. App. 347, 178 Pac. 724.

Moreover, we believe that the evidence adduced by plaintiffs in support of the proof of loss was sufficient to support the finding. Over 200 pages of the reporter's transcript are devoted to the testimony of witnesses regarding the amount of their claims for goods destroyed. Receipts from various parties showing payments aggregating an amount in excess of the policy were introduced in evidence without objection on the part of defendant. The proof of loss set out in detail the several items so paid, and summarized the total loss as follows:

Item No. 2	Cost	Cash Value	Loss
60 suits of clothes	1800	1200	1200

The plaintiff Lauman was asked this question:

> "I will ask you if that information, that data, and those schedules and proofs of loss, were true at the time you furnished them, according to your best knowledge, information, and belief?"

—to which he answered:

> "At that time they were furnished to the best of my knowledge and belief as correct."

While in many instances the witnesses did not testify directly as to the value of the goods, the fact that they had submitted claims for the amount of their losses, and that their receipts had been introduced and received in evidence without objection, and that the witnesses were not cross-examined as to values, taken in conjunction with the proof of loss and the testimony last above quoted, is, we think, sufficient to sustain the finding as to item 2 of the policy, which is the basis of this litigation.

[7, 8] From the record it appears that considerable time was consumed in the trial of the case. The presumption is that private transactions have been fair and regular. This presumption, if not controverted, is satisfactory. The time to raise the point of the competency of the evidence concerning the item now under consideration, if considered not competent, was during the trial of this case. "The defendant cannot remain silent and take the chance of a favorable issue, and, losing, urge as a ground for reversal an error which, but for his silence, might never have found its way into the case. His failure to object justly gives rise to the inference that at the time he saw no injury being done him, and he cannot complain on being met here by a barrier arising from his own omission." People v. Kramer, 117 Cal. 647, 49 Pac. 842. This ruling, a fortiori, is, we think, especially applicable here.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, JJ.

50 Cal. App. 730

STIRNUS v. ADAMS et al. (Civ. 3567.)

(District Court of Appeal, First District, Division 1, California. Dec. 30, 1920. Hearing Denied by Supreme Court Feb. 28, 1921.)

1. Appeal and error 🔑1012(2) — Conclusions supported by evidence not disturbed, though court believes preponderance the other way.

Where there is sufficient evidence of tangible weight to support the conclusion of the trial court, it is not within the province of the Court of Appeal to disturb the findings, though it believes that the preponderance of the evidence is against the findings.

2. Vendor and purchaser 🔑37(5) — Belief of truth of representations or ignorance of falsity immaterial.

Under Civ. Code, § 1572, a positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, if made to induce another to enter into a land contract, is actual fraud invalidating the contract, though the party making the assertion believed it to be true, or did not know that it was false.

3. Vendor and purchaser 🔑36(2)—False assertion of matters of fact to induce contract held to authorize cancellation.

Positive assertion of matters of fact by a vendor's agent to the purchaser concerning the condition of an orchard about which the purchaser had no knowledge, when false and made for the purpose of inducing the purchaser to enter into the contract, and when believed by him, justifies a cancellation of the contract.

4. Vendor and purchaser 🔑37(6)—Misrepresentations held material.

Statements by a vendor's agent that the age of an orchard was only 15 years when it was between 25 and 30 years old, and that there was nothing wrong with it when it was in a diseased, infected, and run-down condition, were misstatements of material facts justifying a rescission.

5. Vendor and purchaser 🔑36(1)—Purchaser entitled to rescind if property would have been worth more if representations true.

One induced to purchase land by false representations may recover back the amount paid by him if the property would have been worth more if the representations had been true, though the property is worth the agreed purchase price.

6. Vendor and purchaser 🔑37(4)—Purchaser entitled to rely on vendor's representations.

Where a purchaser of land, though visiting it on several occasions, was, to the knowledge of the vendor's agent, unable to judge for himself as to the real condition of an orchard because of his entire lack of experience in horticulture, he was justified in relying on the agent's positive statements as to the age of the trees and that there was nothing wrong with the orchard.

7. Vendor and purchaser 🔑334(2)—Purchaser entitled to recover amount paid when representations false.

When representations by a vendor or his agent concerning land could not be made good by them, they could not in equity and good conscience retain the payment made on the land by the purchaser, where he refused to complete the contract.

8. Principal and agent 🔑156—Vendor's agent participating in fraud liable for return of payment by purchaser.

Under Civ. Code, § 2343, as to agent's responsibility to third persons, a vendor's agent who participated in fraudulent representations, whereby a purchaser was induced to purchase, was equally responsible with the vendor for the return of money paid by the purchaser, though he acted as agent and had paid the money over to his principal.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by H. O. Stirnus against M. O. Adams and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. R. Gilbert and Geo. J. Steiger, Jr., both of San Francisco, for appellants.

A. P. Dessouslavy and P. A. Bergerot, both of San Francisco, for respondent.

BARDIN, Justice pro tem. In this action the plaintiff filed his complaint praying for judgment against the defendants in the sum of $1,000 as money had and received by them to and for the use of the plaintiff. The defendants admitted receipt of the sum stated, but denied any liability to plaintiff upon the ground that this sum represented the amount of a deposit paid upon a certain contract of sale of real property belonging to defendant Adams, and which defendant Lyon, as agent, had sold to the plaintiff, and which sum it was agreed would be forfeited by the purchaser (one-half thereof to each of defendants), if he failed to complete the terms of the agreement of sale. The real property referred to contained approximately 19 acres of land, practically all of which was planted as an orchard.

The defendant Lyon filed a cross-complaint, alleging, in effect, among other things, the promise of the plaintiff to pay to Lyon, in the event that plaintiff breached his contract of purchase, the further sum of $1,250 as a broker's commission for negotiating the sale. The plaintiff answered the cross-complaint, alleging that the contract was procured by reason of the fraudulent representations of the defendants as to the quality of the said orchard. Upon the issues in this manner framed the case was tried and judgment followed in favor of the plaintiff.

The court found upon the issues of fraud substantially as follows: That prior to the signing of the agreement of the purchase of said real property the defendants falsely and fraudulently represented to plaintiff that the trees in said orchard were about 15 years old, whereas the same were in fact 25 to 30 years old; that prior to such signing said Lyon, as the agent of said Adams, falsely and fraudulently represented to plaintiff that said orchard was a first-class orchard, in the best possible condition, and that there was nothing wrong with it; that in fact the trees in said orchard were badly sunburnt, due to insufficient moisture and to long-continued failure to prevent or obviate the effects of such sunburn; that a large number of the trees had been seriously injured by the pest known as the "peach borer"; that said orchard was largely infected with oak root fungus, and with black knot or crown gall; that the trees in said orchard were stunted and underdeveloped, and that said orchard was not a first-class orchard, or even an average orchard, but was in a poor, diseased, and infected condition; that said representations were false and untrue, and were known by defendants so to be, and were so made to induce plaintiff's execution of said agreement. And it was further found that "plaintiff was entirely without experience in regard to orchards, and in agreeing to purchase said property relied solely upon the aforesaid misrepresentations of defendant."

No complaint is made against the findings of the court with respect to the formal steps taken for the rescission of the agreement, or the promptitude with which plaintiff acted in that behalf.

[1] As might well be expected in such a case as this, the testimony was in sharp conflict as to whether the defendants had made the representations charged against them. But a careful reading of the record reveals sufficient evidence of tangible weight to support the conclusions of the trial court. Under such circumstances it is not within our province to disturb the findings, even though we should believe that the preponderance of the evidence adduced inclined the scales to tip the other way. And we are not unmindful of the requirements as to the degree of proof required to support findings of fraud.

It is urged by the appellants that the findings to the effect that defendant Lyon knew that the representations referred to were untrue do not find proper support in the evidence, and that for a like reason the finding that Lyon made the representation that the trees were 15 years of age must fall. There is evidence of substantial weight which establishes that Lyon, in fact, did state, not as his opinion, but as a fact, that the orchard referred to was a first-class orchard, in the best of condition, well taken care of and about 15 years old, when, as a matter of fact, the orchard was in the condition and of the age stated in the findings of the court already set out.

[2] It is no answer to the charge that one has made false representations to say that it has not been shown that the misstatements complained of were known to be false by the one charged with the offense. A positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, even though he believes it to be true, if made in order to induce another to enter into a contract, constitutes actual fraud. Section 1572, Civ. Code. Under such circumstances it is immaterial that the party charged with fraud did not know that what he stated was false, or that he believed it to be true. Groppengiesser v. Lake, 103 Cal. 37, 36 Pac. 1036.

[3] This is not such a case as Lee v. McClelland, 120 Cal. 147, 52 Pac. 300, where it was held that expressions of opinion, even though they be the "exaggerated, and it may be the reckless, declarations of an eager trader, holding out the golden promise of profit to induce a sale," cannot be made the predicate to avoid a sale upon the ground of false or fraudulent representations. The statements complained of here, as shown from the circumstances of the case, were positive assertions of matters of fact, not of opinion, and related, too, to material facts about which the purchaser had no knowledge. They were made for the purpose of inducing the purchaser to enter into the contract of purchase. These statements were believed by plaintiff, and by reason thereof he entered into the contract and parted with the money sued for. While the power to cancel a contract should be hesitatingly exercised, this seems to be a proper case for rescission.

[4] It is not necessary to here go into a precise or extended analysis as to whether all the misstatements attributed to the defendants had relation to statements of fact. The statement that the age of the orchard was only 15 years, when it was in fact between 25 and 30 years old, and that there was nothing wrong with it, when, on the contrary, it was in the diseased and infected and run-down condition disclosed by the evidence and findings, each, under the circumstances of this case, constituted misstatements of material facts sufficient of themselves to constitute ground for the rescission of the contract. Davis v. Butler, 154 Cal. 623, 98 Pac. 1047.

[5] In order to permit the plaintiff to recover it was not essential, as claimed by the defendants, that he show that the property purchased was worth less than the agreed purchase price. As stated in Davis v. Butler, 154 Cal. 623, 98 Pac. 1047:

> "It is enough that he was induced, by false representations, to buy property which would, if the representations had been true, have been worth more than it actually was worth"—citing Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011.

[6, 7] The finding of the court that the plaintiff relied solely upon the statements of the defendants as to the condition of the orchard is amply sustained by the record. And while it is true that the plaintiff visited the orchard on several occasions previous to executing the agreement of purchase, he was, on account of his entire lack of experience in horticulture, known to defendant Lyon, unable to judge for himself, as to its real condition, or to see the things that actually condemned it for his purposes. He was justified, under the circumstances disclosed by the record, in relying upon the statements of material facts already referred to, and since the defendants were unable to make their representations good, they should not, in equity and good conscience, be permitted to retain the moneys which have come into their hands by reason of their misconduct.

[8] Defendant Lyon cannot escape liability on account of having acted as the agent of his codefendant in inducing the plaintiff

to enter into the contract of purchase, nor because he paid the money over to his principal. He knowingly participated in the transaction, held to have been fraudulent, and is equally responsible with his codefendant for the return of the money. Mechem on Agency, 1458; Moore v. Shields, 121 Ind. 267, 23 N. E. 89; Gray v. Ellis, 164 Cal. 481, 129 Pac. 791; 2 C. J. 827; section 2343, Civ. Code.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(50 Cal. App. 538)

McINERNEY v. UNITED RAILROADS OF SAN FRANCISCO et al. (Civ. 3598.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1920. Hearing Denied by Supreme Court Feb. 21, 1921.)

1. False imprisonment ⚷15(3)—Railroad held liable for assault and arrest by guards employed during strike.

Where a street railroad, during a strike, employed guards, acting under instructions from the president, when sent to a section of city where attacks had been made upon the railroad's employees and cars, the railroad was liable for the acts of such guards who assaulted and arrested a pedestrian in the mistaken belief that he was one of the strikers and had participated in the attacks; such assault and arrest being within the scope of their authority, regardless of the mistake.

2. False imprisonment ⚷15(3) — Employer liable for wrongful arrest by employees though done with undue violence.

Where employees were acting within the scope of their authority in taking into custody a person believed to be guilty of unlawful acts, the fact that they did so with undue violence or with insulting speech did not absolve employer of liability for the wrongful action in the course of making the arrest.

3. False imprisonment ⚷31—Evidence held insufficient to warrant exemplary damages for malice.

In action against a street railroad for assault and false imprisonment by its guards employed to protect property during a strike, evidence *held* insufficient to show malice, fraud, or oppression, so as to warrant a verdict for exemplary damages.

4. Corporations ⚷498—When corporation liable in exemplary damages.

A corporation may become liable in exemplary damages where an act of one of its employees done in ill will, or in actual malice, or under circumstances of fraud or oppression, is done with the knowledge or under the express direction of its superior officials having power to bind the corporation, or if done without such knowledge of direction is thereafter ratified by such officials, with full knowledge as to the willful and malicious quality of such acts.

5. Master and servant ⚷333—Employer sued with employee for acts of employee done under directions not exonerated by verdict for employee.

In action against employer and employee for assault and false arrest of plaintiff by employee under express directions of employer, the verdict of the jury in favor of the employee did not exonerate the employer from liability; the employer in such case being sued as a joint participant in the wrongful acts.

6. Costs ⚷241—No costs to either party on appeal where item of $500 was stricken from judgment.

In an action for assault and false imprisonment, where plaintiff was awarded $2,000 as compensatory damages and $500 as exemplary damages, the appellate court, in modifying the judgment by striking therefrom the item of $500 assessed as exemplary damages, will require each party to pay its costs on appeal.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Michael McInerney against the United Railroads of San Francisco and others. Judgment for plaintiff against the named defendant, and the named defendant appeals. Affirmed as modified.

Wm. M. Cannon and Wm. M. Abbott, both of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in an action for damages for an alleged assault and false imprisonment. The cause was tried before a jury, which awarded the plaintiff the sum of $2,000 as compensatory damages and $500 as exemplary damages.

There were four defendants other than the appellant herein who were at the time of the plaintiff's alleged injuries its employees. As to three of these—Henry Jones, M. Glennon, and John W. Lynch—a nonsuit was granted. As to the other codefendant, Charles G. Fitch, the verdict of the jury was in his favor. A motion for a new trial was made by the other defendant United Railroads, which the trial court denied, whereupon this appeal was taken.

The alleged assault upon and imprisonment of the plaintiff from which his claim for damages arose occurred in the city of San Francisco on the evening of August 22, 1917. A strike was at that time in progress among many of the employees of the United Railroads. This strike was being resisted by the latter, which, with the aid of its nonstriking employees and other persons replacing the strikers, was endeavoring to operate its cars upon the streets of said city, and also to resist assaults upon those attempting to oper-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ate its system, and to prevent threatened injury to or destruction of its cars and other property. It was a time of violence on both sides of the controversy. On the part of the strikers and their sympathizers frequent assaults were being made upon those who were replacing them upon the cars, during which weapons were freely used and missiles thrown, striking the cars, breaking their windows, and otherwise mutilating and rendering unserviceable the railroad property. On the part of the railroad vigorous efforts were being made to protect its employees from assault and its property from destruction, and otherwise to discourage the strikers, and arrest or disperse those indulging in or disposed to violent or destructive acts. The president of the United Railroads corporation had instructed his immediate subordinates to employ guards and to "spare no expense necessary to keep the cars running or necessary for the protection of passengers or the company's employees or the company's property."

On the afternoon of the day upon which the plaintiff received the injuries of which he complains, Charles G. Fitch, one of the defendants herein, was employed by the United Railroads in the capacity of foreman in charge of the stables and garage of his employer located on Turk street between Webster and Fillmore streets, in said city which was at the time the headquarters of a considerable number of men who were being used as patrolmen and guards to protect the other men and the property of the corporation from acts of violence on the part of the strikers, such as rock throwing at the cars and assaults upon their crews. Acting upon instructions from Mr. Ewing, who, as superintendent of construction and equipment of the railroad, was his immediate superior, Mr. Fitch sent out from said place at 7:30 o'clock on the evening in question an automobile in charge of M. Glennon as driver, with some six or seven other persons as occupants, some of whom were codefendants herein, with instructions, to use his own words, "to do patrol work on the street, to try and protect the property in any way they could—I would not say in any way they could, but to do anything they reasonably could to stop windows from being broken, crews pulled off cars; to help them out." This automobile with its crew of men was to operate on and in the vicinity of Haight street. About the time of this assault the plaintiff, who it appears was an employee of a publishing house and was in no way connected with either the strikers or the defendant, was walking out Haight street towards Scott street, and thence to Page street, with several friends, who were also in no way connected with the strikers or strike, on the way to the rooms of some of their number for a social evening. While passing along Scott street near Page the automobile driven by the defendant Glennon, and in which were the men sent out by the defendant Fitch as aforesaid, drove up and stopped near the plaintiff and his companions, when several of its occupants got out, and, laying hold of the plaintiff, made a violent assault upon him, striking him over the head so as to render him unconscious, and throwing him into the car and holding him there, while the machine made off in the direction of the stables and garage from which it had been sent forth. Upon the plaintiff's partial recovery of consciousness he began to struggle and call for help, when he was again violently assaulted by his captors, with violent and abusive epithets; when the machine with its occupants reached the gate of the stables and garage they found it closed, but it was opened upon signal to admit the car and immediately closed again, not, however, until the plaintiff by his cries had attracted the attention of two policemen, who forced their way into the inclosure, and, taking the plaintiff from his captors, went at once with him and them into the office of the defendant Fitch. Upon arriving in the latter's presence the plaintiff's assailants accused him of being "one of the fellows throwing rocks at the Haight street car." This the plaintiff denied as best he could in his battered condition, whereupon Fitch, apparently believing the accusation, said to the policemen, according to the plaintiff's testimony, "Those fellows are there to prove it; I want to arrest this man and bringing him up in court;" whereupon the policemen took the plaintiff to the emergency hospital, where he was temporarily treated, and thence to the city prison, where he was searched and locked up, remaining in jail about two hours, when he was released on bail. The next morning he was present in the police court, when it appeared that no charge had been made against him, but Mr. James F. Sheehan, an attorney regularly employed by the United Railroads, was present, and, according to the plaintiff's testimony, made the statement that, "I have information that this man (referring to plaintiff) was throwing bricks at a Turk and Eddy street car. I am not ready to prove it now. I want the case put back until Saturday morning." The plaintiff's case was accordingly continued to that time, when Sheehan again was present, and repeated, in substance, his former statement, with a request for a further continuance, which was granted, until the following Monday morning, when, no complaint having yet been filed, the case was dismissed. Thereupon the plaintiff commenced this action for damages for his personal injuries and for his false imprisonment, alleging that these acts committed against him were willful and malicious on the part of the defendants, and praying for both compensatory and exemplary damages.

The foregoing are substantially the facts of the case as they appeared at the trial. The defendants, both in their answers and in their evidence, denied that any other instructions or authority than that above set forth had been given either to the defendant Fitch or to those whom he had sent forth in the automobile on the occasion of their assault upon the plaintiff and of his capture and detention. They also denied that these acts of assault and detention were done either willfully or maliciously by the defendants or by their authority, so as to entitle the plaintiff to exemplary damages. The jury, however, returned a verdict in the plaintiff's favor for both forms of damage as above set forth.

[1] The first contention urged by the appellant is that the evidence is insufficient to show that the United Railroads ever authorized the occupants of the machine or any of them to assault or imprison the plaintiff. We are unable to sustain this contention. The time of the duration of the railroad strike, which had been in progress for some 11 days prior to the date of the plaintiff's injuries, was, as we have said, a time of violence, during which the employees of the railroad were being frequently attacked, and its cars were being fired upon and struck with stones and other missiles, to their great damage, in some cases well-nigh destruction. In resisting a strike attended with violent acts of this character it became necessary for the railroad to employ many persons to act as patrolmen and guards for the protection of their nonstriking employees and such of the traveling public as might have the hardihood to become its passengers, and of their cars and other property from destruction. It may be said incidentally that the employment of these persons for the above express purposes had also as its more or less essential purpose that of discouraging and rendering ineffectual the strike itself. Under these conditions and with these objects in view the president of the corporation issued the general order to his subordinates above set forth. It was under this general instruction that there had been assembled at the stables and garage of the corporation on Turk street a company of approximately 100 men, who were to act under the direction of Charles G. Fitch, foreman in charge there, as patrolmen and guards. It was also under this general instruction of the president of the corporation that Mr. Ewing, Fitch's immediate superior in authority, acted in instructing the latter to send forth the automobile with its driver and occupants to patrol Haight street between Market and Stanyan streets a short while before the assault upon the plaintiff. The immediate reason for sending this party of seven or more patrolmen and guards to this region was that violent attacks upon the railroad servants and cars were being made or threatened in that immediate vicinity at the time. The object of thus dispatching this body of men to the scene of existing or impending turmoil is a matter of easy inference. They were sent there by Mr. Fitch, under the most favorable statement of his instructions as testified to by himself, "to do anything they reasonably could to stop windows from being broken, crews pulled off; to help them out." It cannot be conceived that under these instructions those men arriving at the scene of disorderly action would be expected by their superior to confine themselves to merely remonstrating with the strikers or their sympathizers, to the use of moral suasion as the most reasonable means of preventing violent attacks upon the railroad's employees or property. The objects of their engagement and presence at the point of disturbance could not thus have been attained. It was clearly within the scope, if not within the express letter, of their employment that they should meet force with force, and that finding a striker or his sympathizers in the act of attacking their employer's servants, or throwing stones or other missiles at its cars, they should do whatever the occasion required to put a stop to his unlawful activities and prevent a recurrence of them upon his part. Armed with these implied, if not express, powers, this body of men came upon the plaintiff just off Haight street, and, apparently acting upon the mistaken belief that he was one of those who had been but recently engaged in stoning their employer's cars, undertook to put a stop to his pernicious activities and to have him put in jail for his unlawful acts. They proceeded, therefore, to take him into custody. It is true that they were utterly mistaken in regarding him as one of the strikers or as one of their sympathizers or allies in the attack. It is true also that their methods of achievement of their object and their method of arrest were ruffianly and inexcusable, but they were, nevertheless, acting within the scope of their authority regardless of the fact that they were mistaken as to the identity and guilt of their victim. Johnston v. Chicago, etc., 130 Wis. 492, 110 N. W. 424; Robards v. P. B. Pipe Works, 130 Ky. 380, 113 S. W. 429, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394; Conchin v. El Paso, etc., R. R. Co., 13 Ariz. 259, 108 Pac. 260, 28 L. R. A. (N. S.) 88; American Express Co. v. Patterson, 73 Ind. 430.

The cases which are cited by the appellant as sustaining its above contention do not support it, since in each of said cases the act of the employee was clearly outside of the scope of his authority. The case of Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154, is a fair sample of these. That was a case where the plaintiff was a guest at the defendant's hotel, and while seated at the dinner table was assaulted and beaten by a dining room waiter. Mr. Chief Justice Beatty, in deciding the case, very aptly said:

> "By the general law of master and servant the master is not liable for the malicious torts of the servant committed outside the scope of his employment. The wrongful act must be one which the servant is empowered under some circumstances to do."

So in the case at bar we think that if these employees of the railroad had come upon the plaintiff while in the act of stoning their employer's cars, or immediately thereafter, they would have been authorized by the nature of their employment to put a stop by force, if necessary, to his pernicious activity, and take him into custody for the purpose of turning him over to the authorities; and, this being so, the fact that they were mistaken in his identity as a wrongdoer does not affect their employer's liability for their acts.

What we have said above applies also to the appellant's next two contentions, since we are satisfied that the evidence sufficiently shows that the arrest and detention of the plaintiff by his captors at Scott street, and by the police officers within the appellant's quarters on Turk street, were authorized and ratified by the action and direction of the appellant's foreman, Mr. Fitch, under the belief that the plaintiff had been guilty of stoning the cars of his employer. The case of Lezinsky v. Street Ry. Co., 88 Fed. 437, 31 C. C. A. 573, is not authority for the appellant's contention in the above regard, for the reason that the acts of the employee in that case were clearly beyond the scope of his employment, and hence the liability of his employer depended solely upon its subsequent ratification of his unauthorized act, which is not the case at bar.

[2] The next contention of the appellant has reference to the alleged error of the trial court in giving two certain instructions with respect to the liability of the appellant for the acts of its employees done within the scope of their employment, but in excess of their express direction. These instructions appear to have reference to that margin of excessive zeal which not infrequently attends the execution of an employer's instructions, but does not lie beyond the scope of his employment, as, in the case at bar, if, as we have held, the appellant's employees were acting within the scope of their authority in taking into custody a person believed to be guilty of unlawful acts, the fact that they did so with undue violence or with opprobrious and insulting forms of speech would not absolve their employer for their wrongful action in the course of making the arrest. Turner v. N. B., etc., Co., 34 Cal. 599.

The next contention of the appellant is that the court erred in giving the instructions which it gave upon the subject of exemplary damages. The appellant's objection goes not to the form or substance of these instructions, but is based upon its claim that as against this appellant there is no sufficient evidence of malice or oppression to justify any verdict for exemplary damages, and hence the instructions upon that subject should not have been given.

It is sufficient to say that as to both the appellant and its codefendant Fitch the question of the right of the plaintiff to exemplary damages was an expressly pleaded and hotly contested issue in the case; and, this being so, we think the case ought not to be reversed because such an instruction was given, even if we should conclude upon a close examination of the law and facts of the case that there was not sufficient evidence to uphold the verdict against this particular appellant for exemplary damages.

This brings us to the precise question as to whether or not there was sufficient evidence in this regard to have justified any verdict against this appellant for such damages.

[3] Without undertaking to recite or review in extenso the evidence in this case, we deem it sufficient to say that in our opinion there is no sufficient evidence of malice, fraud, or oppression on the part of this appellant against the plaintiff herein to warrant a verdict for exemplary damages in any sum. As between this plaintiff and this appellant, no relation whatever is shown out of which any imputation of actual ill will or malice could arise; nor is there a particle of evidence of personal ill will or malice as between any of the appellant's officers, agents, or employees and this plaintiff. He was apparently unknown to each and every one of them up to and including the moment of his assault and detention; nor is there a particle of evidence that in making such assault and detention his captors and assailants bore toward him any other ill will or malice than they or any of them would have nourished and manifested toward any other person actively engaged in the unlawful diversion of destroying the property of their employer. That they may have acted with unnecessary force and violence in assaulting and arresting the plaintiff would not suffice to justify a verdict against this appellant for exemplary damages, in the absence of a showing that the superior officers of the corporation, having authority to bind it by their directions to its subordinate employees, had either expressly sanctioned these excessive acts of violence, or had subsequently ratified the same with a full knowledge of their unlawful extent and character. It is, however, claimed by the respondent that there is sufficient evidence of such ratification as will suffice to uphold the verdict for exemplary damages rendered against the appellant herein, and that it is to be found in three distinct forms in this record. The first

of these is in the evidence of the action of the defendant Fitch when the battered and bloody plaintiff was brought into his presence by his captors and assailants. There is no proof that Fitch had any prior or other knowledge of him, or bore any ill will or malice toward him than that engendered by the assertions of his subordinates that he had been seized and brought into his presence as one guilty of stoning his employer's cars. Had he been so guilty, the action of Fitch in insisting upon his further arrest and punishment at the hands of the public officers and administrators of justice would have been justified, and could not be urged as any evidence of either ill will, fraud, oppression, or malice, either chargeable to him or imputable to his employer.

The second set of facts upon which the respondent relies refers to the acts and conduct of James F. Sheehan, one of the appellant's attorneys, in court on the following day and the next two or three days, wherein he sought to have the plaintiff held for trial upon the charge of stoning the cars of the appellant. The action of said Sheehan in that regard cannot, however, be held to amount to a ratification of any prior wrongful acts on the part of the appellant's other employees so as to render it liable in exemplary damages, for the twofold reason that as an attorney at law the said Sheehan had no authority to bind the appellant to a ratification of any such acts, and that, even if he had been shown to possess such authority, he is not shown to have acted with full or any knowledge of the said wrongful acts which it is claimed were ratified by what he said and did on those occasions.

The third set of facts upon which the respondent bases his claim of right to exemplary damages founded upon the alleged ratification of the acts of Fitch and his subordinates consists in the showing that said Fitch was subsequently advanced by the appellant to a superior position in its employment after the appellant is claimed to have had full knowledge of the circumstances, extent, and gravity of the plaintiff's injuries. We are satisfied, however, that the advancement of said Fitch, depending, as it well might, upon conditions entirely removed from any connection with plaintiff or his case, could not be sufficient in itself to give rise to an inference that said Fitch had been advanced as a mark of approval or by way of reward for his acts and conduct in relation to the plaintiff's assault and arrest.

[4] Our conclusion therefore is that there was no sufficient evidence in this case upon which to base the verdict rendered therein against the appellant for exemplary damages in any sum. In arriving at this conclusion we have given particular attention to the case of Davis v. Hearst, 160 Cal. 143, 116 Pac. 530, and to the very full discussion therein contained as to the application to be given to the provisions of section 3294 of the Civil Code, and as to the principles controlling the proof and finding of such actual ill will, malice in fact, evil motive, or malignant fraud or oppression, as will suffice to sustain a verdict for exemplary damages. It is to be remembered that this appellant is a corporation, and while it is undoubtedly the law that a corporation may become liable in exemplary damages where an act of one of its employees, done in ill will or in actual malice or under circumstances of fraud or oppression, is done with the knowledge or under the express direction of its superior officials having power to bind the corporation, or, if done without such knowledge or direction, is thereafter ratified by such officials, with full knowledge as to the willful and malicious quality of such acts, no such conditions are presented by the evidence in the case at bar.

It follows that the judgment must be modified by striking therefrom the specific portion thereof which awards exemplary damages to the respondent.

[5] This brings us to the final contention urged by the appellant, which is that, since the jury by its verdict in favor of the appellant's codefendant Fitch exonerated the latter from liability for the injuries of which the plaintiff complains, it must necessarily be held to have also exonerated the appellant as the employer of Fitch from liability for his acts as its employee. In making this contention the appellant relies upon the cases of Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171, and Thompson v. Southern Pacific Co., 31 Cal. App. 567, 161 Pac. 21, and also upon certain cases cited from other jurisdictions. These cases are, however, distinguishable and are in fact distinguished from the case at bar under the authority of Benson v. Southern Pacific Co., 177 Cal. 777, 171 Pac. 948, wherein it is stated that, where the act of the employee was one for which the employer was liable only under the application of the rule of respondeat superior, the doctrine laid down in Bradley v. Rosenthal and the other above-cited cases might be applied; but that the principle invoked in those cases was not to be given application to a case where the employee was acting under the direction of his employer, who was therefore liable not merely under the rule of respondeat superior, but rather as a joint participant in the acts complained of, as where the act was that of an employee of a railroad in running a train at a negligent rate of speed, and was done under the rules of the railroad requiring such a speed. This principle and the case of Benson v. Southern Pacific Co., supra, which sustains it, have application, in our opinion, to the facts of the case at bar. The defendant Fitch, in sending forth patrolmen and guards,

who wrongfully assaulted and falsely imprisoned the plaintiff, was acting under the general directions of the superior officials of the appellant, which directions, under the circumstances attending their issuance, were broad enough to contemplate the use of force and violence if necessary in repelling the assaults of strikers or their sympathizers upon those operating the appellant's cars, or in arresting such of these as were injuring or destroying its property. In carrying into effect these instructions Fitch and his underlings were but obeying orders, and if they exceeded their duty in so doing through a mistaken excess of zeal their principal would be liable not merely under the doctrine of respondeat superior, but as a joint participant in their wrongful acts.

We think that any further points urged by the appellant are covered by the foregoing discussion.

[6] The judgment will be modified by striking therefrom the item of $500 assessed as exemplary damages, but as to the other items thereof will be and is hereby affirmed; each party to pay its costs upon this appeal.

We concur: WOOD, Presiding Justice pro tem; KERRIGAN, J.

(50 Cal. App. 764)

ANDREWS v. PANAMA OIL CO. et al.

(Civ. 3244.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1920.)

1. Corporations 🔑232(3)—Stockholders held not liable for excess of par value of stock over property delivered therefor.

Directors of a corporation may be honestly mistaken as to the value of property taken in exchange for corporate stock, and, in the absence of proof that their overvaluation was not the result of innocent mistake, the stockholders cannot be held liable to corporate creditors for any difference between the true worth of the property and the par value of the stock; it not being sufficient to prove merely that the property was overvalued in the exchange, and the fraudulent intent must be clearly shown.

2. Corporations 🔑269(1)—Burden of proving notice of overvaluation of property given for stock on one asserting fraud.

The burden of alleging and proving notice of overvaluation of property given for corporate stock by stockholders who are not subscribers to the stock is cast on the party who would advantage himself of the responsibility resulting from the fraud.

3. Corporations 🔑244(7)—Innocent purchaser of stock not liable for difference between true worth of property and par value.

Stockholders who are not subscribers to the stock of a corporation do not assume the unpaid portion of the subscription price, when it appears they have accepted stock ostensibly fully paid, but in reality issued as such in exchange for property at a gross overvaluation, where they have no knowledge of the transaction through which the watered stock was issued.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Claud B. Andrews against the Panama Oil Company, and others. From an adverse judgment, plaintiff appeals. Affirmed.

Henry K. Norton, Roy V. Rhodes, and Wilbur Bassett, all of Los Angeles, for appellant.

John A. Powell, Goodwin & Morgrage, and C. C. Mishler, all of Los Angeles, for respondents.

WELLER, J. Plaintiff seeks by this suit to subject alleged unpaid subscriptions of the defendants, as stockholders, to the payment of the corporation's indebtedness. The Panama Oil Company was organized under the laws of California in May, 1912, with an authorized capital stock of 2,000,000 shares, of the par value of $1 each. On May 24, 1912, one J. B. Hedrick offered to transfer to the corporation, in exchange for all of its capital stock fully paid, certain property, consisting of stock in another oil company, an option in favor of Hedrick and a lease on oil lands in Kern county. The board of directors of the Panama Oil Company accepted this offer, reciting in the resolution of acceptance that in their opinion the property offered was worth fully the sum of $2,000,000. Pursuant to the order of the board of directors, all of the stock was issued to Hedrick as fully paid, on his conveying to the corporation the property offered in exchange. Thereafter the Panama Oil Company became indebted to the American Contracting & Drilling Company, and, on July 12, 1913, in full payment and satisfaction of its indebtedness, executed to the latter corporation its promissory note for the sum of $11,525.03, due six months after date, bearing interest at 7 per cent. per annum. This note was assigned, in good faith and for value, before its maturity, to the American Well & Prospecting Company, and by it transferred to the plaintiff for collection after it became due by its terms. On March 6, 1916, the Panama Oil Company forfeited its charter for nonpayment of its license tax, being at that time and ever since wholly insolvent and without assets of any kind. The defendants, other than Wilbert Morgrage, became the owners of stock in the Panama Oil Company through purchase from Hedrick or his assigns, subsequent to the transaction by which he acquired the stock.

The court found that Morgrage never was a stockholder of the corporation. This find-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ing is attacked as not being justified by the evidence; but, for reasons which will presently appear, it is unnecessary to consider the sufficiency of the evidence on this point. It was stipulated at the trial that at the time the stock was issued to Hedrick, the real market value of the property exchanged by him for the stock was $500,000, and that the American Contracting & Drilling Company accepted the note with full knowledge that all of the stock of the Panama Oil Company had been issued to Hedrick as fully paid and nonassessable, in exchange for property of the market value of $500.000 and no more.

It is not alleged in the complaint that any of the defendants were aware of the dealings between the Panama Oil Company and Hedrick, and no proof was offered tending to show that any of them had any knowledge or notice of the manner in which Hedrick became the owner of the stock. The complaint does not aver that the defendants were subscribers to the stock, but states merely that on the 4th day of March, 1914, they were the owners and holders of stock of the Panama Oil Company. We are unable to determine from the record that any of the defendants was a stockholder at the time of the execution of the note on which plaintiff sues, or that credit was extended to the corporation on the faith of their unpaid subscriptions. As we understand the theory of plaintiff, gathered from the record and the briefs, it is contended that, where stock is exchanged for property, a conclusive presumption of fraud arises upon a showing of disparity between the actual value of the property and the par value of the stock, creating a personal liability for the difference which attaches to the holder of any stock so issued, regardless of his knowledge of or participation in the transaction. The complaint alleges merely that the corporation had not received from the defendants, or the former owners of the stock, more than 25 cents per share. No proof appears in the record of bad faith on the part of the directors who acted on Hedrick's offer. The inference of fraud must rest entirely upon the fact that the property received in exchange for the stock was overvalued, as shown by the stipulation that it was worth only $500,000.

[1-3] Expressions of the courts in some of the earlier cases in this state might seem to imply force to appellant's argument. The trend of the later decisions, however, is to apply to this class of cases the same principles as pertain to fraud in other business dealings. It is not sufficient to prove merely that property was overvalued in an exchange for stock, but it must be clearly shown that it was done with fraudulent intent. Directors may be honestly mistaken as to the value of the property, and in the absence of proof that their overvaluation was not the result of an innocent mistake, the stockholders cannot be held liable for any difference between the true worth of the property and the par value of the stock. Herron Co. v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265. Stockholders who are not subscribers to the stock of a corporation are held to assume the unpaid portion of the subscription price when it appears they have accepted stock ostensibly fully paid, but in reality issued as such in exchange for property at a gross overvaluation, with knowledge of the transaction through which the watered stock was issued. Such guilty knowledge is essential to bind the purchaser of watered stock to respond to an equitable call in behalf of the creditors of the corporation. The burden of alleging and proving notice of the taint in the original transaction in cast upon the party who would advantage himself of the responsibility resulting from the fraud. Rhode v. Dock-Hop Co., 194 Pac. 11. Any other rule would subject the prospective purchaser of stock in a corporation to unjust hardship. He would not be permitted to rely upon the records of the corporation, but would be required to investigate the bona fides of all trades previously made by the company, and, in addition, have an appraisement of all its property, at the time of its acquisition, under penalty of assuming to pay any difference between the value of the property and the stock issued in payment therefor when demanded by creditors of the corporation.

The record in the instant case fails to disclose any intentional fraud perpetrated by the directors of the Panama Oil Company in the negotiations with Hedrick, or that they knew that the value of the property taken in exchange for the stock was less than the par value of the stock. As before stated, there is nothing tending to implicate either of the defendants in the deal, or to bring home to them notice of any facts which would put them on inquiry as to the fairness of the exchange. So far as appears, they were innocent purchasers, and therefore cannot be held liable for any portion of the subscription price which might be construed to have been unpaid by Hedrick when the stock was transferred to him by the corporation as fully paid.

For these reasons, it is not necessary to consider any other points raised by appellant.

Judgment affirmed.

We concur: **FINLAYSON, P. J.; THOMAS, J.**

50 Cal. App. 797

Ex parte RIDER. (Cr. 757.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1920.)

1. Criminal law ⚷641(1)—Defendant in jail entitled to consult counsel without presence of objectionable third persons.

Under Const. art. 1, § 13, declaring that in criminal prosecutions the accused shall have the right to appear and defend in person and with counsel, and in view of Pen. Code, § 825, providing that a prisoner in jail may be visited by his counsel, one accused of felony is entitled to consult with his or her attorney in private, without the presence of objectionable third persons, for the denial of such a right is the denial of the right to defend by counsel.

2. Habeas corpus ⚷13—Writ may issue to inquire into unlawful restraint of liberty of one properly in custody.

Under Pen. Code, § 1473, writ of habeas corpus may be issued to inquire into an unlawful restraint of the liberty of one properly in custody.

3. Habeas corpus ⚷25(1)—Writ may issue to compel authorities to allow petitioner, who was in custody, to consult with attorney.

Though petitioner was confined to Juvenile Hall under a valid commitment issued out of the juvenile court, yet where she was accused of a felony, and so entitled under Const. art. 1, § 13, and Pen. Code, § 825, to be represented by counsel, and for that purpose to have private conferences with counsel, she may obtain that right by habeas corpus, and compel the superintendent of the Juvenile Hall to allow her to consult counsel without the presence of objectionable third persons, for Pen. Code, § 1473, declares that every person unlawfully imprisoned or restrained of his liberty may prosecute a writ of habeas corpus to inquire into the cause of the imprisonment or restraint, and the denial of the right to counsel is a restraint of liberty.

In the matter of the application of Jane Rider for writ of habeas corpus to be directed to the Superintendent of Juvenile Hall, Los Angeles County, to secure petitioner the right to consult her attorney without the presence of third persons objectionable to her. Writ granted.

J. Morgan Marmaduke, of Los Angeles, for petitioner.

Thomas Lee Woolwine, Dist. Atty., and A. H. Van Cott, both of Los Angeles, for respondent.

FINLAYSON, P. J. Petitioner, a ward of the juvenile court for Los Angeles county, complains that she is unlawfully restrained of her liberty, in that she is denied the right of private consultation with her attorney to enable her to prepare for her defense on a criminal charge. She therefore seeks by habeas corpus an order that will effectually safeguard such right. The allegations of her petition, the truth of which are admitted by respondent, supplemented by admissions in open court, establish the following state of facts:

A complaint has been filed in the superior court of Los Angeles county, charging petitioner with the commission of a felony, and her preliminary examination thereon is about to take place. She is now detained in Juvenile Hall, pursuant to an order of the juvenile court in and for that county. Respondent, who is the superintendent of Juvenile Hall, refuses to permit petitioner to consult with her attorney, save in respondent's presence or in the presence and hearing of some other third person whose presence is objectionable to petitioner, thereby depriving her of all opportunity to consult freely and frankly with her counsel and preserve the sanctity of their confidential communications. A reasonable opportunity for consultation between petitioner and her attorney is necessary to enable the former to prepare for her hearing on the criminal complaint charging her with a felony. Application to the superior court for relief having been denied, petitioner seeks a remedy here.

[1] The right of an accused, confined in jail or other place of detention pending a trial of the charge against him, to have an opportunity to consult freely with his counsel without any third person, whose presence is objectionable to the accused, being present to hear what passes between the accused and his counsel, is one of the fundamental rights guaranteed by the American criminal law—a right that no Legislature or court can ignore or violate. In this state, the right of an accused to consult with his counsel is guaranteed by the Constitution, which, in section 13 of article 1, expressly declares that "in criminal prosecutions, in any court whatever, the party accused shall have the right to * * * appear and defend, in person and with counsel." This clause of the Constitution unquestionably was adopted to secure to the accused person all the benefits which may flow from the employment of counsel to conduct his defense. To afford him those benefits it is essential that he should be allowed to consult with his counsel, not only during the actual trial, but prior thereto, in order to prepare for his defense. The privilege of the presence of counsel upon the trial would be a poor concession, if the right of consultation with such counsel prior to the trial were denied. It is equally essential to the enjoyment of this constitutional guaranty that the accused should have the right to a private consultation with his counsel. As said by the Oklahoma Criminal Court of Appeals:

"It would be a cheap subterfuge of and a shameless mockery upon justice for the state to put a man on trial in its courts, charged with an offense which involved his life, liberty, or character, and then place him in such a position that he could not prepare to make his defense. It would be just as reasonable to place shackles upon a man's limbs, and then tell him that it is his right and duty to defend himself against an impending physical assault. If the right of defense exists, it includes and carries with it the right of such freedom of action as is essential and necessary to make such defense complete. In fact, there can be no such thing as a legal trial, unless both parties are allowed a reasonable opportunity to prepare to vindicate their rights. * * * It therefore necessarily follows that it is the absolute right of parties charged with crime to consult privately with their attorneys, and that it is an illegal abridgment of this right for a sheriff, jailer, or other officer to deny to a defendant the right to consult his attorneys, except in the presence of such officer. * * * It is the duty of officers having the custody of persons charged with crime to afford them a reasonable opportunity to privately consult with their attorneys, without having other persons present, taking such precautions as may be necessary, according to the circumstances of each case, to prevent the escape of such prisoner." State ex rel. Tucker v. Davis, 9 Okl. Cr. 94, 130 Pac. 962, 44 L. R. A. (N. S.) 1083.

In this state the Legislature has expressly provided that a prisoner in jail may be visited by his counsel, and that any officer having charge of the prisoner who willfully refuses or neglects to allow the attorney to visit the prisoner is guilty of a misdemeanor. Pen. Code, § 825.

[2, 3] The respondent to the writ concedes that, by denying to petitioner the right of private consultation with her counsel, she has been denied a right guaranteed her by the Constitution, but contends—and this is the sole point urged in opposition to the writ —that habeas corpus is not the proper remedy. Respondent's argument, as we understand it, is substantially this: Petitioner is lawfully confined in Juvenile Hall under a valid commitment issued out of the juvenile court; therefore she cannot be discharged from custody; habeas corpus will lie only where the person on whose behalf the writ is sought is unlawfully imprisoned; ergo, so the argument runs, petitioner is not entitled to habeas corpus, since in any event she must remain in Juvenile Hall in the custody of respondent.

Respondent's argument places too narrow limits upon the high prerogative writ of habeas corpus, the right whereto is guaranteed by the Constitution. By express statutory enactment, it may issue in all cases where the petitioner is unlawfully "restrained of his liberty," as well as where he is unlawfully imprisoned. Section 1473 of the Penal Code provides:

> "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint."

The office of the writ is to afford the citizen a speedy and effective method of securing the removal of any unlawful restraint upon his liberty; and the statute which confers the right has always been construed in favor of the liberty of the citizen. We think that a person may be said to be unlawfully "restrained of his liberty," so as to be entitled to the writ of habeas corpus, when, though lawfully in custody, he is deprived of some right to which, even in his confinement, he is lawfully entitled under the Constitution or laws of this state or the United States, the deprivation whereof serves to make his imprisonment more onerous than the law allows, or curtails, to a greater extent than the law permits even in his confinement, his freedom to go when and where he likes. In Commonwealth v. Ridgway, 2 Ashm. (Pa.) 247, it was said that, whenever a person is deprived of the privilege of going when and where he pleases, he is restrained of his liberty, and has a right to inquire if that restraint be illegal and wrongful, and that whether it be exercised by a jailer, constable, or private individual. Here petitioner is denied the right to go to some place in Juvenile Hall where she may exercise her constitutional right to consult in private with her counsel. To the extent that she thus is denied the right to go to some appropriately secluded place in Juvenile Hall, where she may consult privately with her counsel, to that extent is she denied the privilege of going where she has the right to go. As said by the Oklahoma court in the case cited supra:

> "If the right of defense exists, it includes and carries with it the right of such freedom of action as is essential and necessary to make such defense complete."

No one, we think, would be so temerarious as to question the right of one to the writ of habeas corpus who, being lawfully in jail awaiting trial on a criminal charge, should be needlessly put in irons. In such cases the only legal ground for any incarceration whatever is that thereby the escape of the accused may be prevented pending a judicial determination of his guilt or innocence; and any physical restraint beyond that provided by the law for that purpose would be an unlawful restraint of his liberty within the meaning of the Habeas Corpus Act. So here, though petitioner is lawfully in Juvenile Hall, and her restraint is, to that extent, a lawful restraint of her liberty, the restraint passes the bounds of lawfulness when her jailer restrains her from engaging in a private consultation with her attorney, at some appropriate place in the building wherein she is confined, to the end that thereby she may prepare for her defense.

Constraint need not consist of actual physical force. Conduct inducing a reasonable apprehension of force may be sufficient to restrain one of his liberty. Hebrew v. Pulis, 73 N. J. Law, 621, 64 Atl. 121, 7 L. R. A. (N. S.) 580, 118 Am. St. Rep. 716. If the respondent insists upon being within the presence and hearing of petitioner and her counsel whilst the latter are engaged in consultation, under such circumstances that, if petitioner objects to such arrangement, she will be forcibly deprived of all opportunity for consultation, petitioner most certainly is restrained of her liberty within the letter and spirit of section 1473 of the Penal Code, and has the right to have the legality of that restraint inquired into on habeas corpus.

It is ordered that respondent, Ianthe Densmore, superintendent of Juvenile Hall, be and she is hereby ordered and directed, upon request of petitioner or her counsel, and at all reasonable times, to permit petitioner to consult privately with her attorney in such place and under such circumstances as will afford reasonable opportunity for absolute privacy of consultation.

We concur: THOMAS, J.; WELLER, J.

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50 Cal. App. 687

CITY ST. IMPROVEMENT CO. v. WATSON et al. (Civ. 2600.)

(District Court of Appeal, First District, Division 1, California. Dec. 29, 1920. Hearing Denied by Supreme Court Feb. 24, 1921.)

1. Municipal corporations ⟹446 — Street assessment not invalid for delay in obtaining extension of time to complete work.

Under the Improvement Act, particularly the curative provisions of sections 26, 82, a street assessment cannot be declared invalid on account of a delay of two days in obtaining an extension of time in which to complete the work.

2. Municipal corporations ⟹553—Assessment, diagram, and warrant properly admitted in evidence in action to foreclose lien.

In an action to foreclose a street assessment lien, the assessment diagram and warrant were properly admitted in evidence, the allegations of the complaint as to such matters and the making of due return by the contractor having been admitted by the answer.

3. Pleading ⟹403(2)—Omission in complaint in action to foreclose street assessment lien cured by answer.

In an action to foreclose a street assessment lien, omission of the complaint to state the time fixed by the superintendent of streets for the commencement and completion of the work was cured by the allegations of the answer stating such facts.

4. Municipal corporations ⟹551 — Complaint in action to foreclose assessment sufficient in allegation of performance.

Complaint, in action to foreclose street assessment lien, alleging the making by the superintendent of streets of an assessment in a specified amount at a uniform rate per front foot, etc., and that "all of said assessment roll was duly made in the manner and form prescribed by law," *held* sufficient in its allegations as to performance.

5. Municipal corporations ⟹488, 489(8) — Owner should have appealed to council for correction of assessment as to amount.

Under Improvement Act, § 26, if a street improvement assessment was incorrect as to amount, an objecting owner should have appealed to the council to have it corrected.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by the City Street Improvement Company, against Sarah J. Watson and the Bank of St. Helena. From judgment foreclosing street assessment lien, defendant Watson appeals. Judgment affirmed.

L. C. Pistolesi, of San Francisco (O. F. Meldon, of Sacramento, of counsel), for appellant.

Platt Kent, of San Francisco, for respondent.

Johnson & Shaw, of Oakland, R. M. F. Soto, Fabius T. Finch, Randolph V. Whiting, Paul F. Fratessa, John B. Gartland, and Hobart K. Eells, all of San Francisco, amici curiæ.

RICHARDS, J. This is an appeal from a judgment foreclosing a lien for an assessment levied for certain street work in the city of St. Helena under the provisions of the Improvement Act of 1911. The complaint alleges, in due form, the performance of all things required by the Improvement Act to be done up to the signing of the contract on the 7th day of November, 1912. It alleges the execution of the contract, but does not contain any statement as to what time was therein fixed by the superintendent of streets for the beginning of the work or the completion thereof, other than the general allegation that the superintendent of streets "fixed the time for beginning said work and the time for completing said work." The complaint then goes on to allege that the plaintiff "did and caused to be done all the work in said contract * * * and duly performed on its part in every respect the said work according to * * * the terms of the contract"; that the work was approved and accepted by the superintendent of streets on the 16th day of May, 1913, and that thereupon the assessment and diagram for the work was made by the superintendent of streets, in due form, with his warrant and the engineer's certificate attached, their recordation, issuance to plaintiff, demand of plaintiff for payment, return on the assessment, its recordation; and that no appeal was taken to the city council. The above are not all the allegations of the complaint, but a skeleton of such as are material in this appeal.

The defendant Bank of St. Helena defaulted. The defendant Sarah J. Watson, who will hereafter be called defendant, appeared first by demurrer, both general and special, in which the complaint was demurred to specially upon the ground that the complaint was uncertain, in that it could not be ascertained therefrom the time fixed by the superintendent of streets for the commencement or the completion of the work. Other grounds of special demurrer are alleged, but these are the only special grounds urged on this appeal. The demurrer was overruled, whereupon the defendant answered, admitting all the allegations of the complaint excepting that it was denied that the plaintiff had completed the work according to the terms of the contract, or within the time fixed therein, or according to the specifications for the work. The answer further set out in hæc verba the contract wherein it appears that the street superintendent fixed the 7th day of November, 1912, as the time for commencing the work and 90 days from the 7th day of November, 1912, as the time for completion, and alleges that no extension of time to complete the work was granted plaintiff until February 7, 1913, which was more than 90 days from November 7, 1912.

At the trial the plaintiff introduced in evidence the assessment, warrant, and diagram, and thereupon rested its case. The defendant offered to prove that the work was not completed within the 90 days fixed in the contract, and that the time for completion was not extended by the city council until February 7, 1913. Upon the objection of the plaintiff that the evidence proposed was incompetent, irrelevant, and immaterial, the court excluded it. No offer was made to show that the work was not completed within the time granted by the council on the 7th day of February, 1913.

The main question presented upon this appeal is whether, in view of the curative provisions of sections 26 and 82 of the Improvement Act of 1911 (St. 1911, p. 730), the alleged defect in failing to grant an extension in which to complete the work within the time limited by the contract, was cured.

Section 26 provides that—

> "No assessment, warrant, diagram or affidavit of demand and nonpayment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided, and said notices of improvement have been posted along the line of the work, as provided in section 5 of this act, before the passage of the resolution ordering the work to be done."

Section 82 reads as follows:

> "This act shall be liberally construed to the end that its purposes may be effective. No error, irregularity, informality, and no neglect or omission of any officer of the city, in any procedure taken hereunder, which does not directly affect the jurisdiction of the city council to order the improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council."

These sections will not stop inquiry concerning those parts of the proceedings which are essential to due process of law, that is, "jurisdictional." Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920.

It is claimed by the appellant that by failing to extend the time for completion of the contract within the time limited by the contract for its performance, jurisdiction was lost by the council. In other words, that the requirement that the time shall be extended during the time for the performance fixed in the contract is "jurisdictional," and the error in failing to so extend it is not one that could have been remedied by the council on appeal, and that therefore the defendant was not required to appeal to the council. The respondent contends that under the authority of Chase v. Trout, 146 Cal. 350, 80 Pac. 81, this requirement is not "jurisdictional," and that under the provisions of the act quoted above, the defect, if any, was cured.

In the case of City Street Improvement Co. v. Pearson, 185 Pac. 962, the court, in passing on the provisions of an ordinance of the city of San Francisco for doing street work, and the provisions of which in relation to appeal to the council were practically identical with section 26 of the Improvement Act of 1911, said:

> "Curative provisions in a law of this character may cure any defect that does not go to the jurisdiction of the board over the proceeding."
>
> "In any proceeding designed to subject the property of an individual to the burden of tax or assessment, certain elements are essential to constitute compliance with the mandates of the state or federal Constitutions. It is agreed on all hands that no curative act can deprive a property owner of the right to resist a pretended assessment which, if enforced, would deprive him of his property without due process of law or otherwise infringe his constitutional rights. But short of this, there is no more reason for denying to the statute before us than to that involved in Chase v. Trout, 146 Cal. 350, 80 Pac. 81, the effect of foreclosing any attack based upon the failure to pursue regularly or at all those steps which the Legislature was not bound to make a part of the statutory procedure. As is pointed out in Chase v. Trout, supra, the applicability of curative statutes is not to be determined solely by inquiring whether the steps omitted or defectively performed were 'jurisdictional.' The term 'jurisdictional' has been used in various senses. The power to levy an assessment or

impose a liability on private property is derived solely from the statute, and must be exercised in the manner laid down in the statute. In this sense, the jurisdiction of the board extends only to its right to act in the manner prescribed by the Legislature. But with respect to any steps which are not constitutionally necessary, the Legislature may, in the very act which requires these 'jurisdictional' steps to be taken, declare that unless objection is made at a certain time or in a certain way, a failure to take these steps shall not affect the validity of the proceeding. This is the plain meaning of the holding in Chase v. Trout, supra, and we do not doubt that it is equally applicable here." Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 660, 161 Pac. 113.

The foregoing was quoted with approval and applied to the "curative" clauses of the Improvement Act of 1911, in Watkinson v. Vaughn, 186 Pac. 753, and the court further said in pointing out the distinction between the so-called jurisdictional requirements called for by the statute and those jurisdictional requirements which are necessary for a compliance with "due process of law":

"This very question of what defects in street improvement proceedings could be cured under such provisions as those of section 16 and section 66 of the present act was considered at length in Chase v. Trout, 146 Cal. 350, 80 Pac. 81. The argument was there made that no so-called 'jurisdictional defect could be thus cured.' In response, however, to this argument the decision made a distinction between those so-called jurisdictional requirements which are called for by statute and those jurisdictional requirements which are necessary for a compliance with the constitutional provision that property shall not be taken without due process of law, or with other constitutional provisions, and it was held that, while failure to comply with jurisdictional requirements of the later class could not be cured, a failure to comply with those of the former class might be cured by action of the Legislature, since the Legislature had the right, in the first instance, to omit such requirements entirely. The discussion on this point is thus summed up in Chase v. Trout, supra (146 Cal. 359, 80 Pac. 84):

" 'The correct proposition is that, as the Legislature has power to devise any scheme for the assessment and levy of taxes for local improvements, provided such scheme includes such notice and opportunity for hearing to the owner of property taxed as will be sufficient to constitute the due process of law required by the Constitution, and otherwise complies with constitutional limitations and restrictions, so the Legislature, by a curative clause in the law establishing the scheme, may provide that the issuance of a bond, or the execution of a deed, in the enforcement of such levy or assessment, shall be conclusive evidence of the regularity of the performance of all the required steps in the proceeding, excepting those that are necessary to constitute the due process of law, or to comply with any other constitutional prerequisite. As to all these other statutory steps or acts, the same power which prescribes them is competent to declare that their nonobservance shall not be fatal to the validity of the tax, and that no inquiry may be made concerning them. This is sbstantially the effect of the statute in question here.' "

See, also, Baird v. Monroe, 150 Cal. 568, 89 Pac. 352; Board of Education v. Hyatt, 152 Cal. 515, 93 Pac. 117; Wilcox v. Engebretsen, 160 Cal. 292, 116 Pac. 750; Schaffer v. Smith, 169 Cal. 764, 147 Pac. 976.

Speaking of the very defects urged here, the court said in Chase v. Trout:

"The Legislature undoubtedly could have enacted a valid law, which would have authorized the extension of the contract after the time first fixed had expired, * * * or that the time to begin work need not be fixed in the contract. * * * Having such power, it likewise has power to declare that after the issuance of the bonds it shall be conclusively presumed that such directions, if any such exist, have been followed."

[1] From the overwhelming weight of authority from Chase v. Trout down, we are compelled to conclude that the assessment cannot now be declared to be invalid on account of the delay of two days in obtaining an extension of time in which to complete the work. It will be admitted that, leaving out of view the curative provisions of the act, the authorities are ample and uniform to the effect that the superintendent of streets and the city council have no power to revive or validate a dead contract, and that orders of extension made after the expiration of the time within which such contracts are by their terms to be performed are void. Beveridge v. Livingstone, 54 Cal. 54; Fanning v. Schammel, 68 Cal. 428, 9 Pac. 427; Dougherty v. Coffin, 69 Cal. 454, 10 Pac. 672; Dougherty v. Nevada Bank, 81 Cal. 162, 22 Pac. 513; Broch v. Luning, 89 Cal. 316, 26 Pac. 972; Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664, 1080; Kelso v. Cole, 121 Cal. 122, 53 Pac. 353; Union, etc., Co. v. Campbell, 2 Cal. App. 534, 84 Pac. 305. However, in none of these cases was the effect of the curative provisions of a statute such as are contained in the Improvement Act of 1911 given any consideration. These curative provisions were considered in the Trout v. Chase Case, and that case has never since been questioned.

It may be conceded that it is a "jurisdictional" requirement that the time must be extended within the time limit of the contract, but it is not one of the jurisdictional requirements necessary to constitute due process of law, and hence is cured.

Having arrived at the foregoing conclusion, and in view of the admissions in the answer that no appeal was taken to the council, and of the issuance of the assessment, diagram, and warrant and the return thereon, it follows that the evidence offered was properly excluded.

[2, 3] There was no error in admitting the assessment, diagram, and warrant in evi-

dence, for the allegations of the complaint as to these matters, and the making of a due return by the contractor, were admitted by the answer, and the plaintiff could have rested its case thereon. Raisch v. Hildebrandt, 146 Cal. 721, 81 Pac. 21. Nor was there any reversible error in overruling the special demurrer, as the omission to state the time fixed by the superintendent of streets for the commencement and completion of the work was cured by the allegations of the answer stating these facts. Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370; Daggett v. Gray, 110 Cal. 169, 42 Pac. 568; Burns v. Cushing, 96 Cal. 669, 31 Pac. 1124.

[4, 5] The only grounds urged in support of the general demurrer are that the bid of the plaintiff was made for the work on the basis of a stated price per foot, and there is no allegation as to the amount of work done, that is, as to the number of feet. The complaint alleges the making by the superintendent of streets of the assessment for $4,745.70. The assessment, which was in evidence, shows the assessment to have been made at a uniform rate per front foot and does not show any invalidity on its face. The allegation of the complaint that "all of said assessment roll was duly made in the manner and form prescribed by law" was admitted by the answer. If the assessment was incorrect as to amount, the defendant should have appealed to the council to have it corrected. Improvement Act of 1911, § 26; Bates v. Hadamson, 2 Cal. App. 574, 84 Pac. 51; McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010; Harney v. Benson, 113 Cal. 314, 45 Pac. 687. No evidence was offered by defendant in support of her denial that the work was performed according to the specifications, and no point is made by defendant relating thereto. The allegations of the complaint as to performance are sufficient. California Improvement Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802.

The judgment is affirmed.

We concur: BARDIN, Presiding Justice pro tem.; KERRIGAN, J.

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50 Cal. App. 708

EWING v. HAYWARD et al. (Civ. 2971.)

(District Court of Appeal, Second District, Division 2, California. Dec. 30, 1920.)

1. Partnership 🔑44—Defendants held not jointly liable in absence of proof of partnership.

In a seller's action against buyer and buyer's agents to recover the difference between the amount actually received for barley and the contracted sale price, defendants cannot be found jointly liable unless shown to have been partners. (Per Thomas, J.)

2. Evidence 🔑220(2)—Silence of corporate officer held not an admission.

In a suit against a corporation based on the controverted agency of a firm for it, wherein one partner testified that in the presence of defendant's president he spoke to a copartner about representing another company, with which the president did not appear to be connected, it was *held* that the president was under no obligation to speak, and hence his silence could not militate against the corporation defendant. (Per Thomas, J.)

3. Evidence 🔑471(31)—Conclusion of witness that one was president of a corporation incompetent.

A witness' impression that one was president of a corporation is but a conclusion, and as such is incompetent. (Per Thomas, J.)

4. Partnership 🔑13—Sharing loss in single transaction insufficient to establish.

Civ. Code § 2395, defines a partnership as the "association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them," so that an agreement between buyers to share the loss on a single transaction is insufficient proof of partnership. (Per Thomas, J.)

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

5. Principal and agent 🔑23(1)—Evidence held insufficient to establish agency.

In seller's action against buyers for damages for refusal to take goods, evidence *held* insufficient to establish that a firm of defendants was the agent of another defendant. (Per Thomas, J.)

6. Principal and agent 🔑19—Burden of proving agency rests on party alleging.

Agency is a fact, the burden of proving which rests upon the party affirming its existence. Per Thomas, J.)

7. Principal and agent 🔑119(1)—One relying on it must establish agent's authority.

Where it is sought to charge a principal upon a contract, the burden is upon plaintiff to show that the contracting agent had authority to enter into the contract. (Per Thomas, J.)

8. Principal and agent 🔑123(6)—Agent's authority not provable by his own declarations.

An agent's authority to contract must be proved by evidence aliunde, and not by the declarations of the agent himself. (Per Thomas, J.)

9. Evidence 🔑471(28)—Witness' supposition that orders were for company held a conclusion.

A witness' supposition that certain orders were for a company, and not an individual claimed to represent the company, *held* merely a conclusion and incompetent. (Per Thomas, J.)

10. Principal and agent 🔑145(4)—Party cannot hold both agent and undisclosed principal on contract.

Where one deals with another as principal, and afterwards discovers he was agent for an undisclosed principal, he may elect to hold either agent or principal, but not both, the agent being liable because credit was originally extended to him and the principal, on the theory that, having received the benefit of the contract, he must assume its burdens, but the contract is one, and cannot be split into two, to make both liable.

11. Principal and agent ⚷145(4)—One seeking to fasten liability must elect between agent and undisclosed principal.

The liability of an agent and his undisclosed principal is an alternative rather than a joint or joint and several liability, and either may be held, but not both, so it becomes the duty of the party seeking to fasten liability, after disclosure of agency and identity of principal, to elect which he will hold.

12. Principal and agent ⚷145(4)—Party seeking to fasten liability on undisclosed principal may join agent, but can have judgment against but one.

Where an alleged undisclosed principal denies the existence of the relation of principal and agent, the party seeking to recover on a contract may commence the action against both alleged undisclosed principal and his agent in order to ascertain the facts, but he cannot have judgment against both, and before the close of the case must elect.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by J. F. Ewing against H. C. Hayward and others, copartners doing business as Hayward, Rath & Marshall and individually, and another. Judgment against all of the defendants jointly, and the defendant Newmark Grain Company appeals. Reversed.

Emery & Rehart, of Los Angeles, for appellant.

Frank Birkhauser, of El Centro, for respondents.

THOMAS, J. Neither party to this appeal has given us any statement of the case. We have therefore been put to the labor of going through the pleadings, findings, etc., to get as best we could an understanding as to what the controversy is about.

As near as we have been able to ascertain from the record before us, the action is brought by plaintiff to recover on a certain contract, alleged to have been entered into between plaintiff and a copartnership doing business in Imperial county, this state, under the firm name and style of Hayward, Rath & Marshall, which copartnership, according to the allegations of the complaint, was and still is the local agent of appellant, the Newmark Grain Company. The contract referred to reads:

"No. 54. Store and Field Confirmation and Purchase. May 11, 1918. We, the undersigned, have this day entered into the following agreement, namely, to buy and sell the following named commodity: (Approximately) 800 sacks No. 1 feed barley, price $2.85 per cwt., 45# to bu., f. o. b. cars Rockwood, Calif. Terms, cash on delivery of grain. Certified public scale tag weights to govern. Seller agrees to furnish loader's affidavit as to the number of sacks loaded into car or cars. Settlement made through the buyer's and seller's banks only. Signed by the buyer, Hayward, Rath & Marshall, per M. C. Hayward. Signed by the seller, J. F. Ewing, per. Witnessed by Mrs. J. F. Ewing. Note: *Subject to our office confirmation.*" (Italics ours.)

Nothing appears in the record, to which our attention has been called, to explain what or who is meant by the sentence above italicized. At the time the agreement was entered into not one word was said by any one that the firm was acting as agent for anybody. Plaintiff testified that he supposed he was dealing with the firm there named only; nor was he depending upon evidence of any "holding out" or ostensible agency relationship on the part of that firm.

After the agreement was entered into, plaintiff, upon threshing his barley, tendered the same to Hayward, Rath & Marshall, the firm named in the contract, which tender was refused for reasons hereinafter shown. Thereupon plaintiff made an honest effort to sell at the same price elsewhere, but failed to do so for the reason that the market had declined, the best offer received by him for his barley being $2.15 per hundredweight. The action was then brought to recover the difference between the amount actually received for the barley and that which the firm contracted to pay, as set forth in the contract above quoted.

The complaint alleges that plaintiff has performed all the terms and conditions of said contract on his part to be performed. The answer of the defendant copartnership and of the defendants Hayward, Rath & Marshall admits the making of the contract in question, but alleges that the same was made by them as brokers; while the answer of the Newmark Grain Company puts in issue every allegation of the complaint. On the issues thus formed the case went to trial, the court finding against all the defendants jointly for the sum of $495.52.

[1] Before proceeding with a consideration of the questions raised on this appeal, attention is called to the fact that a finding that the defendants are jointly liable in this case could have been entered only in the event that they were shown to have been partners, and partnership between the firm signing the agreement and this appealing defendant was not an issue before the trial court.

[2] The first point urged for reversal of the judgment is that no agency was proven. Plaintiff himself testified to the execution of the agreement in question; that at the time of its execution neither Mr. Hayward,

of the firm of Hayward, Rath & Marshall, nor any one connected with that firm, informed plaintiff as to whom the copartnership was buying for, or whether or not they were in fact agents for any one; that on June 1, 1918, when plaintiff attempted to deliver the barley referred to in said agreement, Mr. Hayward informed plaintiff that he, Mr. Hayward, had turned the matter over to Mr. Rath, and that the latter would take charge of the contracts; and that plaintiff then drove to El Centro, where he saw Mr. Rath. As to what transpired between Mr. Rath and plaintiff at El Centro, we are not informed. Plaintiff also testified that neither the Newmark Grain Company nor Hayward, Rath & Marshall ever recognized the contract or agreement in any manner, and that he was told by a member of the copartnership that the reason that firm could not accept the barley on their part was that they were acting for Newmark; that they could not get him to take it off their hands; that they were unable to dispose of it at the price named in the agreement, and that they were quitting on orders from Newmark.

On June 15, 1918, according to plaintiff's testimony, Hayward gave plaintiff a note, sending him "over to Newmark Grain Company with it," at which place he delivered the same to a Mr. Shank. Omitting the heading, this note is as follows:

> "Brawley, California, June 15, 1918. Newmark Grain Co., Brawley, Calif. Dear Sir: Mr. J. F. Ewing has just come in with 100 sax barley, which was part of your contract with us. I can't take it in here, so am sending it to you, as I have no shipping instructions covering same. You may have. Hayward, Rath & Marshall. H."

On the presentation of this note to Mr. Shank—presumably in charge of the Newmark Grain Company's place of business at Brawley—a Mr. Wolz wrote the following answer:

> "Hayward, Rath & Marshall: We have no barley bought from Mr. Ewing, nor do I know anything about this being any part of any contract between Hayward, Rath & Marshall and the Newmark Grain Co., & cannot store this barley for you. Yours truly, F. A. Wolz."

As to the connection of Mr. Shank and Mr. Wolz with the defendant corporation, however, we are given no light, except as we may conjecture.

The witness Hayward, testifying for plaintiff, said that he was buying for the Newmark Grain Company, and that he had previously bought grain at Brawley and shipped it to that company, which grain was received, accepted, and paid for by the latter. In regard to a conversation had with Mr. M. N. Newmark, of the Newmark Grain Company, on the night of May 10, 1918, wherein the latter talked about buying a considerable amount of barley, Hayward testified as follows:

> "I told them I had bought that day through the instruction of Mr. Rath to start to buy at $2.85. I had purchased whatever the amount was. I don't recollect just now what the amount was; I turned that over to Mr. Newmark and told him I would get 6,000 more sacks Saturday, and he told me to go ahead and buy it, and the conversation was general what we should do if the price went up, and what we should do if it went down, and any further instructions I was to get from Mr. Rath. If there was any change in the order to stop buying, I was to get that from Mr. Rath."

This witness also testified that Newmark gave him orders to purchase 6,000 sacks of barley at $2.85 per hundredweight, and as to the grain the orders for which he claims were turned over to Mr. Newmark on Friday evening, May 10, 1918, at the Barbara Worth Hotel in El Centro; that it was bought on the orders of and for Mr. Newmark.

The witness Rath, also testifying for plaintiff, said that Mr. Newmark notified him to inform Mr. Hayward that "the deal was off"; that in their conversation with Mr. Newmark about buying grain, plaintiff's name was not mentioned; that the witness had stated to Hayward, in the presence of Mr. Newmark, that they (Hayward, Rath & Marshall) were going to represent the "Newmark Company," and any further information or data that Mr. Newmark wanted Mr. Hayward should feel free in posting him thereon, and that Mr. Newmark "afterward remarked to me that that was a very liberal introduction." In answer to the question, "What relation did Mr. Newmark sustain to the Newmark Grain Company?" put to Mr. Rath on cross-examination, the witness replied, "My impression is that he is president of the Newmark Grain Company," and volunteered the further information that Mr. Newmark transacts all business for the Newmark Grain Company, and that he (Rath) had had dealings with Mr. Newmark which the corporation thereafter "carried out and paid for."

[3] Unless the "Newmark Company" and the "Newmark Grain Company" are different names for the same concern, being used interchangeably—and there is nothing in the record to show that such is the case—the silence of Mr. Newmark, assuming him to be president of the latter named concern, cannot militate against that corporation, for the reason that when Mr. Rath spoke to Mr. Hayward concerning a firm with which it is not even insinuated that Mr. Newmark had any connection, namely, the "Newmark Company," the latter was under no obligation to speak. Furthermore, the impression of Mr. Rath that Newmark was president of any company is but a conclusion, and, being such, is

incompetent. The purported information volunteered by him as to his dealings with Newmark, and that the deals thus entered into were carried out by the Newmark Grain Company, does not even intimate that any agency existed between the copartnership and the corporation heretofore referred to. Nor would the facts brought out by the volunteer statement prove that Mr. Newmark was the president of the corporation.

Testifying for the defendants, Newmark stated that "between 8 and 9 in the morning of the 11th of May, 1918," he gave orders to Rath not to buy any more grain at the present time, "expecting us to buy it of him." This was 11 or 12 hours before plaintiff claims to have executed the agreement in controversy, and the testimony is uncontradicted. With reference to some barley which had previously been bought by Mr. Rath from a Japanese—one Yukewa—Mr. Newmark testified that—

> "Three or four weeks after this barley had been bought Mr. Rath explained in a letter to the firm that the reason he didn't want to tell me about the purchase of this barley, I felt so bad he did not want me to feel any worse."

He also testified that he never authorized Hayward, Rath & Marshall to act as agents for him. During his conversation with Mr. Rath in the Barbara Worth Hotel at El Centro, on Saturday night, May 11, 1918, in the presence of a Mr. Seligman, at which time Mr. Rath told Newmark about buying 6,000 bags of choice barley from a Japanese at $2.85 per hundredweight, Newmark says that he asked Rath the following question. "How did you come to buy that after giving you strict instructions not to buy any barley, expecting us to take it?" to which Mr. Rath replied that "he was compromised with the man, and had agreed to take it," whereupon he (Newmark) said to Rath:

> "To show you I am a sport, if Mr. Seligman is willing we will let you take this barley and handle it on a joint account; that is, each one to stand their proportion of the loss on this purchase."

In addition to the foregoing, respondent claims that while the witness Rath was being cross-examined by the attorney for the defendant corporation, Mr. Newmark stated, in open court, as follows:

> "I grant you everything you say. We don't need this testimony of the orders, or the attorney trying to draw the thing out for an hour or so; it doesn't gain anything. I agree with Mr. Rath that we gave him orders to ship, and what is the use of bringing these documents [telegrams] up here. It won't do you any good or the attorneys either."

[4] Respondent contends that the agency "was clearly established, not only by the declarations of the agents, but likewise by written communications passing between the Newmark Grain Company and the agents," as also by the declarations above set forth, the last of which respondent designates as an "admission." But, to establish such agency before this court, none of the written communications referred to is set forth in the record before us. We are really at a loss to understand how, under our statute, the agreement by Mr. Newmark to share the loss in relation to one isolated transaction can prove the existence of either an agency or partnership agreement between the copartnership firm and the defendant corporation. Indeed, if any relation were created at all, it would, in our opinion, be with Newmark personally. Section 2395 of the Civil Code defines partnership as the "association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." In the construction of this section our courts have held that, by agreement in some way, each party must share in the losses as well as the profits (Wheeler v. Farmer, 38 Cal. 203); for there is an equal liability for the losses which the law will imply. Irvine & Muir L. Co. v. Holmes, 26 Cal. App. 453, 147 Pac. 229. An agreement to share the loss on a single transaction does not and cannot establish a partnership.

[5] So far as the "admission" is concerned, there is nothing in the record to which our attention has been called that could have compromised Mr. Newmark personally or the Newmark Grain Company. There is no explanation as to whom it was understood Newmark referred when he spoke of "expecting *us* to buy it of him," or whom he was understood to speak for when he said "*we* will let you take this barley and handle it on a joint account, that is, each one to stand their proportion of the loss on this purchase;" or what "*firm*" he referred to when he testified that Mr. Rath had written "to the firm" his reasons for not wanting to tell Newmark about the purchase of certain barley; or, finally, when he made, in open court, the "admission" already quoted, wherein it is claimed he said, "I agree with Mr. Rath that *we* gave him orders to ship," etc. The only reasonable construction that can be given this testimony, therefore, is when it is considered in the light of *all* the testimony and the subjects under discussion at the time of the conversations in reference to which the ambiguity appears. So construed, the "us" and the "we" first above italicized will be seen to be none other than Mr. Seligman and Mr. Newmark, and the "firm" the corporation in which Newmark testified that he had an interest, namely, the Great Western Milling Company; while the "we," employed by Mr. Newmark in his so-called "admission" must have referred to none other than himself and those "whom he represented or had connections with what led to the allied interests"—parties whose names are not dis-

closed by the record. If this be so, then the evidence wholly fails to establish any authority of the firm of Hayward, Rath & Marshall that would constitute them agents of this appellant.

As we have seen, the evidence establishes no partnership. Had such been the case, however, that is, had such a partnership existed, evidence of that fact would have been inadmissible, for the reason already stated—the absence of any such issue.

[6-8] Agency is a fact, the burden of proving which rests upon the party affirming its existence. Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425. In this case that party is the plaintiff. Where, as here, it is claimed that the contract was made with an agent, and because whereof it is sought to charge the principal thereunder, the burden is upon the plaintiff to show that the agent had authority from the principal to enter into the contract. This must be proved by evidence aliunde, and not by the declarations of the agents themselves. Petterson v. Stockton, etc., Co., 134 Cal. 244, 66 Pac. 304; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Smith v. Liverpool, etc., Ins. Co., 107 Cal. 432, 40 Pac. 540; Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657. In the instant case, not even a declaration or statement was made to the plaintiff by said alleged agents, or by any one in their behalf, that they were acting as agents for anybody. Nor is there evidence of any "holding out," such as sometimes is the case when a principal intentionally, or by want of ordinary care, causes a third person to believe another to be an agent of such principal who in fact is not employed by him; the plaintiff testifying, as we have already seen, that he knew no one in the deal but Hayward, Rath & Marshall. There is nothing in the record, to which our attention has been called, aside from the declarations of the alleged agents themselves—and these were all made after the agreement in question was entered into—which proves the existence of the relation of principal and agent in this case; and, even if competent, the declarations referred to fall far short of that attainment. Under these circumstances, the absence of such relationship must be held to be an established fact.

[9] It would seem obvious that, unless the record discloses evidence competent to show that Mr. Newmark was an official or agent of the defendant corporation, clothed with authority to bind the latter by any statement made by him to third persons upon which reliance has been placed to their detriment, the judgment must be reversed. In our effort to discover such evidence, we have searched the record furnished us, with the result that the following is the only testimony to be found which in any way tends to identify Mr. Newmark. While the witness Hayward was on the stand he was asked the question, "Who is Mr. Newmark?" to which he replied, "That gentleman there," indicating Mr. Newmark; and, upon being further asked, "Who were the orders for; Mr. Newmark himself or the Newmark Grain Company, or some other person?" this same witness answered, "I suppose it was for the Newmark Grain Company." Clearly the latter question called for and the answer was but the conclusion of the witness, with no supporting evidence—manifestly incompetent.

The evidence being insufficient to support the finding of agency, the judgment cannot stand. It is therefore needless to discuss any other point urged.

The judgment is reversed as to the defendant Newmark Grain Company.

FINLAYSON, P. J. [10, 11] I concur in the judgment. Plaintiff, who is seeking to hold the Newmark Grain Company liable as an undisclosed principal, is not entitled to a judgment against that defendant and the other defendants also. When one party to a contract deals with another as principal and afterwards discovers that such party was in fact agent for an undisclosed principal, he may elect to hold either the agent, or, upon discovery, the principal; but he cannot hold both. The agent is liable because credit was originally extended to him in the belief that he was acting for himself. The undisclosed principal is liable on the theory that, having received the benefit of the contract made by his agent, he should assume its burdens. There is but one contract upon which the plaintiff in such an action can bring suit. The person with whom such plaintiff has directly contracted, the agent of the undisclosed principal, may be held liable on the contract as the real obligor, for he contracted in that capacity. Or, if the plaintiff in such an action so choose, he may treat the contract as the obligation of the undisclosed principal for whose benefit it was made, notwithstanding that, on the face of the contract, his agent appears to be the true obligor. There is, as we have said, but one contract in such cases. And though the plaintiff may elect to hold either one of two persons liable on that contract, either the agent or his undisclosed principal, he cannot make two contracts out of the one contract by seeking to hold each of those two persons liable severally as an independent obligor. Nor can he hold them both liable as joint obligors on one contract. He contracted with but one obligor, not two; and though he may elect to hold either one of the two liable as the obligor under the contract, he may not hold them both jointly liable, for to do so would be to give him two obligors where he contracted with, and for the liability of, but one. The result is that the liability of the agent and his undisclosed principal is an alternative rather than a joint or joint and several liability, and either may be so held, but not both. So we find that, according to the weight of authority, it becomes the duty of the creditor, after disclosure of the agency and the identity of the principal, to elect which of the two he will look to to carry out the agreement of the agent. Note to Murphy v. Hutchinson, 21 L. R. A. (N. S.) 786.

[12] It seems that if, as in the instant case, the alleged undisclosed principal denies the existence of the relation of principal and agent, the party seeking to recover on the contract may commence the action against both the alleged undisclosed principal and his agent, in order to ascertain the facts. But though the plaintiff may bring the action against both, the rule, as I understand it, is that the plaintiff in such an action cannot have judgment against both the undisclosed principal and his agent, but, before the close of the case, must elect whether he will take a judgment against one or the other. See Sessions v. Block, 40 Mo. App. 569; Pittsburg Plate Glass Co. v. Roquemore (Tex. Civ. App.) 88 S. W. 449; Weil v. Raymond, 142 Mass. 206, 7 N. E. 860; Tuthill v. Wilson, 90 N. Y. 423; Mattlage v. Poole, 15 Hun, 556.

The plaintiff, as perhaps it had the right to do, brought the action against the agent and the alleged undisclosed principal. The lower court, instead of requiring plaintiff to make an election at the close of the case to take judgment against the agent or against the alleged undisclosed principal, the Newmark Grain Company, entered judgment against both. This, I think, is ground for reversal.

I concur in the judgment and in the opinion of the Presiding Justice: WELLER, J.

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50 Cal. App. 786

Ex parte HALL. (Cr. 744.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1920.)

1. Constitutional law 🔑274—Municipal corporations 🔑625—Dance ordinance held unconstitutional.

An ordinance prohibiting after 10 p. m. dancing or dance music in a room or hall within 25 feet of a residence *held* violative of the Fourteenth Amendment and Const. art. 1, § 1, being unreasonable and oppressive, and unduly and unwarrantably interfering with personal rights.

2. Municipal corporations 🔑596—Noise ordinances valid.

A city may enact and enforce ordinances designed to prevent boisterous conduct and loud, unusual and discordant sounds that cause public annoyance or menace the public health and welfare.

3. Constitutional law 🔑70(1)—Limits of police power a judicial question.

It is for the lawmaking body to determine when an exigency exists for the exercise of the police power; but what are the subjects of its exercise is a judicial question.

4. Constitutional law 🔑81—"Reasonableness" and "expediency" defined.

"Reasonableness," as applied to a police measure, is not synonymous with "expediency"; matters of expediency are wholly for legislative cognizance, while reasonableness is subject to judicial inquiry; and "reasonableness" is not what extremists upon the one side or the other would deem fit and fair, but is what from the calm sea level of common sense, applied to the whole situation, is not illegitimate in view of the end attained.

5. Constitutional law 🔑81—Existing customs of weight in defining police power.

In determining whether a police regulation is reasonably necessary to secure the public health or welfare, and therefore within the legitimate exercise of the police power, existing habits and customs are of great weight.

Application of Mark Hall for writ of habeas corpus, prayed to be directed to the Chief of Police of the City of Pasadena to secure petitioner's release from custody on a charge of violating an ordinance regulating dancing. Petitioner discharged.

Wilton W. Webster, of Pasadena, for petitioner.

James H. Howard, of Los Angeles, for respondent.

FINLAYSON, P. J. [1] Petitioner is imprisoned under a warrant of arrest issued out of the police court of the city of Pasadena upon a complaint charging him with a violation of an ordinance entitled "An ordinance of the city of Pasadena regulating the hours during which dancing may be conducted and dance music performed in certain places." So far as material, the ordinance reads:

> "Between the hours of 10 o'clock p. m. and 8 o'clock a. m. of the next succeeding day, it shall be unlawful for any person, firm, or corporation in control of any room or hall, any portion of which or any window of which is within 25 feet of any portion of any building used as the residence of any person other than the person in control of such room or hall, to conduct or permit dancing or the performance of any dance music in such room or hall."

The ordinance further provides that any person convicted of a violation thereof shall be punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both such fine and imprisonment.

Petitioner contends that the ordinance is unreasonable and oppressive; that it unduly and unwarrantably interferes with his personal rights and with his right to the enjoyment and reasonable use of his property; and therefore is violative of the Fourteenth Amendment, and likewise section 1 of article 1 of the state Constitution. This contention, we think, must be upheld.

The ordinance does not confine the prohibited acts to any particular locality, or to buildings in any particular part of the city; nor does it differentiate between public dance halls—admittedly proper subjects for reasonable regulation in the exercise of the police power—and rooms in private homes wherein dancing may be conducted or dance music performed for the amusement and enjoyment of the householders, members of their families, and guests. Instead, the ordinance covers and includes any and all rooms or halls within the boundaries of the municipality, any portion of which or any window of which is within 25 feet of any portion of any other building used as a residence. So that if, forsooth, the owner, lessee, or lawful occupant of any private residence should so far forget himself as to permit members of his own family or invited guests to indulge in the innocent amusement of dancing in any room in his own home that happens to be within 25 feet of any part of his neighbor's residence, or permits them to listen to the soft strains of waltz music played in such room, his temerity possibly may cost him a fine of $500 and six months in jail as a common malefactor. To construe the ordinance as covering only public dance dance halls, or as inhibiting only boisterous dancing and loud and discordant music would be but a mere arbitrary decision of the court, and, in effect, amount to a redraft of the ordinance to make it conform to what, in the view of the court, the city commissioners ought originally to have made it.

A consideration of a few of the fundamental principles underlying the police power will suffice to answer respondent's contention that the ordinance in question is a valid exercise of that power.

[2] There can be no serious question respecting the authority of the city to enact and enforce ordinances designed to prevent boisterous conduct and loud, unusual, and discordant sounds that cause public annoyance or menace the public comfort and welfare. To that end any municipality may prohibit, within reasonable limits, the use of premises in such a manner as thus to menace the public comfort or welfare. Ordinances enacted for such purpose, when they do not go beyond the limits of reasonableness and unnecessarily invade the right of the citizen to acquire, possess, and enjoy property and pursue happiness, will be sustained. But to justify legislative interference with property rights under the guise of an exercise of a police power, and to prohibit the citizen from a reasonable enjoyment of a lawful amusement on his own premises, it should plainly appear that the manner in which the property is used does menace the public welfare. Legislation which goes beyond that limit exceeds the rule of reasonableness. Laws which impose penalties on persons and interfere with the personal liberty of the citizen cannot be constitutionally enacted, unless the public health, comfort, safety, or welfare demands their enactment.

[3] It is for the law-making body to determine when an exigency exists for the exercise of the police power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legislative discretion is not subject to review by the courts when measures adopted by the legislative department are calculated to protect the public health and secure the public comfort, safety, or welfare; but the measures so adopted must have some relation to the ends thus specified. The law-making body of a municipality has no power, under the guise of police regulation, arbitrarily to invade the personal rights and personal liberty of the individual citizen. Its determination upon this question is not final or conclusive. If it pass an ordinance ostensibly in the exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, the courts have a right to examine the law and see whether it relates to the objects which the exercise of the police power is designed to secure, and whether it is appropriate for the promotion of such objects. When the police power is exercised for the purpose of prohibiting a lawful amusement or regulating the manner in which it may be carried on or enjoyed, the law-making body is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to enjoy his personal rights and use his own property in his own way. The general right of every person to enjoy his own property and engage in any lawful and innocent amusement therein, and to do so in his own way, provided he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment or municipal ordinance. Tiedeman on Limitation of Police Power, § 3; Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. As said by the New York Court of Appeals in Matter of Jacobs, 98 N. Y. 108, 50 Am. Rep. 636, the police power, "however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded."

[4] There is no certain test whereby the reasonableness of a police measure may be definitely measured in any given case. It is a matter resting in human judgment. So the line between what is reasonable and what is not, marking the bounds of the constitutional authority of the legislative department, is one often difficult of ascertainment, rendering it necessary, in all doubtful cases, for the

judiciary to defer to the wisdom of the lawmaking body. But when the boundary has been plainly passed, the duty of the court to repel the encroachment and so uphold the Constitution is absolute. It has no discretion in the matter. "Reasonableness" is not synonymous with "expediency." Matters of expediency are wholly for legislative cognizance; while reasonableness is subject to judicial inquiry. As applied to a law, "reasonableness" is manifestly not what extremists upon the one side or the other would deem fit and fair. As it is well put in one of the cases, reasonableness is what "from the calm sea level" of common sense, applied to the whole situation, is not illegitimate in view of the end attained. In Ex parte Whitwell, supra, the court said:

> "Legislation of this character * * * cannot be justified by the mere possibility of the danger which it ostensibly seeks to avert. It must rest upon the fact that experience has demonstrated that such danger, in the absence of such legislative regulation, is one which may reasonably be anticipated as the probable result of conducting such business, notwithstanding the exercise of ordinary care to prevent it."

If people prefer living in a city, they can only do so because of others desiring to do the same thing in sufficient numbers to constitute a city, and each tacitly undertakes to suffer such annoyances or inconveniences as are incident to that kind of a community. Such a community is made up of all kinds and classes of persons, whose various tastes and habits of life are of almost infinite variety. Of all such is the average city constituted. They all have rights, and the only requirement of the law is that each shall so exercise and enjoy his rights as to do no injury to others, or the rights of others, in the sense in which the law regards "injury," namely, accompanied by damage. In Ex parte Whitwell, supra, 98 Cal. 83, 32 Pac. 874 (19 L. R. A. 727, 35 Am. St. Rep. 152), the court said:

> "There are many unpleasant and even annoying things which must be borne by persons living in a state of organized society, in order that others may also enjoy their equal rights under the law."

See, also, Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 224, and Pfingst v. Senn, 94 Ky. 556, 23 S. W. 358, 21 L. R. A. 571.

[5] The two cases last cited, it is true, did not present a question respecting the validity of an ordinance or statute passed in an attempted exercise of the police power. They were cases wherein the plaintiffs complained of an alleged private nuisance. But even so, it is a well-recognized principle, applicable alike to ordinances and other forms of legislation, that, in determining whether a police regulation is reasonably necessary to secure the public comfort or welfare, and therefore within the legitimate exercise of the police power, existing habits and customs are of great weight. City of Passaic v. Paterson, etc., Co., 72 N. J. Law, 287, 62 Atl. 267, 111 Am. St. Rep. 678, 5 Ann. Cas. 995. See, also, Matter of Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310.

Turning now to the ordinance in question, and viewing it in the light of the foregoing: From time immemorial, it has been customary in all free countries and in most civilized lands for people to enjoy themselves in their homes by dancing and listening to dance music. Any police measure that would hold these amusements legally objectionable in themselves would destroy one of the purposes for which people congregate in large cities—the opportunity to meet in social intercourse and enjoy the customary social pleasures and amusements. See Village of Des Plaines v. Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524, and Chicago v. Drake Hotel Co., 274 Ill. 408, 113 N. E. 718, L. R. A. 1917A, 1170. It has never been found wise, and it is not legally reasonable, to do more than fix such general conditions to the enjoyment of these innocent amusements as are necessary to the good of the whole community.

The ordinance cannot be upheld upon the theory that it is a reasonable regulation designed to prevent a disturbance of the slumbers of the occupants of nearby residences during the hours usually devoted to sleep. Not only must the inhabitants of cities put up with such ordinary sounds as are the customary and usual incidents to such community habitation, accepting the inconveniences of urban life along with the benefits derivable therefrom, but, what is equally to the point, legislation of this character, imposing an onerous burden upon a lawful and innocuous amusement by absolutely prohibiting it in all rooms that may chance to be within 25 feet of other buildings used as residences, cannot be justified by the mere possibility that disturbing and annoying sounds will endanger the public welfare. It must rest upon the fact that experience has demonstrated that the danger of such disturbance and annoyance, in the absence of such legislative regulation, is one which may reasonably be anticipated as the probable result of permitting any dancing whatever, or performing any kind of dance music, in any hall or room any portion of which or any window of which may happen to be within 25 feet of any portion of any other building used as a residence. Ex parte Whitwell, supra. By suitable regulation, far less drastic than the prohibitory ordinance before us, such an innocent recreation as dancing and such an intrinsically harmless amusement as the performance of dance music can be so conducted and performed as not to give reasonable cause for complaint even to persons of "dainty modes and habits of living." The total prohibition, therefore, of these innocent amusements, during any of the 24 hours, is an arbitrary and unreasonable invasion of private rights. In Re Kelso, 147 Cal. 609, 82 Pac. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178, the Supreme Court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a stone quarry within a certain portion of the city and county of San Francisco. The ground of the decision was that the removal of rock from land is an operation that may be rendered entirely innocuous by proper regulation prescribing the manner of doing the work, and that therefore a total prohibition was an arbitrary and unreasonable invasion of private rights.

> "The test in every case is: Is the prohibition of a particular business or the sale of a particular article necessary to prevent the infliction of a public injury? It is not sufficient that the public sustains harm from a certain trade or employment as it is conducted by some engaged in it. Because many men engaged in the calling persist in so conducting the business that the public suffers * * * is no justification for a law which prohibits an honest man from conducting the business in such a manner as not to inflict injury upon the public." Tolliver v. Blizzard, 143 Ky. 773, 137 S. W. 509, 34 L. R. A. (N. S.) 890.

So here, dancing unquestionably may be so conducted and dance music so performed, in a private residence after 10 o'clock at night, that persons of the average nervous temperament, residing in homes situated within 25 feet of the room where such dancing is conducted or dance music performed, need not be unreasonably annoyed thereby. One or two, or even more, couples might so conduct their dancing in a room, a portion of which or a window of which is within 25 feet of a neighboring residence, as not to jar the most sensitive nerves of the occupants of the neighboring dwelling. Who, for instance, could possibly be disturbed or annoyed by the graceful and stately minuet? Similarly, dance music, one of Strauss' waltzes, for instance, might float into the neighboring dwelling without jarring the most sensitive human tympanum, or it might be played so softly that it would not be heard outside of the room in which performed. It should be remembered that even in these days of bizarre extremes and freak abnormalities, the muscle tickling jazz has not yet succeeded in entirely excluding all sane dance music from the places where the devotees of Terpsichore are wont to foregather. And experts tell us that even jazz, like certain other things fast fading into oblivion, may be denatured—a consummation devoutly to be wished. "The law," says the Supreme Court in Re Farb, 178 Cal. 592, 174 Pac. 320, 3 A. L. R. 301, "does not tolerate the prohibition of something which may be regulated in such way as to overcome any evils which may be incidentally connected with it."

It is not in the power of the legislative department to deprive any of the people of the enjoyment of equal privileges under the law. Nor can any city be permitted to exercise tyrannical powers. The ordinance is unreasonable because it prohibits what, in general, is perfectly lawful; it reaches and passes the limits of the city's police powers. Our conclusion therefore is that the ordinance should be declared unreasonable and void, leaving the city commissioners free to enact, instead, some other more specific and definite regulation.

Petitioner is discharged.

We concur: THOMAS, J.; WELLER, J.

185 Cal. 65

ROBERTS v. POLICE COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 9678.)

(Supreme Court of California. Feb. 8, 1921. Rehearing Denied March 10, 1921.)

1. Criminal law 🔑1014—Appealed judgment of police court not reviewable by certiorari.

The judgment of a police court or justice's court will not be reviewed on certiorari after appeal is taken therefrom and determined in the superior court.

2. Criminal law 🔑1180 — Errors of police court not reviewable on writ to superior court after appeal.

Irregularities or errors committed in the police or justice's court cannot be examined in reviewing the proceedings in superior court on appeal from the police or justice's court, since the writ in so far as it runs against the superior court is directed to review of the action of that court and its functions are limited to such acts as were in excess of its jurisdiction.

3. Criminal law 🔑1180—Exercise of appellate jurisdiction by superior court not reviewable.

Where the superior court was given by statute jurisdiction of an appeal from a police court, its action either in reversing or affirming the judgment of police court was an exercise of its lawful jurisdiction, and not in excess of its jurisdiction, and cannot be reviewed on certiorari even if the affirmance of the police court's judgment was erroneous.

4. Criminal law 🔑260(11) — Cannot review insufficiency of evidence to sustain conviction within jurisdiction.

On certiorari the sufficiency of the evidence to sustain a conviction in a police court for an offense within jurisdiction of that court cannot be reviewed, since the police court's decision on that issue is an exercise of jurisdiction, and, if wrong, is merely error.

5. Criminal law 🔑260(11)—Determination of inferior tribunal of fact in issue is not determination of jurisdictional fact.

The rule that insufficiency of evidence can be reviewed on certiorari to determine facts upon which the jurisdiction of the inferior tribunal depends does not apply to the determination by the police court of the sufficiency of the evidence to show the guilt of one accused of an offense which is within the jurisdiction of the police court.

In Bank.

Application for certiorari by Edward Roberts against the Police Court of the City and County of San Francisco and the Superior Court, Department 3, of the City and County of San Francisco, to review an order of the Superior Court affirming a judgment of the Police Court convicting petitioner of an offense. Writ discharged as to Police Court, and order of Superior Court affirmed.

Raine Ewell, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Leo R. Friedman, Deputy Dist. Atty., both of San Francisco, for respondents.

ANGELLOTTI, C. J. This is a proceeding in certiorari instituted in the District Court of Appeal of the First Appellate District, Division 2. The writ was there issued, and after hearing judgment was given vacating an order of the superior court which affirmed a judgment of the police court. On application of the respondents the judgment of the District Court of Appeal was vacated by this court and a hearing ordered herein.

Petitioner was duly charged, by complaint filed in the police court of the city and county of San Francisco, with having committed a public offense triable in said court. He was tried therein and found guilty, and judgment of imprisonment was pronounced upon such conviction. It is not claimed that the imprisonment adjudged was in excess of that authorized upon conviction of the offense with which he was charged. He then duly appealed from the judgment of the police court to the superior court of said city and county, which was authorized by our law to entertain and determine such an appeal upon a statement of the case settled by the police judge. Sections 1466 to 1470, Pen. Code. The superior court, after a hearing, made its order affirming the judgment of the police court. Petitioner then initiated this proceeding in certiorari.

[1, 2] It is thoroughly settled that the judgment of a police court or justice's court will not be reviewed on certiorari, after appeal taken therefrom and determination of such appeal in the superior court. Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317; Albers v. Superior Court, 30 Cal. App. 772, 775, 159 Pac. 453. It is also clear, as expressly held in Sherer v. Superior Court, 94 Cal. 354, 29 Pac. 716, that whatever irregularities or errors were committed in the police or justice's court cannot be examined in reviewing the proceeding of the superior court, and that the writ, in so far as it runs against the superior court, "is directed to a review of the action of the superior court, *and its functions are limited to such acts of that court as were in excess of its jurisdiction.*" (Italics are ours.)

[3] Jurisdiction of the superior court to entertain and determine the appeal is not questioned. That jurisdiction was invoked by petitioner himself, who, within the time and in the manner required by law, took his appeal to such court from the judgment of the police court, and the statute gives to the court jurisdiction to entertain such an appeal when duly taken. The appeal was heard upon a statement of the case as required by law. The statute gives to such court the power, upon such appeal, to reverse the judgment of the police court and to grant a new trial, or to affirm the judgment of the police court. It must determine the appeal, reversing or affirming the judgment of the police court as it deems one or the other course proper in view of the matters shown by the statement of the case. Whichever it does, it is acting in the exercise of its lawful jurisdiction, and not in excess of such jurisdiction. It has the same power to affirm in any case that it has to reverse, and the mere fact that its conclusion is wrong does not make its action an excess of its jurisdiction. In such case we have simply error in the exercise of jurisdiction. All that petitioner's contention amounts to in this regard is that the superior court should have reversed the judgment of the police court, and that it erred in affirming it. The substantial contention is that the statement of the case showed that the evidence on the trial in the police court was not sufficient to establish the guilt of the petitioner of the offense charged. If that be true, the superior court erred in affirming the judgment, but mere errors in the exercise of jurisdiction are not reviewable on certiorari. It seems superfluous to cite authorities in support of these well-settled propositions, but, if authority be desired, it is to be found in the opinion of this court in the Matter of Hughes, 159 Cal. 360, 113 Pac. 684. No ground appears, therefore, upon which the order of the superior court affirming the judgment of the police court may be here assailed.

[4] It may properly be noted that there is in fact no force in the claim of petitioner that the judgment of the police court was in excess of its jurisdiction. That claim is based on the same contention, insufficiency of evidence to establish guilt of the offense charged. Assuming this contention to be well based, there was no lack of jurisdiction to convict the defendant. What we have said with regard to the superior court on this point is equally applicable here. Where a court is invested with jurisdiction to determine the question of the guilt or innocence of one charged with a public offense, as was the police court in this case, by the filing of the complaint and by acquiring jurisdiction over the person of the defendant, its determination on the question of guilt or innocence, whether based on sufficient evidence or not, is a determination arrived at in the exercise of its jurisdiction, and, however erroneous it may be, it is not void for want of power in the court to render the decision. Invested with the jurisdiction to determine the matter, the court has the power to determine it wrongly upon the evidence as well as correctly, and, under our law, the defendant's only remedy in the event of an incorrect decision is by appeal. On certiorari, as approvingly quoted in Matter of Hughes, supra, "upon every question except the mere question of power, the action of the inferior tribunal is final and conclusive." In such a case a claim of insufficiency of evidence to show guilt of the offense charged does not go to the jurisdiction.

[5] It has been said that "an exception to the rule that the sufficiency of the evidence will not be reviewed is made when the question is whether jurisdictional facts were or were not proved" (Stumpf v. Board of Supervisors, 131 Cal. 364, 367, 63 Pac. 663, 82 Am. St. Rep. 350); that is, whether facts upon which the jurisdiction of a board or inferior tribunal depends were or were not proved. We have in our reports many decisions wherein this exception has been applied, the case in which this declaration was made being one, and the case of Thrasher v. Board of Medical Examiners (App.) 185 Pac. 1006, relied on by petitioner, being another. But the exception has no application whatever to a tribunal invested with jurisdiction to

try and determine a fact in issue with reference to proof of that fact. In such a case that fact is not what is known as a "jurisdictional fact." It is the fact to be determined by the court having jurisdiction to determine it, and the determination of such court thereon is not void, however defective the evidence upon which it is based. See 15 Corpus Juris, p. 729, §§ 25 and 26.

As to the police court the writ is discharged. As to the superior court, the order of said court is affirmed.

We concur: LAWLOR, J.; SLOANE, J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LENNON, J.

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185 Cal. 144

CULVER v. SUPERIOR COURT OF ALAMEDA COUNTY et al. (S. F. 9722.)

(Supreme Court of California. Feb. 17, 1921. Rehearing Denied March 17, 1921.)

Criminal law 🔑1011 — Superior court affirming judgment of justice's court held not without jurisdiction, so that certiorari would not lie.

The superior court has jurisdiction to enter a judgment affirming a judgment of conviction by a justice of the peace, even though the complaint in the justice's court did not state facts sufficient to show the commission of a public offense, or that the judgment of the justice was void for want of jurisdiction, so that the order of affirmance, if erroneous, cannot be reviewed on certiorari.

In Bank.

Application by Laura Culver against the Superior Court of Alameda County and James G. Quinn, Judge thereof, to review an order of the superior court affirming a judgment of the justice's court. Order affirmed.

Chas. C. Boynton, of San Francisco, for petitioner.

Ezra W. Decoto, Dist. Atty., and Frances H. Wilson, Deputy Dist. Atty., both of Oakland, for respondents.

PER CURIAM. This is a proceeding in certiorari, and it is sought therein to annul the order of the superior court affirming on appeal thereto a judgment of a justice's court. In so far as the superior court is concerned, the material questions herein involved are the same in all respects as those involved in Roberts v. Police Court and Superior Court, S. F. No. 9678, 195 Pac. 1053, decided February 8, 1921. See, in addition to cases cited in opinion therein, Valentine v. Police Court, 141 Cal. 615, 75 Pac. 336; American Law Book Co. v. Superior Court, 164 Cal. 327, 128 Pac. 921. It is immaterial in this proceeding whether or not the complaint in the justice's court stated facts sufficient to show the commission of a public offense. If it did not state such facts, the superior court erred in affirming the judgment; but that was mere error in the exercise of its lawful jurisdiction. If for any reason the judgment of the justice's court is void for want of jurisdiction, the superior court nevertheless had jurisdiction to affirm it. Whether or not such judgment can be attacked in some other proceeding, such as habeas corpus, for instance, is altogether immaterial here. The superior court did not exceed its jurisdiction in affirming such judgment. It follows that the order assailed must be affirmed.

The order of the superior court is affirmed.

ANGELLOTTI, C. J., and SHAW, WILBUR, SLOANE, LENNON, LAWLOR, and OLNEY, JJ., concur.

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185 Cal. 127

In re SANTOS' ESTATES.

SANTOS v. SANTOS et ux. (S. F. 9387.)

(Supreme Court of California. Feb. 15, 1921.)

1. Adoption 🔑14 — Proceedings collaterally assailed, where jurisdictional defects appear on record.

If facts constituting jurisdictional defects in adoption proceedings appear upon the face of the petition and the order for adoption, the proceedings may be collaterally assailed.

2. Adoption 🔑1 — Exists only by virtue of statute.

The right of adoption exists only by virtue of statute.

3. Adoption 🔑7 — Orphan may be adopted without guardian's consent.

Under Civ. Code, § 221, providing that "any minor child may be adopted by any adult person" in the cases and subject to the rules prescribed in the chapter, a minor child without father or mother could be adopted, though at time of adoption in the custody of a guardian, and though the guardian does not consent.

4. Adoption 🔑3 — Laws construed so as to promote their object.

Adoption laws should be construed so as to sustain rather than defeat their object of promoting the welfare of children without real parents.

5. Adoption 🔑13—Welfare of child main consideration.

The matter of adoption rests almost entirely in the discretion of the court; the welfare of the child being the main consideration.

6. Guardian and ward 🔑25 — Letters of guardianship properly revoked on adoption of ward.

Under Civ. Code, § 228, and under section 253, subd. 8, providing that a guardian may be removed when it is no longer proper that the ward should be under guardianship, it was proper for the court, on adoption of an infant under guardianship, to revoke the letters of guardianship; the adopting parents having acquired superior rights to the custody of the child, and the reasons for the existence of the guardianship of the person of the child having therefore ceased.

7. Guardian and ward 🔑25—On adoption of child, court may revoke guardianship as to the person alone.

The court in the exercise of a sound discretion had power to revoke letters of guardianship over the person of an infant on the adoption of the infant, and give custody to adopting parents, and at the same time permit the guardian to act as guardian of the child's estate.

In Bank.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

In the matter of the guardianship of the persons and estates of Laura Santos and others, minors. From an order revoking letters of guardianship as to Clarence Santos, on application of J. V. Santos and wife, A. J. Santos appeals. Affirmed.

Short & Sutherland and Carl E. Lindsay, all of Fresno, and Shepard & Shepard, of Selma, for appellant.

Thos. F. Lopez and C. M. Ozias, both of Fresno, for respondents.

LENNON, J. This appeal is from a judgment of the superior court of Fresno county, which revoked, vacated, and set aside letters of guardianship upon the person of Clarence Santos, a minor. The said minor, an infant about three years of age, is the youngest of six children—brothers and sisters—orphaned by the death of their mother and father in the month of December, 1918. By the terms of the last will and testament of the father, who died subsequent to the death of the mother, property of the value of between $20,000 and $30,000 was left to the six children, share and share alike, and in January, 1919, A. J. Santos, a brother of the father, was appointed and qualified both as executor of the will and as guardian of the persons and estates of the six minor children of his deceased brother. Shortly thereafter, J. V. Santos and Maria C. Santos, his wife, who is an aunt of the orphaned children, petitioned for leave to adopt the said Clarence Santos, the minor in controversy. Consent to such adoption was given by certain relatives of the child, but A. J. Santos, the guardian, refused to consent and appeared at the hearing, in person and by counsel, for the purpose of objecting to the making of the order of adoption. The court overruled the guardian's objection and granted the petition for adoption.

Following the entry of the order for adoption, said J. V. and Maria C. Santos, the adopting parents, instituted the present proceeding for the revocation of the letters of guardianship of the said Clarence Santos. After demurrer and answer, testimony was taken from which it appeared that the eldest of the six orphans is 14 years of age, that A. J. Santos, the guardian, has children of his own living with him, in addition to his six wards, and that his wife has left him and the children are being cared for by himself and a hired woman. It further appeared that the petitioners have no children of their own. Among other things, the court found that the moral and physical well-being of the minor Clarence Santos would not be promoted and subserved by his continuing to reside with the guardian, that it would be for his best interest to reside with petitioners, and that, by reason of the relationship created by the adoption, it was no longer proper that the minor should remain under the guardianship of said A. J. Santos. Accordingly, the order, from which the present appeal is taken, was made, whereby the letters of guardianship of the person of said minor, Clarence Santos, were revoked, and A. J. Santos, appellant, was required to surrender the person of said minor to J. V. and Maria C. Santos, respondents.

[1] It is apparent from the record in the instant case that the order revoking appellant's letters of guardianship of the person of the minor was made solely for the reason that it was considered that such guardianship had been rendered unnecessary by respondent's adoption of the infant. It follows, then, that the efficacy of the judgment of removal is contingent upon the validity of the order of adoption, and, if the order of adoption is void, the judgment of removal must necessarily fall, together with the foundation upon which it rests. Consequently the initial question raised upon this appeal is whether or not the court was without jurisdiction to make the order of adoption by reason of the fact that the minor was in the custody of a duly appointed guardian or of the refusal of the guardian to consent to the adoption. If these facts constitute jurisdictional defects in the adoption proceedings, the said proceedings may be collaterally assailed, for the said facts appear upon the face of both the petition and order for adoption. Forbes v. Hyde, 31 Cal. 342, 348; Baldwin v. Foster, 157 Cal. 643, 108 Pac. 714.

[2, 3] In considering the question of the jurisdiction of the court to make the order of adoption, we must look to the sections of the Civil Code dealing with adoption, for the proceeding of adoption "exists in this state only by virtue of the statute which * * * expressly prescribes the conditions under which adoption may be legally effected."

Matter of Cozza, 163 Cal. 514, 522, 126 Pac. 161, 164 (Ann. Cas. 1914A, 214); Estate of Sharon, 179 Cal. 454, 177 Pac. 283. Section 221 of the Civil Code provides that "any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter." The remaining sections of the chapter prescribe the procedure and effect of adoption and certain limitations pertaining thereto, namely, that the person adopting must be at least 10 years older than the person adopted and that consent must be given by the following persons: The husband or wife of the person adopting; the child, if over 12 years of age; the parents, with specified exceptions, if living, or certain officers of the institution, if the child is in the custody of any of the designated institutions. It would seem to result from the provisions thus outlined that a minor child may be adopted, even though he is, at the time of the adoption, in the custody of a guardian.

[4] Wherever possible, such a construction should be given adoption laws as will sustain, rather than defeat, the object they have in view. Estate of McKeag, 141 Cal. 403, 74 Pac. 1039, 99 Am. St. Rep. 80. The main purpose of adoption statutes is the promotion of the welfare of children, bereft of the benefits of the home and care of their real parents, by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child. While a guardian of the person of a minor is charged with a high duty and serious responsibility in the care of his ward, nevertheless the status of guardian and ward falls short of the close approximation to the relationship of parent and child which is attainable through actual adoption, culminating, as it does, in the child becoming a member, to all intents and purposes, of the family of the foster parents. The statutes in question should not, therefore, be construed so as to exclude an orphan in the custody of a guardian from the realization of the peculiar advantages to be derived from an adoption, unless such construction be unavoidable.

While the Code sections above mentioned do not expressly refer to such a situation as is here presented, they do, in effect, by the generality of their language, authorize an adoption in such a case. They provide that any minor child may be adopted by any adult person, in the cases and subject to the limitations set forth in the chapter. The "cases" referred to are clearly those situations where the prescribed difference in ages exists and the requisite consent is obtainable. There is no attempt to limit the privilege of adoption according to the legal relationship of the minor and the person who has him in custody at the time of the adoption proceedings. In view of the fact that adoption is sanctioned where the parents of the child are living and not disqualified from exercising their parental rights, there can be no reason for implying a restriction merely because there is a duly appointed and qualified guardian.

[5] Nor is the consent of such guardian necessary to the validity of the order of adoption. The matter of adoption rests almost entirely in the discretion of the court; the welfare of the child being the main consideration. Matter of Bewley, 167 Cal. 8, 138 Pac. 689. Since the adoption operates in derogation of the natural rights of the parents, the consent of the latter is, by statute, made indispensable, with certain clearly defined exceptions. Matter of Cozza, supra. Where, however, the parents are not living or for some recognized reason their consent is unnecessary, and where the child has not been in the custody of any of the institutions mentioned in the statutes, no consent to the adoption is required by the statutes on behalf of the child, if under 12, other than that of the court granting the adoption. Particularly must this be so when the child is in the custody of a guardian, for the minor is in reality—

> "a ward of the court, and the guardian is in effect an arm of the court, and is subject to the control of the court in the discharge of his duties as such guardian. Such court has authority to control and direct the guardian in the performance of his trust so as to insure the proper care of the infant." Matter of Ross, 6 Cal. App. 597, 92 Pac. 671.

There is apparently no authority in this state upon this question of consent of a guardian, and the cases in other jurisdictions vary, due, possibly, to differences in the statutes they interpret. In the case of Leonard v. Honisfager, 43 Ind. App. 607, 88 N. E. 91, interpreting statutes similar to the California statutes, consent of the guardian was held unnecessary. The court there said:

> "The statutory provisions on the subject give the legal guardian no right to interfere with this power of the court, and the courts will read no such right into the statute. While for many purposes the legal guardian of the child does stand in the place of the parent, the statute does not require his consent to give validity to an order of adoption of his ward."

[6] Appellant next advances the argument that, conceding that the guardian's consent is not essential to the validity of the adoption, nevertheless such an adoption does not, in and of itself, constitute a valid cause for the removal of the guardian. This contention is answered, we think, by subdivision 8 of section 253 of the Civil Code, which provides that a guardian may be removed by the superior court "when it is no longer proper that the ward should be under guardianship." The persons adopting the child acquire the paramount right to the custody of the child, for, after the adoption, they occupy the position of parents, and shall "have

all the rights and be subject to all the duties of that relation." Civ. Code, § 228. The right of parents to the care and custody of their child yields only for the most cogent and compelling reasons, to wit, in case the parents are shown by clear evidence not to be fit or proper persons to have such custody. Guardianship of Akers, 194 Pac. 706; Ex parte Brown, 98 Kan. 663, 159 Pac. 405. In the instant case the evidence fully supports the finding of the court that the best interests of the child would be subserved by residing with the adopting parents. Since the latter have acquired superior rights to the custody of the child, the reasons for the existence of a guardianship of the person of the child have ceased and the continuation thereof is no longer appropriate or "proper." Matter of Schwartz, 171 Cal. 633, 154 Pac. 304.

[7] The power of the court to make the order placing the custody of the child in the adopting parents, and, at the same time, permit the guardian to continue to act as guardian of the child's estate, cannot, we think, be seriously questioned. Doubtless, in the opinion of the court below, it was desirable that the property of the six brothers and sisters remain under the control of one person, and there is nothing anomalous in a situation wherein the custody of the person of a minor is in the parents and that of his estate is in a guardian. We think the court below had power to create this situation, if in the exercise of a sound discretion it found it proper to do so.

The order appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J; SLOANE, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

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185 Cal. 113

OAKLAND PAVING CO. v. WHITTELL REALTY CO. (S. F. 9134.)

(Supreme Court of California. Feb. 15, 1921.)

1. Municipal corporations 🔑515(1) — Assessment statute may cure delay in work.

The Legislature has power to embody in a statute authorizing an assessment for street improvement work a curative provision, which will validate the assessment, though the contract work was not completed in time.

2. Municipal corporations 🔑446 — Contractor's delay in securing extension of time held an "informality" cured by statute.

Failure of contractor for street improvement to secure his extension of time till the day after the contract period, fixed after his bid was accepted, had expired, even if the work was then uncompleted, he having been proceeding diligently with his work, was an "informality," within Improvement Act 1911, § 26, providing that no proceeding prior to assessment shall be held invalid for any informality in it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Informality.]

3. Courts 🔑107—Decision not authority as to matters not considered.

Decisions under a street improvement act as to the effect of failure to complete the contract in time cannot be considered binding on the effect of curative provisions of the statute, where they were not discussed and apparently not considered.

4. Statutes 🔑225¾—Words considered eliminated, in view of prior decisions.

The passage, after decisions declaring the limiting effect of the words "except on appeal" in the curative clause of a street improvement act, of another improvement act eliminating such words, must be considered as done with reference to such decisions, to avoid the limitation.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Oakland Paving Company against the Whittell Realty Company. From a judgment for defendant, plaintiff appeals. Reversed.

Johnson & Shaw, of Oakland (R. M. F. Soto, of San Francisco, of counsel), for appellant.

Reed, Nusbaumer & Bingaman, of Oakland, and J. P. Langhorne, of San Francisco, for respondent.

WILBUR, J. This is an action to foreclose an assessment for the improvement of a street in Oakland. The only defense interposed is that the work was not completed within the time limited in the contract. The court found that the work had not been completed within such time, and therefore held the assessment void. The case was appealed to this court and transferred to the District Court of Appeal (First District, Division 1), which reversed the lower court, holding that the curative provisions of section 26 of the "Improvement Act of 1911" (Stats. 1911, p. 730), under which the work was done, validated the assessment, notwithstanding the finding that the work was not completed in time. The respondent petitioned this court for a transfer after the decision in the District Court of Appeal upon the ground that the decision squarely overruled a long line of decisions by this court upon the effect of the failure to complete a contract within time. The cases so claimed to be overruled are the following: Beveridge v. Livingstone, 54 Cal. 54; Fanning v. Schammel, 68 Cal. 428, 9 Pac. 427; Dougherty v. Coffin, 69 Cal. 454, 10 Pac. 672; Dougherty v. Nevada Bank, 81 Cal. 162, 22 Pac. 513; Brock v. Luning, 89 Cal. 316, 26 Pac. 972; Palmer v.

Burnham, 120 Cal. 364, 52 Pac. 664, 1080; Kelso v. Cole, 121 Cal. 121, 53 Pac. 353; Union, etc., Co. v. Campbell, 2 Cal. App. 534, 535, 84 Pac. 305.

The petition of the respondent was granted, not only because of the apparent force in its contention, but also for the reason that at the time we had under consideration a similar question arising under a street improvement procedure ordinance of San Francisco, in which ordinance the exact language of section 26 of the Improvement Act of 1911, supra, was contained.

Appellant claims that the curative provisions of the Improvement Act of 1911, § 26, supra, establish the validity of the assessment notwithstanding a failure to complete the work in time. This provision appears for the first time in that act and is as follows:

> "Sec. 26. * * * No assessment, warrant, diagram or affidavit of demand and non-payment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided, and said notices of improvement have been posted along the line of the work, as provided in section five of this act, before the passage of the resolution ordering the work to be done."

Respondent in turn claims that this provision is so similar in scope and effect to that contained in previous laws, particularly that of 1871–72 (section 12, p. 815), that the above decisions rendered under such statutes are decisive of the question, and that the assessment is therefore void, notwithstanding the above curative clause.

The question, then, is this: Is the failure to complete the work under this contract an "error, informality or other defect in the proceedings prior to the assessment," within the meaning of section 26, supra? and, if so, has the Legislature the power to prohibit the courts from declaring an assessment void on that account?

In the case at bar the contract was signed December 30, 1911. The contractor was given 150 days from the date of the contract to perform the work. That time would ordinarily expire on May 29th of the succeeding year, but as 1912 was a leap year it expired May 28th. Apparently overlooking this fact, the order of extension was made May 29th.

The work was accepted and an assessment issued July 5, 1912. The only evidence adduced by the respondent on the question of the completion of the work was the categorical answer "No" to the question "Was the work completed May 29, 1912?" addressed to its witness, and the further testimony, given by the same witness, that on June 15, 1912, some of the contractor's employees were working upon the street. There is no evidence whatever as to the amount of work uncompleted on May 29, 1912, or as to what work was being done on June 15th. The testimony of the defendant would be entirely consistent with the fact that on May 29th some trifling imperfection in the work was not completed, and that this imperfection was being completed on the 15th day of June next, or that the work done in June might have been the remedying of some defect which had been discovered after its acceptance by the street superintendent, although, of course, the failure to complete the work may have been much more extensive.

[1] In the case of Chase v. Trout, 146 Cal. 350, 80 Pac. 81, it was flatly decided that the curative provision contained in the amendment to the Vrooman Act (St. 1885, p. 147), sometimes called the Bond Act, making the bond conclusive evidence of the regularity and validity of all previous proceedings, was valid to the extent that nonjurisdictional matters were cured by the issuance of the bond; and it was accordingly flatly held that a failure to perform the work in time was cured by the issuance of the assessment and bond. It was thereby affirmatively established that the Legislature had power to embody in the statute authorizing the assessment a curative provision which would validate the assessment, notwithstanding the fact that the contract work was not completed in time. It follows from this decision that, if the curative provision of the law of 1911 is broad enough to cover the same subject, it is a valid exercise of legislative power, and the assessment in this case must be sustained, even though we should hold that the work was not completed in time. The above-quoted curative provision of the law of 1911 is contained in section 26, which also regulates the right of appeal to the local legislative body and declares the effect of such appeal or the failure to appeal.

[2] It is impossible to avoid the conclusion that a failure to secure an extension of time on the exact day when the contract expired, or before, is a mere defect or informality in the proceedings, where the contractor has been proceeding diligently day after day as the law and contract provides, and has failed to complete the work within the time, which was fixed after his bid to do the work had been accepted. If the extension had been made on the exact day when it should have been made, there would have been no defect and no informality, and consequently no necessity for the operation of any curative provision.

It is, however, contended by the respondent that this proviso is very similar to, if not identical with, provisions in previous laws which have been already passed upon by the court. Without reviewing the whole course of these decisions, it is sufficient to say that, in the earlier provisions of the Consolidation Act of San Francisco, the character of defense which could be interposed in an action upon a street assessment lien was specified in the law. The Consolidation Act of 1862 (Stats. 1862, p. 398, § 12), after providing for an appeal and authorizing the board of supervisors to correct assessments, provides:

> "All the decisions and determinations of said Board upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to an appeal, under the provisions of this section, *as to all errors and irregularities which said board could have remedied and avoided.*" (Italics ours.)

The law of 1871-72 (pages 804, 815, § 12) also provided for an appeal to the board of supervisors. It also provided:

> "And all the decisions and determinations of said Board of Supervisors shall be final and conclusive upon all parties entitled to an appeal. * * * After jurisdiction to order any work has been obtained, no irregularity in any of the subsequent proceedings shall render any assessment illegal."

The Vrooman Act of March 18, 1885 (Stats. 1885, p. 156, § 11), provided for an appeal to the city council, but added the following proviso:

> "All the decisions and determinations of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have remedied and avoided; *and no assessment shall be held invalid, except upon appeal to the city council, as provided in this section,* for any error, informality, or other defect in any of the proceedings prior to the assessment, or in the assessment itself, where notice of the intention of the city council to order the work to be done, for which the assessment is made, has been actually published in any designated newspaper of said city for the length of time prescribed by law, before the passage of the resolution ordering the work to be done." (Italics ours.)

The provision that "no assessment shall be held invalid, except upon appeal to the city council, * * * where the notice of the intention * * * to order the work to be done * * * has been actually published" before the aforesaid resolution ordering the work to be done, was held in the case of Manning v. Den, 90 Cal. 610, 27 Pac. 435, not to apply to any defects which could not be cured by the supervisors upon appeal. It is there said:

> "The provision, in the latter part of section 11, that 'no assessment shall be held invalid except upon appeal to the city council,' etc., has no application to a case in which an appeal is not authorized, or in which, even if taken, the city council could not have remedied the defect. The Legislature did not intend to declare that the owner should be deprived of his defense to any claim upon an assessment, where the assessment was void by reason of incurable defects, because he had failed to invoke the aid of a tribunal which was powerless to grant him any relief."

It will be at once observed that the clause "except upon appeal to the city council" is omitted entirely from the corresponding provision of section 26 of the Street Improvement Law of 1911, supra. This omission is significant in the light of the fact that that clause was the basis of the decision in Manning v. Den, supra, which limited the curative scope of the provision to matters which could have been corrected by an appeal to the city council. The clause of section 26 under consideration here is to the effect that the proceedings shall not be held invalid "by any court for any error, informality, or other defect in the same," etc. If the failure to secure an extension of the time for the performance of the work, until one day after that time expired, is an "error or informality, or other defect" in the prior "proceedings," it is cured by that section. The only similar provision in any of our statutes bearing upon street improvements is that in the statutes of 1871-72, pp. 804, 815, § 12, supra. The fundamental idea of this curative clause is similar to that in section 26 of the Improvement Act of 1911, namely, that, after jurisdiction has been obtained, "subsequent irregularities shall not render the assessment illegal." The statute of 1871-72, supra, also contained the following:

> "In all suits brought to recover street assessments the proceedings therein shall be general and regulated by the provisions of this act, and also, when not in conflict herewith, by the Civil Practice Act of this state; but no defense shall be interposed except: First—want of jurisdiction to order work; second—that the assessment has been paid; third—fraud in the assessment, or in any of the acts or proceedings prior thereto, setting out the facts showing such fraud." Stats. 1871-72, pp. 804, 816, 817, § 13.

Notwithstanding these provisions, assessments under the act were held void where the contract was not completed in time. Beveridge v. Livingstone, 54 Cal. 54; Mahoney v. Braverman, 54 Cal. 565; Dougherty v. Coffin, supra; Raisch v. San Francisco, 80 Cal. 1, 22 Pac. 22; Dougherty v. Nevada Bank, supra; Brock v. Luning, supra. However, the effect of the provisions of sections 12 and 13 above quoted is not discussed in any of these cases. The only discussion at all is on the subject of the effect of a failure to appeal to the supervisors as provided in section 12, supra, although the validity of section 13 of the statute of 1871-72, supra, limiting the defenses which may be interposed to an assessment seems to be fully recognized in several other decisions. Nolan v. Reese, 32 Cal. 484, 487; Brady v. Bartlett, 56 Cal. 350, 369; Doane v. Houghton, 75 Cal. 360, 363, 17 Pac. 426. But, for some reason, neither the effect of these last-mentioned decisions nor of the curative provisions found in sections 12 and 13 is discussed in any of the cases. It seems to be assumed rather than decided that the act of extending the time for the completion of the work fails for lack of jurisdiction, and that, therefore, the defense is one that is permitted under the first provision of section 13, supra, of the law. The other curative provision in section 12, supra, does not seem to have been noticed or discussed. The court simply followed decisions rendered under previous statutes which did not contain this clause. It should be noted, however, in determining the effects of these decisions that the statute of 1871–72 made it mandatory upon the supervisors to relet the contract where the work was unfinished within the contract period. The language of the act of 1911 on that point is not mandatory.

[3, 4] We cannot therefore regard the decisions under this act as to the effect of a failure to complete the contract in time as binding upon the effect of the curative provisions of sections 12 and 13 thereof where that matter is not discussed, and apparently was not considered. Moreover, the law of 1911, having been enacted after the decision of this court in Chase v. Trout, supra, must be construed in the light of that decision. The fact that section 26 of the Improvement Law of 1911 differs in its provisions from the Vrooman Act and from the law of 1871–72 is also to be considered. Relating to the point under discussion is the elimination of the clause "except upon appeal" contained in the Vrooman Act, section 11, supra. As has been stated, it was the insertion of this clause that resulted in the determination by this court in Manning v. Den that only errors which could be corrected upon appeal were referred to in that clause which provided that proceedings should not be held void for errors, etc., "except upon appeal." The elimination of this clause in legislation enacted after the decision in Chase v. Trout, supra, and in Manning v. Den, supra, is a clear indication of the legislative purpose to exercise its power to enact curative provisions which would prevent assessments being declared invalid because of defects, informalities or irregularities whether they could be corrected by appeal to the city council or not.

In view of the foregoing, we have no hesitation in saying that the failure of the contractor to secure his extension of time until the day after the contract period had expired, even if the work was then uncompleted, was an "informality" in the prior proceedings which was cured by the provisions of section 26.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

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185 Cal. 133

SULLIVAN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR MENDOCINO COUNTY et al. (S. F. 9679.)

(Supreme Court of California. Feb. 16, 1921.)

1. Mortgages 🔑497(2)—Parties to foreclosure suit held not entitled to resist issuance of writ of assistance.

Where a decree foreclosing a mortgage adjudged that a lease was subordinate to the mortgage but superior to all other liens and ordered a sale free and clear of all liens and claims and there was no appeal, motion for new trial, or other attack on the decree, the lessees, who were parties to the suit, could not resist the issuance of a writ of assistance for error, irregularity, or inadvertence in failing to protect their right of possession or rights in the surplus proceeds.

2. Mortgages 🔑502—Sale subject to lease subordinate to mortgage cannot be ordered.

When a lease, though superior to all other liens and claims, is subsequent and subordinate to a mortgage, the court can no more order a sale on foreclosure of a mortgage subject to the leasehold interest than it could order a sale subject to the rights of any other subordinate lienholder.

3. Mortgages 🔑567(1)—Lessees whose interest ranked next to mortgage should have had precedence in disposition of surplus.

Where a foreclosure decree adjudged that a lease was subordinate to the mortgage but superior to all other liens, the lessees should have been given precedence over all lien claimants other than the mortgagee in the disposition of the surplus proceeds after satisfaction of the mortgage.

4. Mortgages 🔑542—Bid by lessee sufficient to satisfy prior claim held to give no right of possession as against higher bidder.

That lessees whose lease was subordinate to a mortgage but superior to all other liens bid an amount sufficient to meet the mortgage at the foreclosure sale gave them no right to retain possession as against a higher bidder to whom the sale was made.

5. Mortgages 🔑517—Commissioner bound to sell to highest bidder, though lessees' bid sufficient to meet superior claim.

At a foreclosure sale, though the lessees whose lease was superior to all liens except the mortgage bid an amount sufficient to meet the demand of the mortgage, it was the duty of the commissioner to sell to the highest bidder, where the decree included other liens to be satisfied from the proceeds.

6. Mortgages 🔑544(3) — Writ of assistance against parties to action authorized without notice when so provided by decree.

Where a foreclosure decree provided that in case the purchaser should be refused possession, a writ of assistance should issue without further notice it was conclusive against the parties in possession who were parties to the action, and entitled the purchaser to a writ of assistance without notice.

7. Mortgages 🔑544(3)—Ex parte order for writ of assistance not set aside unless improvidently made.

An ex parte order granting a writ of assistance to the purchaser at a foreclosure sale should not be set aside by the court making it, unless there is a showing that it was improvidently or improperly made.

8. Mortgages 🔑544(3) — Writ of assistance cannot make possession subject to outstanding lease when sale made free from claims.

Where a foreclosure decree adjudged that a lease was subordinate to the mortgage and ordered a sale free from all liens and claims, the court had no power in issuing a writ of assistance to modify its terms so as to make the purchaser's possession subject to the lease.

9. Mortgages 🔑544(3)—Writ of assistance is matter of right when rights adjudicated by decree and not subsequently changed.

Where the parties against whom a writ of assistance is sought by the purchaser at a foreclosure sale were parties to the foreclosure suit and their rights were adjudicated by the decree and there has been no change or modification of the right to possession arising under the terms of the decree, a writ of assistance is a matter of right.

10. Mandamus 🔑3(1)—Right to writ of assistance to enforce foreclosure decree may be enforced notwithstanding other remedies.

Where a foreclosure decree adjudging that a lease is subordinate to a mortgage and ordering a sale free from liens and claims has become final and no equities have arisen since the decree, the purchaser is entitled to a writ of mandamus to compel the issuance of a writ of assistance against the lessees, notwithstanding his remedy by ejectment, unlawful detainer or appeal.

11. Mortgages 🔑546—Lessee planting crops pending running of time for redemption not entitled thereto after time for redemption.

Lessees of land, whose lease was subordinate to a mortgage which was foreclosed, who planted crops pending the running of the period of redemption, were not entitled to retain possession for the purpose of cultivating and harvesting the crops, either on the theory that the termination of the leasehold was uncertain because of the possibility of redemption, or under the common-law rule as to the right of a tenant to emblements.

12. Mortgages 🔑542—Purchaser's right of possession cannot be postponed because of hardship in removing live stock.

The right of a purchaser at a foreclosure sale to possession of the premises on the expiration of the time for redemption may not be postponed because of the hardship to lessees of removing their live stock at that particular time.

In Bank.

Application by W. H. Sullivan for a writ of mandate and prohibition against the Superior Court in and for the County of Mendocino, and others. Peremptory writ of mandamus issued.

Mannon & Mannon, of Ukiah, and Cushing & Cushing, of San Francisco, for petitioner.

John W. Preston, of Ukiah, for respondents.

SLOANE, J. This is an application for a writ of mandate and prohibition against the judge of the superior court, county clerk, and sheriff of the county of Mendocino to secure the petitioner in the execution of a writ of assistance to place him in possession of certain real property which he claims under a commissioner's deed in a sale under foreclosure of mortgage.

All of the facts preliminary to a consideration of petitioner's rights in the premises are determined by the decree in foreclosure.

This decree was obtained in proceedings duly had giving the court jurisdiction of the persons of the defendants and subject-matter of the action in the case of First Federal Trust Company, a corporation, as plaintiff, against Leslie B. McMurtry, Alice A. McMurtry, mortgagors, B. P. Noonan and Standard Live Stock Company, holding a leasehold interest in the premises, subject to plaintiff's mortgage, and other defendants holding liens against the premises, subsequent to and subject to the plaintiff's mortgage and to said leasehold interest. It is the rights of the purchaser at foreclosure sale, under the decree, as against the lessees that are here involved. It was adjudged and determined by the decree that the plaintiff was the owner and holder of a first mortgage lien on the lands in question, upon which there was due, owing and unpaid the sum of $94,516, and that "each and every right, title, interest, and claim of every kind of each and all of the defendants herein and of each and all of the cross-complainants herein" are subsequent and subordinate to the plaintiff's mortgage.

Also, that the certain lease referred to in said answer of said defendants B. P. Noonan, Standard Live Stock Company, a corporation, et al., "is now in full force and effect as to the unexpired term thereof, and that said Standard Live Stock Company is now the owner and holder thereof"; also, that said lease was "and it is hereby adjudged and decreed to be subsequent and subordinate to all said rights, claims and liens of said plaintiff," and that said lease is "prior and superior to any and all claims of liens" of the other defendants and cross-complainants, as parties claiming under them, and that all and every right and interest of the other defendants and cross-complainants "are subsequent and subordinate to the rights of said defendant Standard Live Stock Company under said lease, as successor in interest of the defendant, B. P. Noonan, the lessee therein named."

It was then found and decreed that other defendants and cross-complainants, whose names and interest it is not necessary to set out here, were owners and holders of subsequent and subordinate liens on the mortgaged premises in varying amounts aggregating about the sum of $64,000. The amounts of these subsequent liens were ascertained and determined and all declared subordinate to the lien of plaintiff and to the leasehold of the Standard Live Stock Company.

The decree then ordered and adjudged that a sale be made by a commissioner named for that purpose of all the mortgaged premises in one parcel in the manner provided by law "free and clear of any and all liens and claims of each and all of the defendants herein, and of each and all of the cross-complainants herein, and of any and all other persons and corporations."

It was next directed that the proceeds of such sale be applied first to the payment of the amounts due the plaintiff aggregating the sum of $94,546, and that the balance, if any, be applied in the order of their preference to the subsequent lien claims.

No provision was made by this decree to protect the leasehold of the Standard Live Stock Company, or for the application of any of the proceeds of the sale to its interest in the premises. The decree, however, directs if there remain any balance after applying the proceeds as therein specifically directed, the same "be returned into court to abide the further order thereof."

It is finally provided by the decree that the purchaser at said sale be let into possession of the premises, "and that in case such purchaser or purchasers shall be refused such possession, a writ or writs of assistance issue without further notice, requiring the sheriff of the county in which said lands are situated to place and maintain each of said respective purchasers in the quiet and peaceable possession of the lands and premises so foreclosed by him and the whole thereof."

The sale was made pursuant to said decree, at which sale the petitioner, W. H. Sullivan, bid in the entire mortgaged property at the sum of $152,825, and in due course, no redemption having been made, received the commissioner's deed to the premises. The purchaser was not a party to the foreclosure suit nor in any manner connected therewith. At the time the commissioner's deed was delivered the said B. P. Noonan and Standard Live Stock Company were in possession of the premises, claiming by virtue of their lease. Demand was made upon them and the commissioner's deed was exhibited to them, but they refused to surrender possession. Petitioner then applied to the superior court in which the decree was given that a writ of assistance be issued in accordance with the terms of the decree of foreclosure and sale. Such writ was thereupon ordered and was issued, directed to the sheriff of Mendocino county, requiring him to put the purchaser in possession. Before the sheriff had executed the writ the lessees, Noonan and Standard Live Stock Company, applied to and obtained from the court an order restraining the sheriff from executing the writ, and served notice of motion to amend the writ by providing that the purchaser be placed in possession of the premises "subject, however, to the lease of Standard Live Stock Company, a corporation."

It is to these proceedings withholding and amending the writ of assistance that the petition before us for writ of mandate and prohibition is directed. It is claimed by petitioner, the purchaser at the foreclosure sale, that the court or judge thereof was without jurisdiction to withdraw or modify the original order and writ of assistance issued in accordance with the terms of the foreclosure decree.

[1-3] It seems to us that the main issue in this proceeding, namely, the right of the purchaser at this sale to possession of the entire interest and estate in these premises on receipt of his deed, freed from the leasehold or other subsequent interests, is not open to dispute. The decree was allowed to become final without appeal, motion for new trial, or other attempt to avoid or modify it. The owners of the leasehold were parties to the action. Their interest was declared subject and subordinate to plaintiff's mortgage. The entire interests covered by the mortgage and lease were subject to sale and ordered sold and foreclosed in satisfaction of plaintiff's claim. No provision was made for making this sale subject to the leasehold interest, and the court could no more have subordinated the rights of plaintiff to that of the lessees in making this sale than it could to the rights of the subordinate lienholders under subsequent mortgages. Each, in the order of preference of his claim, was entitled to redeem, but no redemption was made. As to all lien claimants other than the plaintiff, the leasehold was decreed to be prior and superior, and the lessees should have been entitled to take precedence to these in the distribution of the surplus proceeds of the sale after plaintiff's demand had been satisfied.

But whatever the power of the court or the rights of the lessees by way of protection of this leasehold, they were not exercised, and under the decree and order of sale the entire estate in the mortgaged premises was offered for sale and bid in by the purchaser, a stranger to the action, and he received under his purchase and the subsequent deed of the commissioner an unqualified and unlimited title to the entire tract.

The court did not exceed its jurisdiction in decreeing this sale, and it is too late now to go behind its judgment because of any errors or irregularities.

It is no answer at this time to the conclusiveness of this decree and the proceedings under it that the trial judge had intended the decree to safeguard the interests of the lessees, and that the failure to do so was one of mistake or inadvertence.

[4, 5] The status of the holders of the lease was in no way strengthened by the fact that they bid at the commissioner's sale an amount sufficient to meet the demand of plaintiff's prior lien. The decree included other liens to be satisfied from the proceeds of this sale and it was the duty of the commissioner to sell to the highest bidder. The bid of the lessees was not the highest bid, and was ineffective for any purpose. Petitioner's rights as a purchaser were only subject to the right of the various parties in interest to redeem.

[6] The writ of assistance as originally issued was properly granted, and only directs the execution of the decree according to its terms. It is provided by the terms of the decree itself that upon the execution of the commissioner's deed the purchaser be let into possession of the premises, "and that in case such purchaser or purchasers shall be refused such possession, a writ of assistance issue without further notice requiring the sheriff of the county in which such lands are situated to place and maintain each of said respective purchasers in the quiet and peaceable possession of the lands and premises so purchased by him and the whole thereof." Whether or not this provision for the issuance of a writ of assistance without further notice would bar the right of a stranger to the action coming into possession of the premises from requiring notice of an application for such writ, we see no reason why it should not be conclusive against the parties in possession who were parties to the action. While it is true that a writ of assistance will not ordinarily issue without notice to the person in possession, the reason for such rule surely cannot apply where the waiver of such notice has been determined as between the parties by the decree. Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Montgomery v. Tutt, 11 Cal. 190.

[7, 8] Even where an ex parte order without notice has been made, it should not be set aside by the court making the order unless there is a showing that it was improvidently or improperly made. Klokke Inv. Co. v. Superior Court, 39 Cal. App. 717, 720, 179 Pac. 728; Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646. It is very apparent in this case that the attempted vacation or amendment of the writ of assistance as originally issued was solely for the purpose of modifying its terms so as to make the possession of the purchaser "subject to the lease of the Standard Live Stock Company," as is set out in the order of the court recalling such writ. This the court had no power to do. Such a limitation upon the possession of the purchaser at the sale would be an attempt to modify and restrict the right established by the decree.

It requires no citation of authorities to show that petitioner's rights under the judgment and foreclosure sale and conveyance cannot be circumscribed in this way.

We are satisfied that petitioner is entitled to possession of the premises freed from the claims of this lease.

[9] No judgment of court in ejectment or unlawful detainer could give him any clearer right to possession than he has under this judgment and sale. This is not a case where the rights of parties in possession who are not bound by the record in the foreclosure action are involved, and where an independent title or right of possession is claimed. Here the rights of the contenders for possession have been fully adjudicated and it only remains to put the plain provisions of such adjudication into execution. A writ of assistance under such conditions is a matter of right. The province of a writ of assistance is to give effect to the decree, and should only be withheld where it appears that the rights of the parties have been changed by some subsequent agreement or event. City of San Jose v. Fulton, 45 Cal. 316. In this case there is no claim that there has been any change or modification of the right to possession arising under the terms of the decree.

[10] It is strongly urged by respondents that the petitioner cannot resort to mandamus to compel or restrain the action of the trial court in this matter; that a plain, speedy, and adequate remedy is afforded either by appeal or by an action in ejectment, or for unlawful detainer.

It is true that all of these modes of obtaining relief are open to him, but it may well be questioned under the circumstances of this case, if either of them is plain, speedy, or adequate. Where, as here, the judgment has bcome final, and the only question in controversy is the right to enforce such judgment in accordance with its terms, it certainly is a roundabout and inadequate remedy to compel the party seeking enforcement of his decree to prosecute an independent action, when equity provides a direct procedure in the original action for carrying out the decree. Generally, it may be conceded, relief from orders granting or denying writs of assistance is sought by appeal. Such is obviously the proper remedy where issues of fact are involved raising a controversy as to rights acquired subsequent to the judgment. But here the successful prosecution of an appeal would bring the petitioner back to precisely where he now is, his right to possession under the same decree, and to obtain it through a writ of assistance. A subsequent order for or against the issuance of such writ would be subject to another appeal, and so on ad infinitum.

The question as to whether mandamus will lie in the face of a right of appeal upon orders affecting the issuance of writs of assistance has not been directly before the appellate courts of this state. The most that appears from California decisions cited by respondent is that the aggrieved party has always resorted to his remedy by appeal. It was held in State ex rel. Biddle v. Superior Court, 63 Wash. 312, 115 Pac. 307, Ann. Cas. 1913D, 1119, that an appeal furnished a plain, speedy, and adequate remedy; but there, as in most of the cases where an appeal has been taken in this state, issues of fact extraneous to the record in the original action were presented which could not be adequately presented without a transcript of the evidence. In other words, where the right to the issuance of the writ appears on the record and there is no new obligation or extraneous facts giving rise to equities in favor of the respondent there would appear no good reason for denying the petitioner the right to summary relief. We think the case of Holtum v. Greif, 144 Cal. 521, 78 Pac. 11, is substantially in point here. It is true that mandamus was sought in that case to compel the issuance of a writ of execution and not a writ of assistance, and that a writ of execution issues as a matter of right, and not of discretion of the court or judge. But if in the matter before us the facts as disclosed by the petition and answer are such as to take the issuance of the writ of assistance without the discretion of the court the duty to grant and enforce the writ is as mandatory as in the case of an execution in an action at law.

In the decision last cited a writ of mandate to compel issuance of an execution was upheld, notwithstanding an appeal would lie. The court, in the opinion by Chief Justice Beatty, says:

> "Here it is suggested there is a plain, speedy, and adequate remedy by appeal from the order overruling the motion for execution, but this remedy although plain is neither speedy nor adequate. The appeal, in the ordinary course, would not be decided for a long time, and pending the appeal there would be no security for the payment of the judgment. And, besides, nothing would necessarily result from an appeal beyond a reversal of the order, and this would merely confirm the right of the petitioner to execution—a right already complete. So that unless the judgment of reversal was accompanied by a mandatory direction to order the issuance of execution, the petitioner would find himself at the end of his appeal precisely where he is now—with a right to demand the issuance of the writ, but with no power to compel it."

The language quoted seems to us to be exactly applicable to the instant case.

[11] If respondents' contention could be maintained under the facts pleaded in the answer to the petition, that issues are presented giving rise to equities which have arisen since the decree in foreclosure there would be force in the objection to a summary disposal of the matter on this hearing, but we do not think any equities that the court could take cognizance of are pleaded. True, respondents claim a right to retain possession of the premises for the purpose of cultivating and harvesting the crops it planted pending the running of the period of redemption. The theory advanced is that the termination of the leasehold became uncertain by reason of the duty of the landlord to protect the lease by a redemption from the foreclosure sale. Such a presumption might be indulged as against the landlord mortgagor, but it cannot be maintained as against the purchaser under the foreclosure. The respondents holding under this lease had notice that all their rights would be terminated and cut off at the expiration of one year from the issuance of the certificate of sale, November 8, 1919, unless they or their landlord redeemed. That date fixed the termination of their leasehold as definitely as if it had been so written in the lease. They had an option to redeem. This could prove no more effective to extend their time than an option to renew their lease. Neither would have any force unless exercised within the time limited. The purchaser cannot be prejudiced by any laches on the part of the lessor, in failing to protect his tenants, for which the purchaser was in no way responsible. After the certificates of purchase had been issued the lessees planted and cultivated for a harvest that would mature more than a year in the future at their peril. The deed in this case was executed in November, 1920. If we may rely upon common knowledge and observation, it would suggest itself that all crops indigenous to the section of the country where this land is situated grown from the preceding cropping season would already have been harvested.

The common-law rule of the right of the tenant to emblements after the termination of the lease does not apply to an estate in lands thus definitely cut off and terminated by foreclosure.

The only decision cited by respondent which appeals to us as being at all in point on this proposition is that of Monday v. O'Neil, 44 Neb. 724, 63 N. W. 32, 48 Am. St. Rep. 760, but in that case the crops were planted before the foreclosure sale. The court says:

> "O'Neil knew, of course, that a sale might be made and confirmed before his crop would mature, but he could not know that such would be the case."

Here, the sale was completed and the only contingency that could stay the termination of the leasehold within the year was the exercise by the tenant or his landlord of the right of redemption, a matter entirely beyond the control of the purchaser, and for the failure in which there seems no good reason in law or in equity why his estate in the land should be deferred.

[12] The hardship incident to moving respondents' live stock from the premises at the particular time when their right of possession terminated is a matter which may not postpone petitioner's right of entry. In the varied and extensive population of a large stock ranch with cattle, swine, and sheep, if the time of removal should be adjusted to meet the periods of maternity of all the animals, it would prove difficult to find an entirely convenient season.

We recognize the unfortunate situation in which the respondents have been placed under this foreclosure decree and sale, but it is too late to afford them any relief by modifying the effects of the judgment.

Under the facts as they appear on the face of the record, it is our conclusion that the writ of assistance was not improvidently or inadvertently issued, and that the court is without power to amend it so as to subject petitioner's possession of the premises to the lease of the respondents, or to further withhold its execution.

Let a peremptory writ of mandamus issue requiring the issuance and execution of a writ of assistance in accord with the terms of the decree of foreclosure and sale, and providing that the purchaser at the foreclosure sale be placed in absolute possession of the premises as against all of the defendants in said action and all parties claiming under such defendants, or any of them.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; LENNON, J.

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51 Cal. App. 1

CARBAUGH et al. v. WHITE BUS LINE.
(Civ. 3655.)

(District Court of Appeal, First District, Division 1, California. Jan. 4, 1921. Hearing Denied by Supreme Court March 3, 1921.)

1. Highways 🔑184(3) — Whether motorist after observing another vehicle was justified in proceeding held for jury.

Where a motorist who had the right of way and was proceeding at a lawful rate of speed, though observing the presence of defendant's passenger bus approaching, continued on his rightful way across a boulevard in advance of the bus, the question whether such motorist was guilty of contributory negligence in view of the speed of the bus *held* for the jury.

2. Trial 🔑251(8)—Instruction cannot submit contributory negligence not pleaded.

Where defendant pleaded contributory negligence, an instruction which submitted the negligence pleaded was properly refused where it also attempted to submit the question whether plaintiffs were guilty of any other contributory negligence.

3. Trial 🔑255(11)—Party bound to request instruction submitting issues.

Whether defendant deemed itself entitled to an instruction on the doctrine of the last clear chance, it should request a correct instruction on that issue.

4. Highways 🔑175(1)—Last clear chance doctrine inapplicable.

In an action for injuries resulting when plaintiff's motorcar was struck by defendant's autobus, the last clear chance doctrine has no application where plaintiff had the right of way, and there was nothing to show that, after he discovered the dangerous position in which he was being placed by the action of the driver of the bus in failing to reduce its speed or turn so as to pass behind his car, he could by any action have avoided the collision.

5. Highways 🔑175(1) — Motorist entitled to presume that others will obey the law.

A motorist proceeding at a lawful rate of speed and having the right of way is entitled to presume that others will obey the law.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Actions by D. C. Carbaugh against the White Bus Line, and by Alice Carbaugh against the same defendant, which were consolidated. From a judgment for plaintiffs, defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.
E. B. Drake, of Los Angeles, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiffs in actions brought by them to recover damages for injuries which they each received in a collision between the automobile of which they were occupants and a motorbus operated by one of the defendant's employees. Each of said plaintiffs commenced a separate action against the defendant, but by agreement and order of the court the two actions were consolidated and tried together.

The complaint in each case charged that "the defendant, through its agents and servants in charge thereof, so negligently operated one of defendant's autobuses or passenger stages that the same collided with the plaintiff's automobile, and he was injured as hereinafter set out." The defendant in its answer in each case specifically denied this allegation, and in addition thereto pleaded by way of separate defense that the plaintiff was guilty of negligence in a number of specially pleaded particulars in connection with and at the time of said collision.

The consolidated cases were tried before a jury, which rendered a verdict in favor of the plaintiff D. C. Carbaugh for $1,775, and in favor of the plaintiff Alice Carbaugh for the sum of $6,000. The amount of these combined verdicts was, upon motion for a new trial, reduced by plaintiffs' consent to the extent of $2,500, and thereupon said motion was denied, and judgment for the reduced amount entered in plaintiffs' favor, from which judgment the defendant prosecutes this appeal.

The facts of this case may be summarized as follows: The collision in question occurred on June 22, 1919, at the intersection of San Gabriel Mission drive with Pomona boulevard in the county of Los Angeles, state of California. Pomona boulevard runs east and west. The San Gabriel Mission drive runs in a general northwesterly and southeasterly direction, and intersects, but does not cross, Pomona boulevard at an angle of approximately 45 degrees. The plaintiffs' car was a five-passenger Saxon, and just prior to said collision was being driven by the plaintiff D. C. Carbaugh on the Mission drive approaching Pomona boulevard, into which he intended driving and thence turning to the east. As said plaintiff, driving his car, approached the intersection of these two streets he was driving on the right side of the road and sitting on the left side of his car, in which there were five persons besides himself, one of whom was the plaintiff Alice Carbaugh. The car was being driven at the rate of about 15 miles an hour, and when within about 50 feet of the point of intersection its driver looked to the east and saw the defendant's motor stage approaching from that direction along the boulevard. When he first observed the stage it was approximately 250 feet from the intersection, and appeared to be traveling at the rate of from 30 to 35 miles an hour. The plaintiff Carbaugh, as he approached the intersection, reduced the speed of his car to from 10 to 12 miles an hour, keeping the stage continually in view. When he arrived at the point of intersection the stage was approximately 150 feet away, and appeared to be coming along or near the center of the boulevard and traveling at the rate of about 35 miles an hour. Plaintiff Carbaugh, according to his own testimony and that of those who were with him in his car, put out his left hand, blew his horn, and proceeded to cross the boulevard, turning to the eastward as he reached its center. The defendant's stage continued with undiminished speed until it reached a point within a few feet of the plaintiff's car, when it swerved suddenly to the left and collided with it at a point which, according to the testimony of the plaintiffs' witnesses, was to the left of the center of the boulevard. The plaintiffs' injuries were the result of this collision.

[1] The first contention of the appellant herein is that the plaintiff D. C. Carbaugh, as the driver of said automobile, was guilty of contributory negligence as a matter of law in entering upon and attempting to cross said boulevard after observing the defendant's stage approaching its point of intersection with the Mission drive. This contention is absolutely without merit. The plaintiff D. C. Carbaugh, as he approached the intersection of these two streets, was driving upon the right side of the Mission drive at a rate of speed permitted by law, and had, under the provisions of the Motor Vehicle Act, the right of way across Pomona boulevard in advance of the defendant's stage approaching thereon. Whether or not after observing the approach of said stage and its position upon said boulevard, and the rate of speed at which it was traveling, the said plaintiff was justified in proceeding upon his rightful way across said boulevard in advance of said stage was clearly a question of fact for the jury. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513; Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 Pac. 677; Commonwealth Bonding, etc., Co. v. Pac. Elec. Ry. Co., 184 Pac. 29; Robinson v. Clemons, 190 Pac. 203; Baker v. Western Auto Stage Co., 192 Pac. 73.

The authorities cited by the appellant in support of his above-mentioned contention do not sustain the same, since the facts in each of said cases differ materially from those of the case at bar.

[2] The appellant's next contention is that the trial court erred in refusing to give certain of the defendant's requested instructions. The first of these instructions to which our attention is directed has reference to the alleged contributory negligence of the plaintiff. The rejected instruction reads as follows:

> "I instruct you in this case that, even though you believe the defendant was negligent, your next inquiry should be whether or not the plaintiff himself was negligent, and whether or not his negligence contributed, even slightly, or to any extent to the cause of the accident; and if you believe that the plaintiff was negligent, either by failing to use ordinary care as he drove into said boulevard, or by failing to stop his automobile if he realized his perilous position, or if he was negligent in any other particular, and that said negligence or any of it contributed even in a small degree to the accident, then neither of the plaintiffs can recover, and your verdict must be for the defendant."

The vice of the foregoing instruction is discovered when it is compared with that portion of the defendant's answer which contains his affirmative plea with regard to the contributory negligence of the plaintiff. His pleading in that regard is specific, setting forth with particular detail the specific acts of the plaintiff's alleged negligence upon which the defendant relies. In the above-quoted instruction, however, after reciting certain of these specific negligent acts, the defendant seeks to have the court charge the jury that—

> "If he (said plaintiff) was negligent in any other particular, and that said negligence or any of it contributed even in a small degree to the accident, then neither of the plaintiffs can recover, and your verdict must be for the defendant."

This portion of said instruction is so clearly contrary to law that it requires no authority to uphold the action of the trial court in refusing to give it.

[3-5] The next and only other contention of the appellant deserving attention is its contention that the trial court was in error in refusing to give an instruction embodying the doctrine of "last clear chance." The only instruction which, so far as we can discover, the defendant asked upon that subject, was the above quoted instruction, which, as we have seen, the trial court was for other reasons justified in refusing to give. If the defendant believed itself entitled to an instruction in this case embodying the doctrine of the last clear chance, it was its duty to request the giving of an instruction upon that subject which would not be objectionable upon other grounds, but in our view of this case there is no room for the application of the doctrine of the "last clear chance" to the facts in evidence, since there is not a scintilla of evidence tending to show that, after the plaintiff D. C. Carbaugh discovered the dangerous position in which he was being placed by the action of the driver of the defendant's stage in failing to reduce its speed or turn to the right on the boulevard so as to pass behind the plaintiff's car, he could by any action on his part in either stopping his own car or accelerating its speed have avoided the collision. The said plaintiff was at all times within the limits of both his own right and duty in attempting to make his way across said boulevard; he had no knowledge or means of knowledge that the defendant's stage was not under control, or could not have been slowed down from the speed at which it was traveling when he first observed it so as to permit the plaintiff to make his rightful way across the boulevard in safety. Being strictly within his own rights, he had the right to presume that the driver of the defendant's stage would obey the law and perform his duty in the premises. Had he done so, it is clear that the collision in question would not have occurred. The law governing the respective rights of the parties under circumstances similar to those of the case at bar is fully stated in Whitelaw v. McGilliard, 179 Cal. 349, 176 Pac. 679; Harris v. Johnson, 174 Cal. 55, 161 Pac. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Robinson v. Clemons, supra, and Baker v. Western Auto Stage Co., supra.

There are no other points urged by the appellant which we deem worthy of separate consideration. The instructions of the trial court upon the issues tendered to the jury were full and fair and are not properly subject to the appellant's criticism.

The judgment is affirmed.

We concur: KERRIGAN, J.; SEAWELL, Presiding Justice pro tem.

50 Cal. App. 776

WILDER v. NICOLAUS. (Civ. 1951.)

(District Court of Appeal, Third District, California. Dec. 31, 1920.)

1. Boundaries 🔑9 — Conveyance of quarter section held to carry title to strip 40 chains square.

A conveyance of the northeast quarter of a designated section carries title to a strip of land 40 chains square when nothing appears to the contrary.

2. Boundaries 🔑37(3) — Evidence held to warrant inference that county surveyor followed government survey.

In a boundary dispute involving a question as to the location of the line connecting the centers of two adjoining sections of swamp land which were not fully surveyed by the United States, but were surveyed by the county surveyor under St. 1855, p. 191, evidence *held* to warrant the inference that he established the line in accordance with the government survey, assuming that the government survey was not controlling.

3. Boundaries 🔑46(1)—Rule as to establishment of boundary by agreement stated.

When adjoining owners, being uncertain of the true position of a boundary, agree upon the true location, mark it on the ground, or build up to it and occupy on each side up to the place fixed, and acquiesce in such location for the period of limitations or under such circumstances that substantial loss would be caused by a change of its position, it becomes the true line regardless of the accuracy of the agreed location; but, if the line is located, not for the purpose of settling an uncertainty, but to take land from one and transfer it to the other or with the intent to fix the true line, the agreement is invalid and does not change the boundary.

4. Appeal and error 🔑994(3)—Credibility of witnesses concerning conversation 40 years before is for the trial court.

In a suit involving a disputed boundary, the credibility of witnesses testifying to a conversation between the parties' predecessors in title for the purpose of showing that there was no agreement that a fence should constitute the boundary line was for the trial court, though the conversation took place 40 years before.

5. Boundaries ⚷37(5) — Evidence held to warrant finding against agreement that fence was boundary.

In a suit involving a disputed boundary, evidence *held* to support a finding that there was no agreement between the parties' predecessors in title that a fence constructed by one of them was on the true line.

6. Appeal and error ⚷762—Point first made in closing brief may be ignored.

A point made for the first time in appellant's closing brief as to error in admitting testimony may be ignored.

7. Appeal and error ⚷1050(1)—Admission of declaration not adding anything to further testimony of same witness not prejudicial.

In a suit involving a disputed boundary, where testimony of a witness concerning declarations by plaintiff's predecessor in title added nothing to the effect of his testimony as to a conversation between plaintiff's predecessor in title and defendant's predecessor, its admission was not prejudicial.

8. Adverse possession ⚷93—Payment of taxes for five consecutive years must be shown.

Where title by prescription had not been acquired prior to the amendment of 1878 of Code Civ. Proc. § 325, it was necessary to show payment of the taxes on the disputed strip for five consecutive years.

9. Adverse possession ⚷90 — When assessment of adjoining owners was by description in deed, held that there was no payment of taxes.

Where the assessment to adjoining owners was made according to the description in their deeds which described the lands by reference to the government and state surveys, there was no payment of taxes by one of them on a strip in his adverse possession, but not covered by his deed.

10. Boundaries ⚷47(1) — Party not estopped to recover land by delay in absence of injury to adjoining owner.

A landowner was not estopped by delay to sue for the recovery of a strip in possession of the adjoining owner where the adjoining owner was not misled injuriously by any act or declaration of plaintiff's grantor and had not spent any money in improving the land or in erecting any structure thereon.

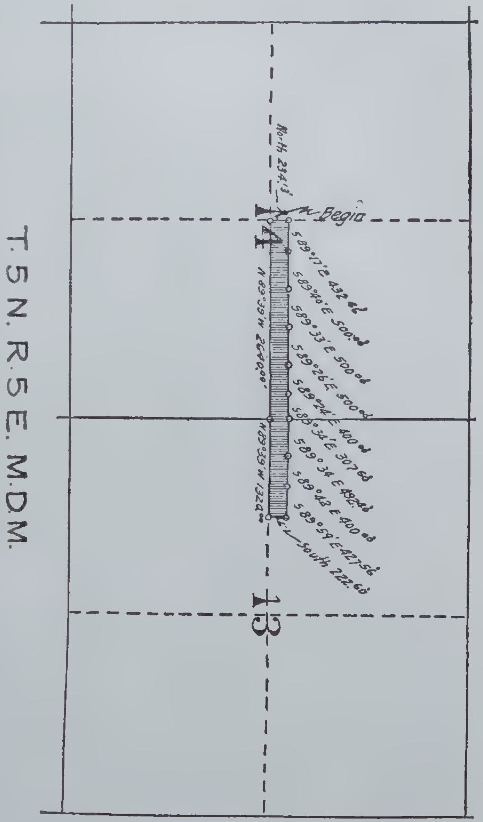
Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Elitha C. Wilder against Frances Nicolaus, as executrix. From a judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

George & Hinsdale and S. W. Downey, all of Sacramento, for appellant.

R. Platnauer and Hughes & Bradford, all of Sacramento, for respondent.

PER CURIAM. The action was brought to quiet title to a rectangular piece of land containing about 20 acres. It is described in the complaint and findings by metes and bounds, the southern boundary of which as "the quarter section line running easterly and westerly through the center of sections 13 and 14, township 5 north, range 5 east, M. D. M." The strip in question is represented by the shaded portion of the following diagram:



The vital controversy in the case is as to the location of the southern boundary line of plaintiff's land, and the solution of this question depends upon the location of the center of said sections 13 and 14. It is not disputed that the legal title to the land lying north of a line connecting these centers belongs to plaintiff, and that lying south is the property of defendant. The contention of the latter is, however, that said southern boundary line constitutes the northern boundary instead of the southern of said disputed strip, the distance between them being 234.13 feet at one end, and 222.60 at the other, as shown on the diagram.

Admittedly, plaintiff's title is deraigned through two patents from the state of California of swamp land surveys, numbered 77 and 78. Survey No. 77 was patented to W. C. Hopping, March 15, 1861; the land conveyed being described as follows:

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

> "Survey No. 77, swamp and overflowed lands, Sacramento county, township No. 5 north, range 5 east, Mt. Diablo meridian, section 14. The east half of section 14, more particularly described in the field notes as follows: Beginning at a quarter section corner of the north line of section 14 in township 5 north, range 5 east of Mt. Diablo meridian; run thence south 80 chains; thence east 40 chains; thence north 80 chains; thence west 40 chains to the place of beginning—containing 320 acres, lines run by the true meridian variation 15 degrees and 30 minutes east."

On February 1, 1883, W. C. Hopping conveyed to Ben W. Wilder "the N. E. ¼ of section 14, township 5 north, range 5 east, M. D. B. & M.," and on January 7, 1898, the latter conveyed to plaintiff "the northeast quarter of section 14," same township and range.

Survey No. 78 was patented to Wm. N. Brainard March 15, 1861. The land not involved in this controversy being omitted, the description in said patent is as follows:

> "Survey No. 78, swamp and overflowed lands, Sacramento county, township No. 5 north, range 5 east, Mt. Diablo meridian, sections 11, 13, and 23. * * * The west ½ of section 13, * * * more particularly described in the field notes of said survey as follows: Beginning again at the southeast corner of section 11; run thence south 80 chains; thence east 20 chains; thence north 80 chains; thence west 20 chains to the place of beginning—containing 160 acres."

On September 2, 1895, B. W. Wilder obtained a judgment in the superior court of Sacramento county against William N. Brainard adjudging that said Wilder was the owner in fee of "the W. ½ of the N. W. ¼ of section 13" of said township and range, and quieting his title thereto, and on January 7, 1898, said Wilder conveyed to plaintiff the same property as thus described. Plaintiff also deraigns title through a deed from George C. Higgins and others to B. W. Wilder, and dated February 1, 1859, wherein the property is described as the W. ½ of the N. W. ¼ of section 13 and the N. E. ¼ of section 14 in said township and range.

Defendant's title is connected with a deed dated December 28, 1865, executed by Wm. R. Wilder and Frances E. Wilder to Wendel Kearth, describing the land by metes and bounds, "beginning at the N. E. corner of the W. ½ of the S. W. ¼ of section 13; thence running west to the geographical center of section 14," followed by other calls unnecessary to mention, and "including the following tracts of swamp and overflowed lands, to wit: The south half of section 14 in township 5 north, range 5 east, being a part of swamp surveys No. 76 and No. 77, containing 320 acres, more or less; also S. W. (W.?) ½ of S. W. ¼ of section 13," same township and section, "containing 80 acres more or less."

It thus appears that the land conveyed to plaintiff and also that conveyed to defendant is described by legal subdivisions, and, furthermore, there is no doubt that the exterior boundaries of the surveys had their initial point at some United States section corner. The controversy, though, as to the location of the division line between the parties arises from the circumstances that said sections 13 and 14 do not appear to have been fully surveyed by the United States, that no monuments of such survey can be found at certain section corners, that the so-called swamp land surveys were made by the county surveyors, and it is the claim of appellant that these latter surveys must be followed, and that, in accordance therewith, said division line lies north of the disputed strip, although the United States survey may show it to be south.

[1] It may be said, though, that the United States survey is the basis for the survey by the county surveyor under the direction of the surveyor general, and the law makes it the duty of said official to have the survey made "as near as practicable, in accordance with the surveys of the public lands of the general government" (Stats. 1855, p. 191); and as we might expect, we find swamp land survey No. 77 beginning at the northwest corner of section 14, and the field notes end with this statement:

> "And surveyed in accordance with the instructions of the surveyor general, and being a continuation of the United States surveys."

The initial point of survey No. 78 is stated as the southeast corner of section 11, and the field notes conclude with the same statement as in 77. No doubt said reference is to the corners as located in accordance with the United States survey. It is true that the southeast corner of section 11 does not appear to have been established and set by the official survey made by the United States, but the exterior boundaries of section 11, the line between sections 11 and 14 and the western boundary line of 14 had been surveyed and established. Hence there would seem to be no difficulty in determining on the ground the location of said corner of section 11. But, even if the exact location of said corner is left in doubt, the evidence shows that the north line of section 14, as surveyed by the government, corresponds with the northern boundary of plaintiff's land. The conveyance, therefore, of the N. E. ¼ of section 14, nothing appearing to the contrary, would carry the title to a strip of land 40 chains square, but 40 chains south from said northern line would include the disputed strip in said section 14.

[2] A similar condition exists as to the portion of said strip in section 13. The northern boundary of said section is the continuation of section 14, and 40 chains south therefrom reaches the line drawn through the centers of said sections, as shown on the diagram.

The location of the northern boundary of plaintiff's land and the designation of the legal subdivisions thereof, in the absence of nullifying evidence to the contrary, seem to justify the finding of the court that the southern boundary thereof lies south of the disputed strip.

Of other circumstances tending to confirm this view, we refer to the testimony of the surveyor, J. J. Rooney. He made a survey of the premises in accordance with the United States survey, and he made a map thereof. This map was received in evidence, and it shows the southern boundary of plaintiff's land to correspond with the southern boundary of said disputed strip. Of some importance also is the testimony of J. A. Wilder, the son of B. W. Wilder, who declared that there was a stake in the northern boundary line of section 14 having a surveyor's mark upon it which was generally recognized around that vicinity as being a government survey stake; that subsequently the stake was taken up and some coal was found deposited at the foot of it. "In connection with the Wilder place, as it now exists—that is, the northwest corner of quarter section 14—it is the northwest corner of the place known as the Wilder place." He proceeded to state that he and his father measured south from that point 160 rods and it carried them 17 rods south of the northern boundary of the disputed strip.

It may be added that there is nothing in the evidence to show that the acreage claimed by plaintiff is in excess of what her deed calls for, and even some of the maps introduced by defendant and representing the swamp land surveys show the exterior lines of these sections to correspond exactly with the map and the survey made by the United States and in accordance with the claim of plaintiff herein.

The principal evidence relied upon by appellant to support her claim as to the location of the division line consists of the expert testimony of a prominent civil engineer and surveyor, but his opinion was based upon certain data of somewhat speculative and uncertain value and is subject to the familiar objections to this kind of testimony. Its force was also weakened by the cross-examination, and attention may be called to this significant admission by him that—

> "The actual position of this fence is 3.57 chains north of the location of the center of section 14, as the same would be located by the projection of the United States surveys. The point where the line would be located between the Wilder and Nicolaus ranches, according to what I have testified, would entirely depend upon where I made my starting point. * * * The map that I made did not coincide with the United States general map, but it did coincide with the swamp land. The fence line will not agree with the United States government line. * * * The northwest corner of the land occupied by Wilder is practically in the center of the road; the line is on the center line of the county road; that is, on the west boundary. The distance from the center of the county road south of the fences that we are speaking about is 36.43 chains."

The witness also testified that in 1853 "the United States surveyor had located the east boundary on Nicolaus' east line of 13 and had fixed the south corner of 13." This was three years before the said swamp land surveys were made by the county surveyor, and it would therefore appear that from the established government survey the county surveyor could locate the initial points of the two surveys, Nos. 77 and 78, and the presumption is that he followed that course, and located on the ground the half section corners of the sections 13 and 14, as called for by the government survey, notwithstanding the opinion of the witness to the contrary. Hence, if we accept the government survey as controlling, the conclusion cannot be avoided that plaintiff is the owner of the legal title to the land in dispute; and, if we must follow the survey of the county surveyor, it is at least a fair inference that he established the division line in accordance with the government survey.

Great stress is laid by appellant upon the point that—

> "The location of the true boundary line common to the 'Wilder' and 'Kearth' ranches, due to the conflicting surveys of the United States and of the state, is uncertain and is believed by the owners to be uncertain, and the survey, location, and staking of the line between the two ranches by the surveyor Winn in 1871, the construction thereon in 1873 or 1874 of the line fence ever since maintained on that line, and the acquiescence of the plaintiff and her predecessor in interest for upwards of 40 years in the line so surveyed and fenced as the true boundary line between the two ranches, conclusively establishes that line and the fence built and maintained thereon the true boundary between the two ranches."

As to the law applicable to such situation it is apparent that the earlier view of the Supreme Court has been modified by the later decisions, or, at least, that the correct doctrine was not fully stated in the earlier opinions. For instance, in Sneed v. Osborn, 25 Cal. 619, it is declared that—

> "When the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line."

[3] The rule is more fully and accurately stated in Grants Pass Land, etc., Co. v. Brown, 168 Cal. 456, 143 Pac. 754, as follows:

> "When such owners, being uncertain of the true position of the boundary so described,

agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed, and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements. * * * And if the line is located and agreed to, not for the purpose of settling an uncertainty in the minds of the parties as to the position of the true line upon the ground, but to take land from one owner and transfer it to the other, or without the intent to fix the true line, such agreement is invalid and does not change the legal boundary nor affect the title of either party to the land he previously owned."

In Friedman v. Southern California T. Co., 179 Cal. 266, 176 Pac. 442, it is said:

> "But the doctrine can be invoked only where adjoining owners, being uncertain of the actual position of the boundary described in their deeds, agree upon its true location. * * * The validity of such an agreement rests upon the belief and understanding of both parties that they are establishing the true boundary line between their properties."

The latest expression of the Supreme Court to which our attention has been called is found in Staniford v. Trombly, 58 Cal. Dec. 357, 186 Pac. 599, wherein it is declared that—

> "A fence built between adjoining property owners for the purpose of preventing the straying of stock, and not built upon an agreed boundary line, which boundary line was uncertain when the fence was built, cannot be considered as establishing the true boundary line between the properties, notwithstanding the acquiescence in the existence of the fence and the occupancy of each property up to the fence for a period of 30 years after its construction."

The court held that the acquiescence in the existence of the fence and the occupancy of the land did not amount to an agreement that it was upon the boundary line.

[4, 5] In this case there is no doubt of the existence of the fence and the occupancy of the land as claimed by appellant for a much longer period than required by the statute of limitations. But it is claimed by respondent that there was no uncertainty as to the location of the true boundary line, and there was no agreement that the fence was on the true line.

We may notice only the latter contention, as it is decisive of the controversy. Whether the circumstances, in the absence of direct evidence, would require a conclusion favorable to appellant, we need not determine, since there is the testimony of two witnesses to the effect that there was no such agreement between the owners of the property at the time the fence was built. This testimony is the subject of mirth and derision on the part of appellant, but its credibility was manifestly for the determination of the trial court. Assuredly we cannot say that it is inherently improbable, although it may appear somewhat remarkable, that they should remember a conversation for 40 years. We may quote the testimony of J. A. Wilder, as follows:

> "I am a son of Benjamin W. Wilder. On my twelfth birthday, March 25, 1874, my father and I started from Shingle Springs and arrived at the ranch where we now are, on March 29th. We put up a little cabin there to live in, and then we built some fence between our place and W. R. Bradford. We were there about two or three weeks. I saw Mr. Kearth; he talked with my father in my presence. Mr. Kearth came up to where we were building that fence, and spoke to my father about he was going to build that line fence on the south; he had not started then; he was then working on the west fence. He said, 'Mr. Wilder, there is lots of water down there on me; I am going up on you 16 rods.' My father said, 'Mr. Kearth, you go right on the line, and don't come on me an inch.'"

He further testified that after the fence was built the following conversation took place:

> "My father said, 'Mr. Kearth, you came upon my land.' He said: 'Yes.' 'Well,' he said, 'you move the fence back.' He said: 'I won't do it. You want your land you go up on Owen on account of the water.'"

From this and other testimony the court was amply justified in the conclusion that there was no agreement as to the fence being on the boundary line.

In explanation of the inaction for so many years of plaintiff and her predecessor in interest in reference to this fence, it may be said, as a matter of common knowledge that until a comparatively recent period this overflowed land was considered of such trifling value as hardly to justify the expense of any litigation to settle the title to a few acres.

[6] In this connection it is urged that the court committed error in overruling an objection to the testimony of these two witnesses as to certain declarations made by their father in the absence of Mr. Kearth in reference to this fence. But, conceding error in that respect, it is sufficient to say that the point is made for the first time in the closing brief of appellant, and we would be justified, therefore, in ignoring it. Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24.

[7] Moreover, it is quite apparent that the error was not prejudicial. It added nothing to the effect of the testimony as to the conversation between Wilder and Kearth.

If such testimony had been given by another witness, there might be some merit in the claim that it had probably influenced the decision.

[8] As to adverse possession, the court was perfectly justified in finding against appellant. The fence was constructed in 1874, less than five years prior to the amendment of 1878 of section 325, Code of Civil Procedure, and, while there is some evidence of the use of the disputed strip prior to this time by appellant's predecessor in interest, yet the court was warranted in finding that it was not exclusive and under a claim of right or such as to give notice of any hostile claim. Mattes v. Hall, 28 Cal. App. 361, 152 Pac. 436. Hence, for appellant to establish title by prescription, it was necessary to show that she and her predecessors in interest had paid the taxes on the disputed strip for five consecutive years.

[9] It seems that the assessment was made to the adjoining owners according to the description in their deeds. In Friedman v. Southern California T. Co., supra, a similar situation was involved, and the court said:

> "Concededly the defendant paid no taxes except those assessed upon the land described by its deed. Its claim that by reason of the representations and agreements of the parties the description in the deed should be regarded as extending to the fence is but an attempt, in another form, to invoke the rule of agreed boundaries, and this, as we have seen, cannot be done."

The cases to the contrary cited by appellant where the assessment has been construed as extending to the fence were instances where the division line had been established by the parties. Such is not the condition here.

[10] We can see no element of estoppel in the case. Neither the defendant nor Wendel Kearth was misled in any manner injuriously by any act or declaration of plaintiff's grantor. There is no evidence that either of them spent any money in improving the land or in erecting any structure thereon. In Loustalot v. McKeel, 157 Cal. 634, 108 Pac. 707, and Young v. Blakeman, 153 Cal. 477, 95 Pac. 888, buildings had been erected near the supposed boundary line under circumstances that would make it inequitable to disturb the possession and apparent title of the parties. Herein upon the facts found by the trial court the only persons who have been injured are respondent and her grantors, who have been deprived of the use of their land. Staniford v. Trombly, supra.

Under the rules by which this tribunal is governed, we think the action of the lower court must be upheld.

The judgment and order are therefore affirmed.

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51 Cal. App. 60

CARPENTER et al. v. ATCHISON, T. & S. F. RY. CO. (Civ. 3436.)

(District Court of Appeal, Second District, Division 1, California. Jan. 12, 1921. Hearing Denied by Supreme Court March 10, 1921.)

1. Negligence ⟹93(1) — Automobile driver's contributory negligence at crossing not chargeable to passenger.

A passenger in the automobile of another having no control over the owner driving the car or the operation of the car which he occupied merely as passenger was not chargeable with contributory negligence of the owner and driver at a railroad crossing.

2. Railroads ⟹327(12)—Automobile passenger must use ordinary care.

An automobile passenger, though not chargeable with the driver's negligence at a railroad crossing, is bound to exercise ordinary care for his own safety, without which the injury received in a collision is attributable to his own negligence.

3. Railroads ⟹346(5)—Automobile passenger killed in crossing collision presumed to have used care.

Under Code Civ. Proc. § 1961, in the absence of evidence to the contrary, the law presumes that an automobile passenger killed in collision at a railroad crossing did everything that a reasonably prudent man would have done under the same circumstances for the protection of his own safety.

4. Railroads ⟹350(21) — Automobile passenger's negligence held question of fact.

It cannot be said as a matter of law that a passenger in an automobile driven by another was guilty of negligence contributing to his own death in collision with a train at a railroad crossing because he did not call to the attention of the driver of the automobile an approaching train when he himself saw it.

5. Railroads ⟹350(21)—Automobile passenger's negligence in failing to interfere with operation of car or to leave it held for jury.

If decedent, a passenger in another's automobile, when the car reached a point 30 feet distant from a railroad crossing, while moving at only 4 miles an hour, saw a train 300 feet away approaching at high speed, his failure to interfere with the driver's operation of the car rather than to rely on the latter's judgment in escaping the threatened danger, and his failure to leave the car, cannot be said, as a matter of law, to have constituted contributory negligence.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Gene Carpenter and others, by Mary Carpenter, their guardian ad litem, and by Mary Carpenter, against the Atchison, Topeka & Santa Fé Railway Company. From judgment of nonsuit, plaintiffs appeal. Reversed.

T. M. McNamara, of Taft, and Rowen Irwin, of Bakersfield, for appellants.

E. W. Camp, U. T. Clotfelter, Robert Brennan, and M. W. Reed, all of Los Angeles, for respondent.

SHAW, J. At the close of plaintiff's evidence, defendant's motion for a nonsuit was granted, and from the judgment entered thereon plaintiffs have appealed.

Plaintiffs are heirs of C. M. Carpenter, deceased, who died from injuries alleged to have been sustained as a result of defendant's negligent operation of a railway passenger train which collided with an automobile in which deceased was at the time traveling as a passenger.

It appears that Oak street in the city of Bakersfield extends north and south, crossing at right angles the railway tracks of defendant, which at the time in question was operating a passenger train thereon from the west, while W. C. Gibson, in an automobile in which Carpenter was a passenger, was driving south on said street to a point which required him to cross the railway tracks in reaching the destination to which Carpenter had employed Gibson to take him. Gibson was at the wheel of his car on the left side thereof, and Carpenter was sitting beside him on the west side, from which the train was coming. In approaching the railway from the north on Oak street the view of the railway tracks until within some 30 feet thereof was at the time more or less obstructed by telegraph poles, a fence, growing vegetation, bushes, and cars standing on a spur track extending in a northwesterly direction. But upon the automobile reaching a point 30 feet distant from the track the view thereof on the west, from which direction the train came, was unobstructed for a distance of 300 feet. Covering this distance of 30 feet from the track the automobile was operated at a speed of some 4 miles per hour, while the train approached the crossing at a speed of some 35 or 40 miles per hour, and while there was at the crossing a wigwag and bell, they were not operated, nor did the men in charge of the train give any signal or warning of its proximity to the crossing until within a few feet thereof, at which time the front wheels of the automobile had crossed the north rail of the track, and, while Gibson was trying to back his car, the engine collided therewith and caused the injuries to Carpenter from which he died.

Upon the evidence offered the jury might very properly have found defendant guilty of negligence in operating its train. Gibson, as owner and driver of the automobile, was familiar with the existence of the crossing, knew that trains were operated over the same at regular intervals, and, conceding that, as claimed by appellants, there was an absence of warning given by defendant's servants of the approach of the train, and that the track could not be seen by one traveling south on Oak street until within 30 feet thereof, nevertheless it clearly and conclusively appears that when the automobile reached a point 30 feet distant from the track a plain and unobstructed view thereof was afforded for a distance of at least 300 feet to the west, from which direction the train was coming, and from which point the automobile traveled up grade to the track at a speed of 4 miles per hour, during all of which time the approaching train was in plain view. That Gibson neglected the simplest precaution and omitted every duty devolving upon him for the protection of himself and passenger is upon the evidence not open to the slightest question.

[1-3] We cannot, however, assent to respondent's contention that such gross negligence on the part of Gibson should be imputed to deceased, who had no control over the former or the operation of the car which he occupied merely as a passenger. Indeed, the authorities, in this state at least, are uniformly to the contrary. Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; 1 Thompson on Negligence, §§ 500, 502; 7 Am. & Eng. Encyc. of Law, p. 447; Fujise v. Los Angeles Ry. Co., 12 Cal. App. 207, 107 Pac. 317; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; Ilardi v. Central Cal. T. Co., 36 Cal. App. 488, 172 Pac. 763; Hermann v. Rhode Island Co., 36 R. I. 447, 90 Atl. 813. While Carpenter, the deceased, was not chargeable with the contributory negligence of Gibson, nevertheless he was in duty bound to exercise ordinary care for his own safety, without which, as affirmatively alleged in defendant's answer, the injury received would be attributable to his own negligence. Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460; Bresee v. Los Angeles Traction Co., supra. In the absence of evidence to the contrary, the law presumes that he did everything that a reasonably prudent man would have done under the same circumstances for the protection of his own safety. Code Civ. Proc. § 1961; Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 143 Pac. 714; Baltimore & Potomac R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262. To overcome this presumption defendant invokes not only the conditions in connection with and surrounding the collision, by reason of which it is claimed Carpenter must be deemed to have seen the approaching train, but the uncontradicted testimony of Gibson, wherein he, referring to the travel of the automobile while covering the 30 feet, during which time the train was in sight, said:

> "I don't think any one said a word. I don't remember saying anything to Mr. Carpenter or Mr. Carpenter saying anything to me. I don't recall that I was engaged in any conversation at all; not a word I can recall was said. The car was making scarcely any noise in its operation."

And, basing its argument thereon, respondent insists that—

> "Deceased did not do anything to prevent the accident; he did not utter a word; he made no effort to leave the automobile."

[4] Conceding that deceased did see the approaching train and said nothing to the driver of the automobile or otherwise interfered with his operation thereof, nevertheless we cannot say as a matter of law that by reason of such omission he was guilty of negligence. As said in the Ilardi Case:

> "Such interference by the passenger or guest where the vehicle is about to be placed in a position of danger might prove to be gross imprudence and so disconcert the driver as to cause the disastrous result which such interference was designed to avoid"

—in support of which see cases cited. For aught that appears to the contrary, he might have reasonably believed that Gibson intended to and would have either stopped or increased the speed of the car and thus have easily escaped the threatened peril. Hence it cannot be said that deceased was guilty of negligence by reason of his noninterference with the driver's operation of the automobile. As to whether deceased attempted to escape from the automobile, there is no evidence whatever, and in the absence thereof, assuming that under the circumstances he should have attempted to so escape the danger which threatened him, the presumption arises that he did try to leave the automobile. The sole ground upon which the negligence of deceased is predicated is the fact that he could, had he looked, have seen the approaching train, and therefore, argues respondent, he should in the exercise of ordinary care for his safety have done something to escape the result of the collision. This question, however, in view of the presumptions arising, is one of fact to be determined by the jury from all the circumstances in the case, for, as said in Fox v. Oakland, etc., St. Ry., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216:

> "Negligence is not absolute, but is relative to circumstances, and it is very rarely that a set of circumstances is presented which enables the court, as matter of law, to say that negligence has been shown, but, as a general rule, it is a question of fact, or of inference of fact, to be deduced by the jury from the circumstances proved."

To the same effect are Hennesey v. Bingham, 125 Cal. 627, 58 Pac. 200, and Maxwell v. Fresno City R. Co., 4 Cal. App. 747, 89 Pac. 367.

[5] Assuming that deceased, when the automobile which he occupied as a passenger or guest, reached the point 30 feet distant from the crossing, and traveling at a speed of only 4 miles per hour, saw the train 300 feet away therefrom and approaching at a high rate of speed, we cannot say as a matter of law that his failure to interfere with the driver's operation of the car rather than to rely upon the latter's judgment in escaping the threatened danger, nor that his failure to leave the car, constituted contributory negligence. The question as presented was one of fact which should have been left to the verdict of the jury.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

51 Cal. App. 56

LAPIQUE v. AGOURE et al. (Civ. 3618.)

(District Court of Appeal, First District, Division 1, California. Jan. 11, 1921. Rehearing Denied Feb. 10, 1921. Hearing Denied by Supreme Court March 10, 1921.)

1. False imprisonment 🔑20(1) — Complaint held bad.

A complaint alleging false imprisonment for contempt and for criminal libel, which nowhere showed under what circumstances plaintiff was committed or in what respect defendants were responsible, *held* bad as against demurrer.

2. False imprisonment 🔑20(1) — Complaint must aver facts showing want of jurisdiction.

A complaint for false imprisonment under the guise of judicial action must allege facts from which want of the court's jurisdiction appears, and allegations merely that the imprisonment was unlawful and void tender no issue.

3. False imprisonment 🔑22—Jurisdiction presumed.

In an action for false imprisonment, it will be presumed, in the absence of contrary allegations, that complaint under which the warrant was issued stated facts proper to give the court jurisdiction to issue the process, and that the arrest and imprisonment were made in the legal execution of lawful authority.

4. False imprisonment 🔑7(1)—Imprisonment in due course of regular proceeding not actionable.

An action for false imprisonment does not lie for an imprisonment in due course of regular proceedings of a court having jurisdiction of the offense.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by John Lapique against Kate Agoure, administratrix of the estate of Pierre Agoure, deceased, and others. From a judgment dismissing his complaint after the sustaining of demurrers thereto, plaintiff appeals. Affirmed.

See, also, 185 Pac. 178; 189 Pac. 834, 835.

John Lapique, of Orange, in pro. per.

Henry T. Gage and W. I. Foley, both of Los Angeles, for respondents Kate Agoure and others.

O'Melveny, Millikin & Tuller, of Los Angeles, for respondent Title Guaranty & Surety Co.

KERRIGAN, J. This action was brought by plaintiff to recover the sum of $175,000 for false imprisonment.

Demurrers by the various defendants were interposed to plaintiff's second amended complaint, which were sustained without leave to amend, and judgment of dismissal followed. The present appeal is from such judgment.

Plaintiff appeared in the court below and does here in propria persona. It is manifest that he is not an attorney at law, and, in fact, his pleading so admits. The amended complaint contains some 64 allegations, in addition to which 11 additional causes of action are attempted to be stated. It would be an endless task to review its allegations in detail, and no useful purpose would be subserved thereby. In substance the pleading is an attempt to state a cause of action for damages on account of two imprisonments suffered by the plaintiff—one for contempt of court; the other for criminal libel. The demurrers of the different defendants were based upon numerous grounds, among which were that the complaint did not state a cause of action; that it was unintelligible and uncertain; that several causes of action were improperly united; and that the alleged cause of action was barred by the statute of limitations.

[1] In substance the complaint recited that one Pierre Agoure died a resident of Los Angeles, leaving an estate of the value of about $800,000; that he was indebted to plaintiff at the time of his death as a partner in the sum of $27,573.65; that the wife of Agoure had prior to his death through forgery and perjury acquired a homestead in property of her husband valued at about $300,000; that defendants murdered Agoure by administering poison to him; that his wife was thereafter appointed administratrix of his estate; and that one of the defendants, the Title Guaranty & Surety Company, became a surety on her bond. Then follow different recitals showing the attempt of plaintiff to collect his alleged claim. Among other things, he recites the filing of objections to the account of the administratrix and to her petition for final distribution. He also alleges an application on his part for a change of venue upon such hearings upon the ground of bias and prejudice of each and all of the judges of the superior court of Los Angeles, the granting of such motion, and the false and fraudulent entry by the clerk of an order reciting that his motion had been denied. Then follow recitals that the plaintiff was unlawfully imprisoned for contempt of court, and prosecuted and unlawfully imprisoned for criminal libel and kept in confinement from December 21, 1914, to September 8, 1916. In this connection it is also alleged that one of the defendants caused him to be held "incomunicado." By other recitals certain of the defendants are charged with various other offenses, but we do not deem a further review of the allegations necessary. Enough has been said to indicate that the demurrers were properly sustained. The complaint nowhere shows how or in what manner or under what circumstances plaintiff was committed for contempt of court, or in what respect defendants could be responsible for his conviction and imprisonment on this charge; nor can it be ascertained from the complaint how and under what circumstances plaintiff was imprisoned on a charge of criminal libel, or in what manner his arrest or release was secured—whether by serving or satisfying a fixed term of imprisonment or otherwise. There is nothing in the complaint to show that the process upon which plaintiff was arrested was defective or void, or the judgment thereon illegal, or that the courts were without power or jurisdiction to arrest and imprison plaintiff on the charges recited.

[2] A complaint for false imprisonment must aver facts from which want of jurisdiction appears. Allegations, as here, that the imprisonment was unlawful and void, tender no issue. Going v. Dinwiddie, 86 Cal. 633, 25 Pac. 129.

[3] Here there is no showing that the warrant issued in the criminal libel case or the commitment on the contempt charge were insufficient to state a cause of action; for, in the absence of contrary allegations, it must be presumed that the complaints under which the warrant was issued stated facts proper to give the court jurisdiction to issue the process under which the arrests and imprisonments were made, and that they were made in the legal execution of a lawful authority. Donati v. Righetti, 9 Cal. App. 45, 97 Pac. 1128.

Nor does the complaint show that the judgments rendered in either of the prosecutions complained of have ever been directly attacked, or that they do not stand in full force and effect.

[4] An action for false imprisonment does not lie for an imprisonment in due course of regular proceedings of a court having jurisdiction of the offense. 19 Cyc. 339.

For the reasons given, the judgment is affirmed.

We concur: SEAWELL, Presiding Justice pro tem.; RICHARDS, J.

51 Cal. App. 49

Ex parte SHEPARD. (Cr. 759.)

(District Court of Appeal, Second District, Division 2, California. Jan. 7, 1921.)

1. Health ⚷24—Mere suspicion that person has isolable disease not sufficient to give officer "reason to believe" so.

Mere suspicion that an individual is afflicted with an isolable disease is not sufficient to give a health officer "reason to believe" that such person is so afflicted, under Pol. Code, § 2979a, making it the duty of health officers to protect the public against spread of such disease from persons whom such officers have "reason to believe" are afflicted with such diseases.

2. Health ⚷24—Woman charged with being prostitute and suspected of having venereal disease was improperly detained.

That a woman had offered to indulge in sexual intercourse for a consideration and had been charged with conducting a house of prostitution, and was suspected of having a venereal disease, did not warrant her detention in a hospital under Pol. Code, § 2979a, making it the duty of health officers and others to take necessary measures to protect the public against the spread of certain diseases from persons whom such officers know or have reason to believe to be afflicted with such diseases, in the absence of other facts on which to base the suspicion that she was so diseased.

Application for writ of habeas corpus by Irene Shepard against the Superintendant of the Mission Valley Hospital of San Diego. Petitioner discharged.

A. W. Treadwell and W. M. Tompkins, both of San Diego, for petitioner.

C. G. Selleck, of San Diego, for respondent.

WORKS, J. The petition in this matter is presented by a friend of Irene Shepard, and alleges that the latter is held under quarantine and isolation by the respondent, Dr. Alex M. Lesem, but that she is not afflicted with any disease quarantinable or isolable under the law. It is further alleged that the respondent has no information of the existence in Mrs. Shepard "of such diseases as may * * * be made the cause" for her quarantine and isolation.

The respondent, by his return to the writ, alleges that Mrs. Shepard is isolated in a hospital under his charge, "suspected of being infected with a contagious, infectious, and communicable disease, namely, syphilis and gonococcus infection"; that, in his opinion, "it is now necessary to isolate the said Irene Shepard until an examination is made to determine whether said Irene Shepard is inflicted with said diseases, or either of them"; and "that there is reasonable cause to believe that she is so infected." He further alleges that Mrs. Shepard refuses to submit herself to the desired examination.

The circumstances under which the woman is detained, stating them most favorably to the contention of respondent and disregarding Mrs. Shepard's denials, are shown by the evidence presented to us to be these: A deputy sheriff was told by three negro sailors that there were some girls to be found at the residence of Mrs. Shepard. The sailors then pointed out the house, she being in front of the place at the time. Two days later the deputy went to the house and remained there about two minutes. While there he asked Mrs. Shepard if she would indulge in sexual intercourse with him for a consideration, and she said she would. It then was arranged that the deputy should return later to commit the act. Some days afterward, another officer, under whom the deputy sheriff had been working, swore to a complaint against Mrs. Shepard, charging her, in due form, with conducting and maintaining a house for the purpose of assignation and prostitution. She was thereupon, but without warrant or other legal process, taken to the city jail, where she remained but about ten minutes. At the end of that time she was ordered by respondent to be taken to the city hospital, in which she has since been detained.

[1, 2] If the respondent has any power to deprive Mrs. Shepard of her liberty, that power is to be predicated upon the provisions of section 2979a of the Political Code, which makes it the duty of health officers and others to take necessary measures to protect the public against the spread of certain diseases from persons whom such officers know or have reason to believe are afflicted with such diseases. There is certainly nothing in the record here to show that the respondent knows Mrs. Shepard to be diseased, and we cannot see that he has sufficient reason to believe that she is diseased. Paying just regard to the constitutional guaranties of the right to personal liberty and personal security, it must be asserted that more than a mere suspicion that an individual is afflicted with an isolable disease is necessary to give an officer "reason to believe" that such person is so afflicted. The circumstances disclosed to us here are lacking in the elements necessary to establish even a well-defined suspicion that Mrs. Shepard is diseased as alleged in the return. The facts before us come within the purview of the language of the court in Ex parte Dillon, 186 Pac. 170.

It is ordered that Mrs. Shepard be discharged from the custody of the respondent.

We concur: FINLAYSON, P. J.; CRAIG, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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WEINBERG CO. v. BIXBY et al.

(L. A. 5707.)

(Supreme Court of California. Feb. 15, 1921. Rehearing Denied March 14, 1921.)

1. Waters and water courses 🔑171(3)—Owners on both sides of river held jointly liable for damages caused by embankments.

Where owner, who had constructed embankments to protect land from river flood waters, constructed other embankments on other side of river for the benefit of owner of land on such other side, at the request of such owner and in consideration of such owner consenting to the use of his land for a portion of the work of owner constructing the embankments, the construction of the embankments on the two sides of the river was in a sense a joint enterprise, making the two owners jointly liable for any damages proximately resulting from a negligent or wrongful performance of the work.

2. Waters and water courses 🔑171(1)—Owner may erect embankments where flow in natural channel not interfered with.

River flood water is a common enemy, which may be guarded against or warded off by owner whose property is invaded or threatened by obstructions which are merely defensive in their nature and not calculated to interfere with the current of the water in its natural channel, even though the result is to throw an increased volume of water on opposite or lower proprietors.

3. Waters and water courses 🔑118—Owner cannot retard or increase flow of surface waters.

Owner must permit the passage of surface waters arising from rain or melting snow, or springs and swamps before they have found their way to and become a part of a stream or river, over his land in such a way as not to retard its flow from the lands above him nor to concentrate and increase this flow upon the lands below.

4. Waters and water courses 🔑54—Owners could construct dikes and deepen river channel to protect land from flood waters.

Owners of land along the banks of the Los Angeles river had a right to construct dikes along and parallel with the river banks and to deepen the river channel along its natural course to protect their lands from flood waters, so long as they did not obstruct the natural flow of the stream or divert its course, notwithstanding damage to lower proprietors; such damage being damnum absque injuria.

5. Waters and water courses 🔑54—Owner not required to maintain embankment constructed to protect land from flood waters.

The fact that a landowner avails himself of the right to repel vagrant waters of a river by embankments does not, in the absence of some further circumstances, impose upon him any obligation to maintain such obstruction or to refrain from restoring natural conditions.

6. Waters and water courses 🔑171(1)—Owners constructing embankments not liable for increased flow through outlet caused by accumulation of silt.

Owners of land on river bank, who constructed embankments and dredged river channels and restored old outlet, which had been obstructed, to protect their lands from overflow of surface waters, were not liable for damage from increased flow through such outlet as the result of accumulation of silt in channel below outlet caused by construction of the dikes, since such silt fill could not have been reasonably contemplated.

7. Waters and water courses 🔑54—Owners constructing dikes and dredged channel not liable for silt carried by current to points below.

Owners who constructed dikes and dredged channel of river to protect lands from overflow of flood waters were not accountable for the silt carried to points below.

8. Waters and water courses 🔑171(1)—Owners removing dike liable if resulting damage could have been reasonably anticipated.

If owners, in reopening old outlet of river by removal of dike which had been constructed, turned the main stream of the river from the old natural channel into the side cut, and if such result could have been reasonably anticipated, they would be liable for such damage as could have been reasonably anticipated.

9. Waters and water courses 🔑171(1)—Reasonableness of act determined by existing conditions.

The reasonableness and prudence of an act causing flowage of land is to be determined by the conditions as they existed at the time, and not in the light of after consequences.

10. Waters and water courses 🔑171(3)—Owners held jointly liable for damages caused by opening of outlet to avoid overflow.

Where owner of land, to protect his land from flood waters of river and to protect the land of another for whom he was active agent, reopened outlet of river, the owner of the other lands for whom he was agent was jointly responsible with him for the damage which resulted, if the main stream was diverted, though the other owner had no actual knowledge of the probable consequences of reopening the outlet, and though neither was actuated by any thought of wrongdoing.

11. Trial 🔑142—Jury to draw inference of facts where reasonable minds might differ.

Where reasonable minds might reach different conclusions, the inference to be drawn is a question for the jury.

12. Action 🔑50(6)—Causes of action for diversion of waters held misjoinder.

The joinder of a cause of action for damages for wrongful diversion of flood waters against a railroad because of the construction and maintenance of embankments and trestles across channel of river in the year 1901, in such a way as to interfere with the flow of the river, with a cause of action against other owners for diversion of water in 1913 by constructing embankments along the river bank and by dredging and deepening the channel of the river and by cutting an opening in embankment so as to divert waters from their natural courses, *held* a misjoinder of parties and of independent and unrelated causes of action, in the absence of a showing of any connection between the acts of the railroad and the acts of the other owners.

13. Torts 🔑22—What constitutes "joint tort-feasors."

In order that parties may be "joint tort-feasors" there must be a concert of action, a unity of purpose or design, and two or more defendants working separately, but to a common purpose, and each acting with the knowledge and consent of the others.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Joint Tort-Feasors.]

14. Waters and water courses 🔑179(5)—Instruction not distinguishing between flood and surface waters erroneous.

In action for wrongful diversion of flood waters of river, instruction *held* erroneous, in that it failed to discriminate between the flood waters of river and the diversion of surface waters.

15. Waters and water courses 🔑54—Owner may construct embankments to protect land from overflow.

Owner of land on river can protect his land from overflow of flood waters by construction of embankments at any point upon his premises, and is not required to construct such embankments along the entire length of his land.

Olney, Shaw, and Lawlor, JJ., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the Weinberg Company against George H. Bixby, Amelia M. E. Bixby, and the Dominguez Estate Company, and another. Judgment for plaintiff against the named defendants, and they appeal. Reversed.

H. C. Beach, Hunsaker & Britt, Hunsaker, Britt & Cosgrove, Le Roy M. Edwards, Roy V. Reppy, Henry J. Stevens, O'Melveny, Millikin & Tuller, and O'Melveny, Stevens & Millikin, all of Los Angeles, for appellants.

Haas & Dunnigan, Veitch & Richardson, Andrews, Toland & Andrews, Frank Karr, and R. C. Gortner, all of Los Angeles, for respondent.

SLOANE, J. This appeal is from a verdict and judgment awarding damages for alleged wrongful diversion of the flood waters of the Los Angeles river upon plaintiff's lands.

The Pacific Electric Company, a railway corporation, the Dominguez Estate Company, a private corporation, and George H. Bixby, and Amelia M. Bixby, who are husband and wife, were joined as parties defendant. The Pacific Electric Company was exonerated from liability by the jury, and verdict and judgment were against the other defendants appellants here, as joint tort-feasors.

The defendant Dominguez Estate Company was the owner of farming lands on the westerly banks of the river and defendant George H. Bixby, and later his wife, the defendant Amelia M. Bixby, was the owner of farming lands on the easterly side of the river at and in the vicinity of the place where the alleged wrongful diversion and interference with the river channel occurred. The Pacific Electric Company was the owner of a right of way and an electric railroad with embankments and trestles across the river valley, and particularly of a trestle which it had constructed over the natural channel of the Los Angeles river above and in the immediate vicinity of the diversion works charged to the other defendants.

It is alleged in the complaint that the location and construction of the railroad embankments and trestle were such as to concentrate the waters of the river in time of floods at this point and that the other defendants, by the construction of embankments from this trestle down stream and along and on each side of the river bed and by dredging and deepening the channel of the stream between such embankments, so increased the current and flow of the river as to silt up and fill the natural bed of the stream below, thereby causing the waters to spread to each side, and that, in order to relieve this condition of overflow, they thereafter cut an opening in the easterly embankment above the silted fill, thereby turning the current of the river from its former and natural course into a new channel, and that in recurring floods covering a period of two or three years great volumes of water were thus turned into this new channel and flowed down and across plaintiff's lands below, cutting, eroding, and silting them, to the damage of plaintiffs.

For an intelligent understanding of the points involved on this appeal it is necessary to describe generally the topography of the country forming the watershed of the Los Angeles river. The river with its various tributaries has its source in the Sierra Madre mountain range, lying to the north of the city of Los Angeles. These branches converge in the northerly part of the city, where a comparatively narrow pass exists between the highlands. From this point the river runs in a generally southerly direction through a constantly widening plain and empties into the ocean between the cities of Long Beach and San Pedro. For several miles above its outlet the river bottom is near the sea level and has a very moderate slope toward the south. To the east of the watershed of the Los Angeles river is another watershed having its source in the same mountain range and draining its waters into what is known as the San Gabriel river. Toward the ocean the course of this stream is through a valley which widens out and merges on the west into the territory through which the Los Angeles river flows. The outlet of the San Gabriel river into the ocean through a period of its history has been east of the city of Long Beach and beyond the mesa lands in the vicinity of that city. The result is that in time of excessive floods the whole territory through which the two rivers flow, for a distance of some miles back from the coast, becomes a vast lake; the waters of the two streams commingling and moving toward the ocean with a very moderate current, which, of course, is accelerated in the deeper channels where the water is accustomed to run when the rivers are within their banks. At such times of overflow the higher body of land in the vicinity of Long Beach and extending back from the coast three or four miles stands above the flood waters as an island, and serves to separate the outlets to the ocean of the two rivers. At the northwesterly end of this body of mesa land a point juts out into the valley near the place where the defendants constructed their dikes or embankments, and also forms an abutment for the southeasterly end of the railroad trestle of the Pacific Electric Company. The line of road of the electric company extends from this point in a northwesterly direction across the river bottom to a projecting point of mesa lands on the opposite side called the Dominguez hills. The valley above and below these points immediately widens, both to the east and the west, but more particularly on the eastern and northern side, where it extends toward the San Gabriel watershed.

The construction of the electric company's railroad across this space from hill to hill, which is frequently called the Narrows, consists of an embankment several feet in height, intersected by a number of trestles or bridges at places of natural depression in the floor of the valley. The principal trestle is the one at the southeasterly end. This is about 1,000 feet in length, consisting of stringers and rails, resting upon bents composed of piles driven into the ground, and braced with cross-timbers. The bents were placed about 20 feet apart and at right angles with the track.

The main channel of the Los Angeles river passes under this trestle in a slightly southwesterly direction at this point. At the time of and prior to the events upon which this action is based, the natural bed or channel of the river was a shallow erosion through the comparatively level floor of the valley, not generally exceeding 2 or 3 feet in depth, and from 100 to 200 feet wide. Nearly every winter season the flow of the waters greatly exceeds the capacity of this channel and spreads over the adjacent land, and occasionally there occur floods which cover the valley from mesa to mesa, with only infrequent spots of slightly higher land appearing above the surface.

[1] The railroad embankments and trestles referred to were constructed by the Pacific Electric Company in the year 1901. The diking and dredging along the river channel by others of the defendants occurred in the fall and spring of 1912–13. This latter work originated with the Dominguez Estate Company. It owned lands bordering the westerly bank of the river, and was also in some way interested in a subsidiary company that was maintaining a cement water ditch which extended under this trestle from the north on the westerly side of the river. The construction of a line of embankment along the west bank of the river and the deepening of the eroded channel from a point some distance north of the trestle was designed to protect their lands and this water ditch from overflow of the flood waters. In extending this work south from the trestle it was necessary to carry it over lands belonging to the defendant George H. Bixby. He consented to such use of his land, provided that for the protection of his property the Dominguez Company would construct a like embankment on his side of the river from the natural high ground at the southerly end of the trestle, and carry the work on both sides of the river, further south than it had planned, to a point where the river bed divided into two channels. To this extent these two defendants joined in this work of flood protection. So far as involved in this suit, the west embankment was constructed by the Dominguez Company for its own benefit, but with the consent of Bixby. The eastern embankment was constructed by the Dominguez Company for the benefit of Bixby on his land, and at his request, and in consideration of his consent to the use of his land for a portion of the Dominguez Company's work. While each of these defendants separately owned and were the sole beneficiaries of the structure on their respective sides of the stream, it may properly be held that it was in a sense a joint enterprise, and that they became jointly liable for any damages proximately resulting from a negligent or wrongful performance of the work, and they were properly joined as defendants in the action.

It does not appear from the evidence, however, that the dredging and diking of the river channel was negligent or wrongful, or that any of the damage suffered by plaintiff proximately resulted therefrom. The complaint alleges, and the proof indicates, an entirely independent intervening cause, namely, the cutting of a channel through the easterly embankment by the defendant Amelia M. Bixby after she had succeeded to the interest of defendant George H. Bixby in the premises. This opening in the embankment occurred after the channel below where the cut was made had become silted and obstructed, and the stream was, by reason of such obstruction of the river bed and cut in the embankment, diverted into a new channel and across the lands of plaintiff. It is not contended, and in any event not shown by the evidence, that the lands of plaintiff would have been injured by the defendants' dikes and dredging if the easterly dike had remained intact. Had such condition continued, the waters of the river would either have forced their way through the silted channel and proceeded on their established course or would have been diverted through the breaks that occurred by the action of the flood in the westerly dikes and flowed westerly over the Dominguez property, as the evidence shows actually happened with the greater volume of the flood.

Moreover, as we have stated, the work of diking and dredging was not wrongful or negligent. The appellants here were in no way responsible, individually or collectively, for the physical conditions which at the time existed along the course of the river channel. The embankments and trestles of the Pacific Electric Road had been constructed over ten years before, without their co-operation or connivance. They did not connect their work of flood protection in any way with the railroad structure in order to avail themselves of any obstruction it might offer to the natural flow of the stream. Their westerly dikes commenced at a point considerably north of the trestle, followed along the westerly bank of the river, outside the channel, under the trestle, at a point some 400 feet from the railroad fill at the northerly end of the opening, and continued south along the westerly river bank. The evidence presents some conflict as to whether some pile sheeting on the face of the dike under the trestle was attached to the trestle bents or to independent piling put in by appellants; but that is an immaterial matter. The dikes thrown up by appellants presented no different obstruction to the current of the stream than it would have done had the trestle not been there. The appellants merely accepted the conditions that were thrust upon them and constructed this dike to prevent the flooding of their lands. On the easterly side of the river, as we understand the evidence, the dike did not pass under the trestle to the north, but commenced with the natural projection of the mesa against which the southerly end of the trestle abutted. The embankments at no place invaded the channel, but ran parallel to it, and the dredging was in the eroded bed of the stream.

[2] The doctrine of the common law relating to protection against flood overflow of rivers, and which has been adopted by the California courts, recognizes such flood waters as a common enemy which may be guarded against or warded off by one whose property is invaded or threatened by obstructions which are merely defensive in their nature and not calculated to interfere with the current of the water in its natural channel.

The rule as stated in Rex v. Commissioners, 8 B. & C. 355, and which has been often quoted with approval by this court, declares that the sea "is a common enemy," and that any proprietor of land exposed to the inroads of the sea may protect himself by erecting a groyne or other reasonable defense, although it may render it necessary for the owner of the adjoining land to do the like, and that "each landowner for himself * * * may erect such defenses for the land under his care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy." Bailey, J., concurring in this opinion, says:

> "I am entirely of the same opinion. It seems to me that every landowner exposed to the inroads of the sea has the right to protect himself and is justified in making and erecting such works as are necessary for that purpose."

This rule has been so often cited, approved, and commented upon by the Supreme Court of this state, as applied to dikes and embankments by property owners to prevent overflow of their lands by the flood waters of the Sacramento river and similar streams of this state, even though the result of such obstruction has been to throw an increased volume of the flood upon opposite or lower proprietors, that it is not necessary to review the decisions at length. Lamb v. Reclamation Dist., 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575; Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169; Island Rec. Dist. v. Syn, 167 Cal. 467, 140 Pac. 4; De Baker v. Railway Co., 106 Cal. 258, 39 Pac. 610, 47 Am. St. Rep. 237; Horton v. Goodenough, 194 Pac. 34.

Commenting on the rule established by the decisions just cited, the principle is thus tersely stated in Jones v. California Development Co., 173 Cal. 565, 574, 160 Pac. 823, 827 (L. R. A. 1917C, 1021):

> "The underlying principle governing the decision of all these cases which deal with extraordinary water conditions, whether created by the ocean or by unexpected and unprecedented floods, is that in such stress the landowner may use every reasonable precaution to avert injury from his land, and whether or not his conduct be reasonable will be determined by existing conditions and not by after consequences; so that if the acts of the landowner be, in the light of the existing circumstances, not unreasonable, he will not be held liable for consequent damages which by these reasonable acts may be inflicted upon another landowner."

We recognize the limitation in all of these cases that such right of self-protection does not permit of any obstruction of or interference with the natural channel of the stream or diversion of the flow of the water in such channel.

[3] The distinction, too, is recognized in this state between the flood waters of a natural water course and the surface drainage arising from rain or melting snow, or springs and swamps before they have found their way to and become a part of a stream or river.

As to such drainage, our courts have adopted the rule of the civil law, which places upon the proprietor of land the burden of permitting the passage over his land of the surface drainage in such a way as not to retard its flow from the lands above him, nor to concentrate and increase this flow upon the lands below. Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Gray v. McWilliams, supra; Los Angeles, etc., Association v. Los Angeles, 103 Cal. 461, 37 Pac. 375; Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Sanguinetti v. Pock, supra. In Gray v. McWilliams, supra, and Sanguinetti v. Pock, supra, the distinction between the rule applying to flood waters and that applying to surface waters is clearly pointed out.

[4] That the overflow waters of the Los Angeles river, spreading from the channels of the stream over the adjacent country and accompanying the channel waters in a parallel course to the sea, are flood waters and are

subject to the doctrine of flood and not surface waters will not be questioned.

It follows from the authorities cited that the construction of dikes along and parallel with the river banks and the mere deepening of the river channel along its natural course, either by the Dominguez Company or the Bixbys, for the protection of their respective lands on one or the other banks of the river, or by their joint action through dikes on both sides of the river, were not wrongful so long as they did not obstruct the natural flow of the stream or divert its course. If damage to lower proprietors had followed from such defensive construction, under the authorities cited, it would be damnum absque injuria. Even though the effect upon the channel of the stream below, by reason of increased flow and current between the embankments, was to silt and obstruct the lower channel, it would afford no ground of action. If the defendants merely fend the intruding waters from their own premises in a reasonable and prudent manner, they cannot be held responsible for the action of the stream in depositing more silt and débris either in the channel or on adjacent lands below than would have been done had it been permitted to spread over defendants' lands.

In the recent case of San Gabriel Valley Country Club v. Los Angeles County, 188 Pac. 554, 9 A. L. R. 1200, which involved liability of the county of Los Angeles resulting from the construction of a cement ditch or conduit in place of the natural channel of a water course, the effect of the change was to materially increase the flow and current of the water in the stream, thereby causing erosion of plaintiff's lands below. In the opinion it is said by Mr. Justice Olney:

> "Summing up the discussion, our conclusion, as we have stated, is that an improvement for the purposes of the drainage and protection of lands above does not give a lower riparian owner on the stream a cause of action merely because such improvement increases the volume of water in the stream as it comes to his land, even though the burden he is necessarily under of protecting his land against the stream is thereby increased and his land is injured because of his failure to meet such increased burden, and, further, that the rule is not subject to the limitation that the increased volume must not be such as to make the stream exceed the capacity of its channel."

This rule which permits the owners of lands subject to overflow from adjacent rivers to erect barriers to such overflow upon their own borders may and often does result in serious damage to adjoining or lower properties, but it is the only rule consistent with the development and improvement of vast bodies of potentially rich and valuable lands along low-lying river bottoms. It is true that if the whole territory is permitted to lie in its native state these periodical floods may repeatedly spread over the surface of the country in a gradual unobstructed flow and pass off with very little damage to the soil. But the moment improvements are made this condition begins to change. Every furrow that is plowed, every fence erected, every orchard planted, every irrigation ditch constructed, creates an obstruction or diversion which changes the course and volume of the current and starts new channels and cuts and erosions.

It becomes absolutely essential that those who build houses, plant crops and orchards, and make other valuable improvements must be permitted to shut out from their premises these vagrant floods, though the result may overwhelm an adjoining or lower proprietor. In many of our California streams, particularly in the southern part of the state and near the sea, where the rainfall is periodical and the valleys low and level, the natural eroded bed of the stream is wholly inadequate to carry the flood waters in periods of heavy rainfall. In this case the channel of the Los Angeles river was but 2 or 3 feet lower than the surrounding surface of the valley, and 100 or 200 feet in width. In seasons of flood the whole valley is needed as a water course. Under such circumstances, if the landowners on one side of the stream build dikes and embankments, it throws the whole volume of the flood on the opposite side. If both banks are protected, the compressed and elevated volume of water is poured in a torrent upon any unprotected lands below. The only practical recourse is for every man to "build over against his own house," or for the community to join in a public system of flood protection for the entire exposed territory.

Returning to the consideration of the nature, effect, and responsibility for the acts here complained of, the undisputed evidence shows that almost immediately after the storm of January, 1914, which was the inception of the flood conditions which, it is claimed, in conjunction with the acts of defendants, resulted in the damage suffered by plaintiff, the flood waters passing under the trestle, and deflected by the bents of that structure toward the west, washed out several hundred feet of the northerly end of the dike on the west bank and diverted a vast portion of the channel flow in that direction. This was never replaced. The attempt of the Dominguez Company to prevent further widening of the river channel after the first floods by putting a barrier of sand bags across a wash in the river bank was trivial in its extent and not shown to have contributed in any way to plaintiff's damage.

It does appear in evidence that on subsequent occasions the city of Los Angeles erected barriers and dikes connecting with the Pacific Electric embankment at the northern end of the trestle and extending to a connection with the southerly remnants of the original westerly dike. It is clearly shown, however, that this was an entirely independent project carried on by the city of Los Angeles to protect the harbor of Los Angeles from becoming obstructed by silt from the floods; that it was not pleaded in the complaint; and that at least the defendants Bixby were not even remotely connected with it. The Pacific Electric Company gave its permission to a connection with its railroad embankment, and the Dominguez Company consented to its construction on their lands. This obstruction by the city, if wrongful and injurious and attributable in any way to either of the defendants here, was an entirely new and independent cause of action, and if relied upon should have been separately pleaded.

It must be borne in mind that these embankments of the city of Los Angeles present a very different condition from the first construction work. They joined with the railroad embankment and extended at a sharp angle in the direction of the river, and were perhaps calculated to shift the course of the flood across the channel to the lands on the east. The dikes constructed by appellants ran approximately parallel with and close to the river channel, and left an open space under the trestle 400 feet in width between the westerly dike and the northwesterly end of the trestle where it abutted on the railroad embankment, through which space a large part of the flood passing under the trestle could and did flow, and, in fact, was diverted from the easterly side of the valley by appellants' dike.

Our conclusion is that plaintiff's cause of action is reduced, under the law and the undisputed facts in this case, to a question of the responsibility for and the effect of cutting through the easterly dike, and the resultant divergence in that direction of the normal flow of the river and of a large portion of the flood waters during the overflow.

Directing our attention to this phase of the case, the evidence shows without substantial dispute that for a period of 40 or 50 years there had existed at this point where the cut in the embankment was made a natural channel opening out of the river bed, within a foot or two of the bottom of the river, through which in time of high water a portion of the channel flow was diverted toward the east, and for some distance at least ran between defined banks. Further down this flow spread out over the surface of the ground and the banks disappeared, but there was a swale in that direction along the border of the mesa, and, at a road crossing a quarter of a mile or so below, a bridge was maintained a good part of the time. Just what became of this water eventually does not very clearly appear, but the contour of the land shows that it would flow near the easterly mesa to the sea. It is also undisputed that the flow of water through this natural opening was so frequent and so threatening that it was customary in conditions of high water, after the general overflow had subsided within the banks of the river, to dam this side channel to prevent the passage of water to the lands on the east. On one occasion at least the plaintiff's predecessor in title bore part of the expense of making such a dam for the protection of the very lands in question here. It also is shown that these dams were invariably washed out upon the recurrence of a freshet. If this was a natural channel of the river it was a wrongful act of the defendants to construct a dike over it, and the removal of such dike at that point would have been a duty.

[5] But conceding that it was a mere inlet or bypass, as plaintiff contends, such as was held properly subject to obstruction in an effort to protect adjacent lands from flood waters in Lamb v. Reclamation District, supra, did any duty rest upon defendants to maintain their dike across it? We think clearly not if the result of the cut or opening was to restore the conditions at that point to their former and natural state. The fact that a landowner avails himself of the right to repel vagrant waters of a river by embankments does not, in the absence of some further circumstances or set of circumstances, impose upon him any obligation to maintain such obstruction, or to refrain from restoring natural conditions. There is nothing in the doctrine of self-protection against flood waters to prevent a landowner from applying it to a single acre of his lands or the conservation of a single annual crop by temporary structures.

[6, 7] The doubtful question in this case is whether the opening of the dike at this point restored the side channel to its original condition. The evidence shows that the cut was made at the exact place of the old outlet, and it was made no wider and no deeper below the adjoining natural surface. It was, however, left with an artificial embankment extending up and down the river on each side of the opening. This cut was reopened at a time when the natural channel below had been more or less obstructed by an accumulation of silt, apparently caused, in part at least, by the diking and dredging above. It is claimed that the result of reopening this side channel was to divert more water through it than would naturally have gone in that direction had the channel below been unobstructed. While the defendants had been within their rights in creating the conditions which filled up the lower channel, they would have no right to relieve themselves and others from the results of such damming of the natural channel by reopening this outlet to the east in a manner calculated to divert the natural channel. It is doubtless true that they were not legally lia-

ble in damages for any results directly attributable to the creation of or existence of this silt fill, conceding it to have been caused by the construction of their dikes. The silting was not, in the first place, a result contemplated by the defendants or perhaps reasonably to have been anticipated. They expected by the building of the dikes along the banks of the river and dredging the eroded channels to so increase the volume and flow of the channel as to keep it clear from silting and to even increase its capacity. That would ordinarily be the natural result. The evidence shows, however, that after this protection work was completed in 1913, the first rainy season did not cause extremely high water in the stream, and the effect of the moderate flood that did come was not only to fill up the section they had dredged, but to pile silt and sand along the bed of the river within their dikes a considerable distance to the south, and even to raise the old channel above the former level at a point just below where the cut was afterward made. It may further be said that no liability could result to defendants from the silting of the river bed below, for the reason that, in diking and dredging the channel merely for the purpose of enlarging and directing its current in its normal course to prevent the overflow of their adjacent lands, they were not accountable for the disposition of the water or the silt and débris it carried at points below. As in the case of San Gabriel Valley Country Club v. Los Angeles County, supra, the inevitable consequence of straightening or deepening a channel at a given point and increasing the flow and current of the stream therein is to cause the extra flow of water to spread out where the current ceases and to deposit at some point below whatever débris it carries. In the natural course of events, if the river embankments had remained intact, the excessive flood waters which followed in the spring of 1914 would have scoured out these beds of silt along this dredged channel, but the inevitable result would have been to deposit the silt further down wherever the waters were permitted to spread out and the current was abated. In other words, the operation of the river within such protection works as riparian owners may lawfully make to protect themselves from injury is attributable to the natural flow of the stream.

[8] Even so, the condition in which the river bed was left at the subsidence of the high waters of 1913 became its natural condition. If the Bixbys found it with a sand bank, below the point where they made the cut, which was calculated to divert the waters from the natural channel, they would have had a right to remove this obstruction as well as the embankment and restore the natural flow of the river through both channels; but they may not remove a portion of this dike and reopen the old waterway to the southeast, under circumstances which obviously would result in turning the main stream from the old natural bed into this side cut.

It is claimed that this was what happened, and that thereafter, by reason of these conditions, when the recurring high waters of 1914–1916 came, the eastern opening was widened and deepened to an extent that would not have happened if the natural conditions had not been interfered with, and thereby a large volume of the flood waters caused to flow in that direction and overflowed and eroded a wide channel through plaintiff's lands below. We are of the opinion that to whatever extent the evidence may show these conditions to have existed, and that the effect of making such change in the embankment and resultant damage, if any, were such as were reasonably to have been anticipated, the appellants responsible for such change in the channel would be liable.

[9] As stated in Jones v. California Development Co., supra, however, the reasonableness and prudence of the act is to be determined by the conditions as they existed at the time, and not in the light of after consequences.

[10] Conceding, however, that an actionable wrong was committed, who was responsible for it? At the time the cut was made the defendant Amelia M. Bixby was the owner of the premises along the east side of the river, her husband having conveyed them to her after the dikes were constructed. Her husband, the defendant George H. Bixby, was the active agent in procuring the reopening of this outlet. His wife knew of it and consented to it and paid for the work, and in legal effect made her husband her agent for this purpose. It does not appear that she had any actual knowledge of the physical conditions or probable consequences of making this opening, but the law imposes upon her responsibility for the natural consequences of her act. The husband, although he had parted with title to this immediate property, was still owner of adjacent lands affected by the flood waters, and was originally responsible for the closing of this side channel. He had an independent and personal interest in reopening it. Though neither of them were actuated by any purpose or thought of wrongdoing, we think they were jointly responsible for any damage which resulted and which was reasonably to have been anticipated from an unnatural increase of flood waters through this opening.

We fail to see how the defendant Dominguez Estate Company was a party to the reopening of this side channel. As already pointed out, the original dike and dredging for which it was responsible was not wrongful. The dike on the east side of the river, though built by the Dominguez Company, was constructed for and became the property of George H. Bixby and was for his benefit. The Dominguez Company had no further interest in or control over it. It was of no benefit or concern to their property. They had no part in advising or making this cut. It is true the president of the Dominguez Company knew of Mr. Bixby's purpose, and expressed the opinion that he had a right to either maintain or remove the obstruction as he saw fit, but such expression would not make him personally liable for consequences of the act, much less bind the corporation to such liability. It follows from this reasoning that the evidence does not support a verdict against the Dominguez Company.

We doubt greatly whether the evidence justifies the conclusion that the opening of the cut in this eastern embankment by the defendants Bixby was the efficient and proximate cause of the erosion and silting of plaintiff's land, or that such damage would not have resulted if such cut had not been made. It can hardly be questioned, under the facts in this case, that the floods of January and February, 1914, were unusual and excessive. Not only was the natural flood drainage of the Los Angeles river of this excessive nature, but the evidence shows that the main channel of the San Gabriel river had cut through the intervening plain between the natural course of the two streams and was adding its waters to the floods of the watershed of the Los Angeles river. The whole country above and below the Pacific Electric embankments was a great lake. All the trestles of the railroad embankment across the Narrows were running to their full capacity, to the northwest of this trestle at the main channel of the river, and at this point through the 1,000 feet of this opening a flood was pouring for the entire width and to within 2 or 3 feet of the top of the timbers. The dikes along the river were flooded and in places out of sight. Several hundred feet on the westerly side were washed out. Some time during the overflow a wide strip of the easterly embankment below the Bixby cut was washed away by the current. The greater part of this deluge of water was pouring under this long trestle, and being more confined at this place was, of course, moving with a more rapid current and carried silt and débris which, when the waters spread out below as the current slackened, was deposited in the lower channels and on the overflowed lands. One of the natural channels of the river crossed plaintiff's property and turning to the east skirted along its southerly border. In previous overflows this land had been silted and more or less eroded. It would inevitably have been overflowed during the high waters of these floods of 1914–1916, irrespective of the making of the Bixby cut; and the natural channel at the Bixby cut without any artificial embankments would have had to carry to its full capacity during these periods of high water. It is admitted by the testimony of plaintiffs that these lands suffered no material injury during the moderate freshets of 1913 after the cut had been made, or until the extremely high waters of 1914.

[11] There is no serious conflict in the evidence as to the physical conditions surrounding these successive floods. The case resolves itself merely into inferences to be drawn as to the result of these various conditions. We recognize the province of the jury to determine these inferences in all instances where reasonable minds might reach different conclusions. Yet when we take into account the immensity of this flood, the eddies and currents and backwaters and shifting channels of this cataclysm of nature, and in face of the fact that all along the course of this river other lands were eroded, new channels created, and great areas of silt and débris deposited, entirely independent of the acts of these defendants, the question remains whether any conclusion that the actions of appellants were the proximate cause of damage to plaintiff's land can be more than a surmise or conjecture.

Conceding, however, that there was sufficient evidence to make the nature and effect of the reopening of this side channel a question for the jury, there were errors of law occurring at the trial which in our judgment call for a reversal.

[12] We are satisfied that there appears on the face of the complaint a misjoinder of parties defendant and of independent and unrelated causes of action. A cause of action is stated against the Pacific Electric Company for damages resulting from the construction and maintenance of its railroad embankments and trestles across the channel of the Los Angeles river during the year 1901 in such a way as to interfere with and divert the natural flow of the river upon plaintiff's land to its damage. A cause of action is stated against the other defendants for constructing in 1913 embankments along the banks of the Los Angeles river and dredging and deepening the channel thereof, and in afterwards cutting an opening in such embankments in such fashion as to wrongfully divert the waters of the river from their natural course onto plaintiff's land, thereby washing and eroding them. No causal relation is pleaded to connect these independent and widely separated acts into one cause of action, or to show a joint liability for the damages alleged. It does not appear that the defendants appealing here were in any way connected with or responsible for the construction or maintenance of the embankments or trestles of the Pacific Electric Company, or that they made use of them as a part of their system of flood protection. Neither does it appear that the Pacific Electric Company in any way aided, advised, or permitted the diking of the river banks, or dredg-

ing of the channel, or had any right to control or interfere with the appellants in that work, or that the acts of appellants in any way rendered the trestles and embankments of the railroad harmful in any greater or different way than if the work of appellants had not existed.

The only connection suggested is in an allegation that appellants constructed their flood barriers in the vicinity of the railroad embankments and trestle knowing of the existence of such structures and of their effect in increasing the flood volume of the river at this point. This may be admitted, and that one of the reasons for attempting to protect their lands at this point was the increased danger from the river by reason of the concentrated power of the floods under this trestle. Not being in any way responsible for this added peril, they had a right to fortify themselves against it.

[13] Respondent in its brief correctly states the condition of joint tort-feasors: (1) A concert of action; (2) a unity of purpose or design; (3) two or more defendants working separately but to a common purpose and each acting with the knowledge and consent of the others. We do not think that any of these relations are shown here between the Pacific Electric Company and the other defendants. The objections by way of demurrer, answer, and motion to this misjoinder were well taken.

There are numerous exceptions to rulings of the trial court in admitting evidence prejudicial to appellants relating to defendant thus improperly joined with appellants, and to the work of flood obstruction and diversion by the city of Los Angeles, not covered by the pleadings, and in no way connected with the defendants Bixby. In some instances the prejudicial effect of such evidence may have been avoided by rulings of the court limiting its application to designated defendants, or by instructions to the jury, but there was a great deal of testimony directed to these unrelated transactions and defendants which the jury was left at liberty to apply to appellants, and which was calculated to fix upon them in the minds of the jurors liability for diversions of the flood waters for which they were not responsible either under the pleadings or the proof.

For instance, although the jury absolved the Pacific Electric Company from liability to the plaintiff for any of its railroad construction, it was left free to hold the appellants accountable for damage which might reasonably be attributed to the embankment of the railroad across the valley at this point in a southeasterly direction calculated to concentrate the flood waters at the trestle over the main channel of the river in the direction of plaintiff's lands. It can hardly be doubted that the increased volume and current of the river at this point and from this cause had much to do with the amount of silt that was deposited in the river channel and over the adjacent lands below, and in increasing the flood of water through the plaintiff's lands. These results would have been properly charged to appellants under the theory of the complaint that all of the defendants named were associated in a common purpose and working to a common end, but were improperly in evidence under our view of the relations of the parties.

Likewise, the testimony offered as to the embankments attempted by the city of Los Angeles was not only inadmissible as relating to an independent cause of action not pleaded, and with which at least the defendants Bixby were not connected, but was prejudicial, for the reason that it quite probably influenced the jurors to include in their verdict compensation for damages which they attributed to these embankments.

[14] We think, too, the trial court in its instructions to the jury failed to sufficiently discriminate between acts of the defendants which they might rightfully exercise in the construction of dikes and levees along the banks of the stream to protect their property from the invasion of flood waters, although the effect might be to increase the flow of the stream upon lower proprietors, and such acts as would amount to an interference with the natural current within the channel itself. As, for instance, the jury was instructed (instruction No. 10) that while there was no vested right in plaintiff to have the flood waters of the Los Angeles river overflow through the farming lands adjacent, "the absence of such right did not authorize any person or corporation to so divert or concentrate such flood water as to cause damage to the lands of plaintiff referred to in the complaint, if you find that said flood water was so diverted or concentrated."

The jury was thus instructed that defendants were liable for any damage caused by an increased volume or flow of water upon their lands resulting from protective dikes along the river bank constructed by defendants. This is directly in conflict with the rule laid down in San Gabriel Country Club v. Los Angeles County, supra, and other cited cases.

[15] The jury was also erroneously instructed that it was the duty of the defendants, if they undertook to protect their property or any part of it from overflow, "to construct and complete said dikes and embankments from the point of beginning continuously to the down stream edge of their said property, so that the owner of land next below in the course of the stream and riparian thereto could in like manner protect his said land by similar construction joined to the said embankments."

As already pointed out, we find no authority to thus qualify the right of self-protection against the flood waters of a stream so as to require the diking of all or none of the defendants' riparian possessions, or to create a liability in damages for an increase by such means of flood waters upon lower proprietors. Ae we understand the California decisions on this point, the right to repel flood waters is purely one of self-defense. The proprietor of land so threatened can ward off the danger by suitable obstruction to the invasion of his land at any point upon his own premises, and by any means that does not go beyond the limits of a defensive act, and become an aggressive diversion of the natural flow upon other proprietors.

We are of the opinion that there was prejudicial error in refusing defendants' proposed instruction covered by exception No. 298, and also in the giving of the instruction as modified by the court. The instruction as proposed properly presented to the jury defendants' theory that the damages complained of were caused by the excessive and unusual extent of the floods together with the conjunction of the waters of the San Gabriel river with those of the Los Angeles river, rather than as the result of any acts of the defendants, and declared the burden of proof was upon the plaintiffs to show that the injuries complained of were the result of the wrongful and negligent acts of the defendants, and that if they believed from the evidence that such damage was the natural and proximate result of the excessive flood waters, and that the same or substantially the same injuries would have occurred if the dikes of defendants and the subsequent cut in the east embankment had not been made, their verdict should be for defendants. The instruction as modified embodied some of these limitations on defendants' liability, but coupled with the conditions for which defendants might be held responsible, the effects which might be attributed to the embankments and trestles of the Pacific Electric Railway Company, for which appellants were in no way liable.

There are nearly 3,000 pages of the record on this appeal, and very many specifications of error are presented and elaborately argued. It is impracticable to consider in detail all the points discussed. We have pointed out errors which call for a reversal of the judgment. If a new trial is had, the issues will be so narrowed, under the views here expressed, as to obviate a recurrence of many of the remaining objections to the introduction of evidence and to instructions given or refused.

As has been said, many of these have been rendered harmless by the elimination of some of the parties under the verdict, and by the withdrawal of objectionable evidence from the jury, but we cannot doubt that in the matters herein discussed, arising out of misjoinder of parties and causes of action and admission of evidence on issues not covered by the pleadings, the defendants against whom the verdict of the jury was returned have been seriously prejudiced.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.

OLNEY, J. (concurring). I concur in the judgment of reversal and in the main opinion, except in its discussion of the liability of the two Bixbys because of the cut which they caused to be made in the levee which had been previously constructed along the southeasterly bank of the river. The main opinion would seem to hold that it may be there was evidence sufficient to justify the verdict against the Bixbys because of their having made this cut. In my judgment this is not true; the evidence shows that the cut was in no wise the cause of any injury done the plaintiff's land.

As I understand the main opinion, it applies to the present case the principles contained in the quotation which it makes from Jones v. California Development Co., 173 Cal. 565, 160 Pac. 823, L. R. A. 1917C, 1021, and holds that while the defendants were under no obligation to maintain the embankments they had constructed, that is, either to prevent breaks therein caused by natural forces or to repair such breaks, yet they had no right to cut or remove those embankments, if they knew or should reasonably have known that the result of so doing would be to change the channel of the stream, and that because the evidence was sufficient to justify the possible conclusion that when the Bixbys cut the southeasterly levee they should have known that it would not improbably change the channel of the stream, it was sufficient to justify the verdict. With the proposition that the principles announced in Jones v. California Development Co. apply, I agree. I am not so certain that the evidence justifies any conclusion that the Bixbys should have known that the making of the cut would not improbably change the channel. Nor am I certain that the channel actually did change. There had been a flood water channel there before, and I am not certain that anything more appears than that the channel continued as a flood water channel merely. But passing these doubts, and assuming both that the channel was changed and that the Bixbys should have known that the cut in the embankment would not improbably cause it to change, the evidence, to my mind, shows conclusively that it was not, in fact, the cut that did cause it to change.

The cut in question was a small one, six feet across on the bottom. When the first flood came after its being made, the flood of January, 1914, the embankments on both sides were intact except for the cut. The flood was one of the highest known. It spread over the plain below the railroad trestle where the plaintiff's lands lie, practically from mesa to mesa, and flowed across this plain to the ocean. It would have done this if the embankments had been intact and had remained so. The embankments extended only a comparatively short distance into the plain, and the high waters of the river on reaching the ends of the embankments and being released from their restraint would have flowed around the ends and covered the entire plain, as they did. In fact, one of the witnesses for the plaintiff testifies that in the minor floods of 1912–13 the water "backwatered" around the ends of the embankments in just this fashion. The plaintiff's lands were a mile or more below the lower ends of the embankment, and directly in the course of flood waters passing them. More than this, the channel of the river divided immediately below the embankments and one branch ran to and across the plaintiff's lands. I do not understand that it is contended that the plaintiff's lands would not have been flooded if it had not been for the cut. What is contended is that by the cut the channel was changed so that the flood came with greater force and carrying more silt and sand, with consequent erosion of the plaintiff's land and a deeper deposit upon it.

Now, it is evident that the cut operated in the first instance only to permit the water to pass through the embankment. It is likewise evident that if the water would have broken the embankment, if the cut had not been there, and would have broken it at or about the same place, the final result would have been the same, and the cut was not a factor in causing that result. It was due to the flooding river alone. But the fact that the water would have broken the embankment if the cut had not been there is demonstrated by the fact that it did break through even with the cut there. The situation when the flood of January, 1914, came was, as I have said, that the levees on both sides of the river were intact except for the cut. The amount of water coming down was enormously greater than could be carried in the space between the two embankments. The result was that both gave way. That on the northwesterly side went out for a single stretch of some 600 feet or more. That on the southeasterly side broke just a few yards below the cut. It cannot be questioned that this break would have taken place if the cut had not been there, for the effect of the cut was to relieve, not to increase, the pressure upon the levee below it. Furthermore, the width of the break was greater than that of the cut even after the latter had been enlarged by the passage of the two floods of January and February, 1914. The plaintiff's own maps and the testimony of its witnesses show that after these floods the cut had been enlarged to a width of 50 or 60 feet only, while the break had a width of over 100 feet. The levees were of light soil, easily eroded, and there would seem to be no escape from the conclusion, not only that the levee would have been broken if the cut had not been there, but that if it had not been there and the levee had held at that point, the break below would have been correspondingly enlarged because of the increase of pressure so that the amount of water that passed through the levee would have been substantially the same. In addition to these circumstances, there is the further fact that the contour of the land on the inner side of the break is such that water passing through the break would follow the same course across the Bixby land to that of the plaintiff as water passing through the cut. We have, then, these three conclusions, from none of which, in my judgment, is there escape: First, that the levee would have broken, as it actually did, even if the cut had not been there; second, that substantially the same amount of water would have passed through this break; and, third, that the water so passing through would follow the same course as water passing through the cut. If these things be true, it means that the cut was not a factor in the final result.

So far, I have been discussing the case with reference to the flood of January, 1914, the flood which came when the levees were intact except for the cut. But, if the defendants are not responsible for injury done by this flood, they are certainly not responsible for any done by subsequent floods. They were under no obligation to repair the levee, and when those floods came the levee was already broken. The conditions which those floods met were conditions caused by the previous flood and for which the defendants were not responsible. Not being responsible for those conditions, nor under obligation to remedy them, they were not responsible for injury which the subsequent floods may have worked because of them.

We concur: SHAW, J.; LAWLOR, J.

(185 Cal. 160)

STAUTER v. CARITHERS. (L. A. 6399.)

(Supreme Court of California. Feb. 25, 1921.)

1. Adoption ⚷4—Wife may adopt child without husband's consent where "lawfully separated" by interlocutory divorce decree.

Under Civ. Code, §§ 221, 223, permitting a married woman to adopt a child without the consent of her husband if they are lawfully separated, and section 159, permitting a separation under an agreement, a wife who had secured an interlocutory divorce judgment is lawfully separated from her husband and may adopt a child without his consent.

2. Adoption ⚷4—Statute permits spouse lawfully separated by interlocutory decree to adopt child without consent of other spouse.

Since, under Civ. Code, § 132, a final judgment of divorce restores the parties to the status of single persons, the words "lawfully separated," in section 223, permitting adoption by one "lawfully separated," does not mean persons finally divorced, but includes persons lawfully separated by interlocutory divorce decree.

3. Adoption ⚷11—That adopting parent proceeded under other than her real name held immaterial.

Where, by the order of adoption, the child retained its former surname, it was not a fatal defect that the adopting parent did not proceed under her real name, she being separated from her husband, but used the name by which she was ordinarily known, no real fraud being perpetrated.

4. Appeal and error ⚷175—Matter not put in issue below cannot be heard on appeal.

In a suit to set aside proceedings for the adoption of a minor where plaintiff's counsel agreed that the trial proceed only upon the question of jurisdiction and introduced no evidence of fraud, the question of fraud is not presented on appeal.

Department 2.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Suit by Sadie Stauter against Della A. Carithers to set aside the adoption by defendant of the minor, Katherine Virginia Stauter. Judgment for plaintiff, and defendant appeals. Reversed.

John F. Poole, of Los Angeles, for appellant.

M. M. Cohen and Frank Dominguez, both of Los Angeles, and Dehm & Cohen, for respondent.

LENNON, J. The plaintiff in this action sought and secured a decree setting aside an order granting the petition of defendant, Della A. Carithers, for the adoption of the minor, Katherine Virginia Stauter. The adoption was consented to by the parents of the child, the plaintiff Sadie Stauter and her divorced husband, who is the son of defendant, and the order of adoption was entered entirely without objection. In May, 1918, plaintiff instituted the present proceeding for the cancellation of the said order, relying upon the following undisputed facts: Defendant and one Charles W. Lyke were married in 1913; in 1915 they ceased to live together and ever since that time have continued to live apart; in the same year, 1915, defendant instituted divorce proceedings against said Charles Lyke, wherein an interlocutory decree was entered in her favor on September 20, 1916, followed by a final decree of divorce in March, 1918. The order of adoption was granted on August 7, 1917, while the interlocutory decree of divorce was in force and over a month before defendant became entitled to a final judgment in the divorce proceedings. Charles Lyke did not consent to the adoption and it does not appear that he ever had any knowledge thereof.

Plaintiff's theory is that, by reason of the absence of the consent of defendant's husband, the court was without jurisdiction to enter the order of adoption. The trial court, apparently accepting this view of the case, set aside and canceled the order of adoption. Upon a new trial of the instant case the same result was reached for a second time, from which defendant appeals.

[1] Section 223 of the Civil Code reads as follows:

> "A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife, nor can a married woman, not thus separated from her husband, without his consent, provided the husband or wife, not consenting, is capable of giving such consent."

Eliminating the portions which have no bearing upon the facts of the present case, the section provides, in effect, that a married woman not lawfully separated from her husband cannot adopt a child without her husband's consent. The only limitations upon adoption in this state are the rules prescribed by the chapter of the Civil Code which deals with adoption (Civ. Code, § 221), and section 223 of that chapter, above quoted, covering and controlling adoption by married persons, does not require the consent of a husband from whom a wife is lawfully separated. It follows that, if a married woman who has been granted an interlocutory decree of divorce can be said to be "lawfully separated" from her husband, then she may adopt without her husband's consent and the court did not lack jurisdiction to enter the order attacked in the instant case. Our attention is therefore concentrated upon a consideration of the legal consequences of an interlocutory decree of divorce.

The effect and nature of such a decree are noted in the case of London Guarantee & Accident Co. v. Ind. Acc. Comn., 184 Pac. 864, where it is said:

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"An interlocutory judgment of divorce is therefore, so far as it determines the rights of the parties, a contract between them. It is temporary and provisional in its nature, it is true, but it settles the rights of the parties for the time being, and until some action, proceeding, or motion is begun to change the status, and some order is made thereon which has that effect, or until they become reconciled and resume marital relations, in which event their mutual obligations are, for the time being at least, restored * * * the personal obligations between them remain in abeyance until changed by some subsequent action or agreement which is binding upon the husband. *They are, by virtue of the interlocutory judgment, living separate by agreement.*" (Italics ours.)

In general the law discourages the separation of husband and wife. It does, however, authorize and recognize such separation under certain conditions. For instance, section 159 of the Civil Code permits a husband and wife to live separate under agreement between themselves. Likewise, marriage ties are not dissolved by the entry of an interlocutory decree of divorce (Estate of Dargie, 162 Cal. 51, 121 Pac. 320; Estate of Seiler, 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093) but, while the marriage relation is not ended until final judgment of divorce and one of the purposes in the postponement of the entry of final judgment is to provide an opportunity for reconciliation and resumption of marital relations (Olson v. Super. Ct., 175 Cal. 250, 165 Pac. 706, 1 A. L. R. 1589), nevertheless, after the entry of the interlocutory decree and until some change is effected either by legal act or reconciliation, the law contemplates the termination of personal relations between the parties (Estate of Walker, 176 Cal. 402, 413, 168 Pac. 689; Id., 180 Cal. 478, 494, 495, 181 Pac. 792). The result is that, where there is an interlocutory judgment decreeing that the parties are entitled to a divorce, even though the married status continues, the law, under the circumstances, permits the separation and recognizes it as rightful in substance. Such separation is therefore clearly lawful, for "lawful" denotes something which, in its substance, is sanctioned or permitted by the law, as distinguished from conformity to positive rules of law. Anderson's Dictionary of Law. Defendant was therefore lawfully separated from her husband at the time of the adoption.

[2] Plaintiff seeks to interpret section 223 as requiring consent of the husband unless the final decree of divorce has been granted. The wording of the section will not permit such an interpretation. A final judgment of divorce restores the parties to the status of single persons (Civ. Code, § 132), and, consequently, a divorced person is no longer married. Section 223 of the Code provides that "a married man, not lawfully separated from his wife," and "a married woman, not thus separated from her husband," cannot adopt without the consent of the wife or husband. Therefore, unless the phrase "lawfully separated" refers to separation, as distinguished from final divorce, it is without meaning, for, by the term "married," divorced persons are excluded from the operation of the section.

[3, 4] The adoption order provided that the child was to retain the surname of Stauter; the fact that, in the adoption proceedings, defendant appeared by the name of Carithers, the name which she had always used, rather than by her real name of Lyke, is therefore immaterial. There was no mistake in identity, and the court finds that the plaintiff had full knowledge of the facts at the time of the adoption proceedings, including knowledge of the financial condition of defendant. If it had appeared that defendant had, by concealment of her status, obtained an order for adoption which would not otherwise have been granted, that might have warranted the cancellation of the order of adoption upon the ground that a fraud had been practiced upon the court. All that appears from the record of the adoption proceedings in regard to the status of defendant is that, in the petition for adoption, defendant referred to herself as a "widow." The order granting the petition, however, omitted any reference to the defendant as "widow," providing only that "Della A. Carithers" was granted the adoption. This is insufficient to warrant the inference that the status of defendant was concealed from the court. Moreover, counsel for plaintiff agreed, at the trial, to proceed only upon the question of jurisdiction, and, accordingly, no evidence was given concerning the question of fraud, and therefore the question of fraud is not presented upon this appeal.

In view of the holding that the consent of defendant's husband was not essential to the validity of the order of adoption, it is unnecessary to consider the remaining points raised by counsel for defendant as to estoppel and the presumptions to be indulged in favor of the validity of the order of adoption.

The judgment canceling the order of adoption is reversed, and, a new trial being unnecessary for the reason that the error consisted in the conclusions of law drawn from the findings, the trial court is directed to enter a judgment in favor of defendant and sustaining the order of adoption.

We concur: SLOANE, J.; WILBUR, J.

185 Cal. 146

KELLEY v. ABBOTT et al. (two cases).
(L. A. 6448, 6449.)

(Supreme Court of California. Feb. 21, 1921. Rehearing Denied March 21, 1921.)

1. Corporations 🔑90(4)—Cannot bring single action in equity against subscribers to stock.

Where individual subscriptions to corporate stock were several and independent contracts, remedy of corporation on failure of subscribers to pay installments was separate action at law against each, and it could not bring a single suit in equity against all the stockholders, though a very large number of actions at law would be required to make collection of the balances unpaid on the stock.

2. Bankruptcy 🔑245—Trustee does not represent bankrupt corporation in collecting unpaid subscriptions.

A trustee in bankruptcy is not representing the bankrupt corporation in collecting unpaid subscriptions, but is representing the creditors.

3. Bankruptcy 🔑282—Trustee may enforce rights not open to bankrupt.

While a trustee in bankruptcy must resort to the courts of the state where a bankrupt corporation resides, he may therein enforce rights and avail himself of remedies which are open to him as a representative of the creditors of the bankrupt, but not available to the corporation itself, in view of Bankruptcy Act, § 47 (Comp. St. § 9631).

4. Corporations 🔑259(8)—Judgment creditor may maintain suit in equity in nature of creditors' bill against stockholders to recover unpaid subscriptions.

A judgment creditor of a corporation may maintain a suit in equity in the nature of a creditors' bill against all the stockholders of a corporation to recover for the benefit of creditors the amount due on unpaid subscriptions to the capital stock of the corporation.

5. Bankruptcy 🔑299—Trustee could join all stockholders in suit to recover unpaid subscriptions.

Trustee of a bankrupt corporation may maintain an action in equity against all the stockholders of the corporation to recover unpaid subscriptions to the capital stock of the corporation.

6. Venue 🔑41—Improperly joined defendants not entitled to change.

The remedy of persons improperly joined as defendants in an action in a county other than that in which they reside is by demurrer or answer, and they have no right to take the plaintiff's cause, so far as it affects defendants properly sued in the county, to the county of their residence for trial.

Department 2.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by S. F. Kelley, trustee (Ernest U. Schroeter, substituted), against W. F. Abbott, J. G. Snyder, and Mrs. J. G. Snyder (J. G. Snyder, executor, substituted). From orders denying their individual applications for change of venue, the last two named defendants bring separate appeals. Affirmed.

Tobias R. Archer, of Los Angeles, for appellants.

Wm. B. Ogden, of Los Angeles, and Walter E. Byrne, of San Bernardino, for respondent.

SLOANE, J. The appellants above named were joined with numerous other defendants in an action to recover unpaid subscriptions to capital stock of a corporation, the Gibraltar Investment & Home Building Company, which action was begun in the superior court of the county of San Bernardino. They have prosecuted separate appeals from orders of the court denying their individual applications for change of venue to the county of Los Angeles, where they reside.

As the two appeals are identical in the law and the facts involved, they are here disposed of together.

The grounds of the motion for change of place of trial were that the petitioners were residents of the county of Los Angeles, and that none of the other parties joined with them as defendants were necessary parties to the cause of action set out in the complaint against the petitioners.

The plaintiff in the action was the trustee in bankruptcy in the matter of the Gibraltar Investment & Home Building Company in bankruptcy proceedings pending in the United States District Court for the Southern District of California. The defendants, upwards of 100 in number, were joined in a single action to recover for the bankrupt estate their several unpaid subscriptions to the capital stock of the corporation.

No showing was made by affidavit or otherwise that all or any of the defendants other than the petitioners were nonresidents of San Bernardino county. None of the other defendants join in the application for change of place of trial.

[1] The sole ground to be considered, therefore, is as to whether or not petitioners were properly joined under the complaint in the same action with the other defendants. It clearly appears that the individual subscriptions to the corporate stock were several and independent contracts, that each constituted a separate cause of action, and that none of the other defendants was a necessary party to an action at law upon the individual subscription of either of the petitioners. Appellants' contention that they are improperly joined with the other defendants is urged upon the authority of Kelley, Trustee, v. Gill, 245 U. S. 116, 38 Sup. Ct. 38, 62 L. Ed. 185, instituted in the federal courts and involving these same subscriptions. The trustee had been authorized in the bankruptcy pro-

ceedings to institute a suit in equity to enforce collection thereof in the United States District Court. The action was dismissed by the United States Circuit Court for want of jurisdiction. The ground of dismissal was found in the Bankruptcy Act, which confers upon the court of bankruptcy jurisdiction "to cause the estates of bankrupts to be collected, reduced to money and distributed," etc. (section 2, cl. 7 [Comp. St. § 9586]), but prohibits the trustee (with exceptions not here applicable) from "prosecuting without the consent of the proposed defendant a suit in a court other than that in which the bankrupt might have brought it, had bankruptcy not intervened" (section 23b [Comp. St. § 9607b]). The court in its opinion further says:

> "The corporation is a citizen of California. It could not have sued the stockholders except in the state courts. The court of bankruptcy was therefore without jurisdiction."

This would seem to be all that was necessary to the decision of the matter before the United States Circuit Court. It, however, proceeds to deal with the nature of the right of action on the part of the corporation in the state courts in the following language, which the appellants claim is decisive on these appeals:

> "The cause of action sued on is the failure of the several stockholders to perform their several unconditional promises to pay definite amounts at fixed times which have elapsed. The amount payable by one is in no way dependent upon what is due from another. The corporation had a separate right against each alleged stockholder; and the remedy open to it was a separate action at law against each."

The trustee rightly assumes that the corporation could not have brought a single suit in equity against all these stockholders, although a very large number of actions at law would be required to make collection of the balances unpaid on the stock. There was no common issue between these alleged stockholders and the corporation; and the liability of each would have presented a separate controversy unconnected with that of any other. Thus elements essential to jurisdiction in equity to avoid a multiplicity of actions at law by the corporation were lacking. St. L., I. M. & So. Ry. Co. v. McKnight, 244 U. S. 368, 375.[1] "That lack is not supplied by the assignment to the trustee. * * * For him, also, the appropriate remedy was a separate action at law against each stockholder."

[2] It is urged by respondents that the portion of this opinion last quoted is dictum. Conceding that it correctly states the law as to the rights of the corporation in prosecuting these claims in its own behalf, it may be doubted if it in any way curtails the right of the trustee to pursue whatever remedy is given him under the laws of California to prosecute claims of this kind in behalf of the creditors of the bankrupt corporation. The bankrupt act merely relegates the trustee to the court to which the corporation might have resorted, but does not determine the rules of practice and procedure which would govern in such cases. The obvious purpose of this limitation is to prevent subjecting creditors of a bankrupt to greater hardship and inconvenience than would obtain if they were sued under like conditions in the courts to which the corporation might resort.

The trustee is not representing the bankrupt corporation in collecting these unpaid subscriptions, but is representing the creditors. In re V. & M. Lumber Co. (D. C.) 182 Fed. 231; In re Kessler, 186 Fed. 127, 108 C. C. A. 239; Babbitt v. Read (D. C.) 215 Fed. 395.

[3] While the trustee is relegated to the forum of the bankrupt estate to enforce collections, he is not necessarily subject to the limitations of the bankrupt corporation, in the form of his action or the nature of the relief sought. Creditors' rights, which are enforceable under state laws, accrue to a trustee in bankruptcy, and he may maintain or defend proceedings and collect assets under circumstances where the bankrupt would not be at liberty to act. Courtney v. Fidelity Trust Co. (Cir. Ct. App., 6th Dist.) 219 Fed. 57, 134 C. C. A. 595; In re Kessler, supra; In re Desnoyers Shoe Co. (D. C.) 210 Fed. 533. In other words, while the trustee must resort to the courts of the state where the bankrupt resides, he may therein enforce rights and avail himself of remedies which are open to him as a representative of the creditors of the corporation which might not be available to the corporation itself. Bardes v. Hawarden Bank, 178 U. S. 24, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Hicks v. Knost, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183. Section 47, subc. 5, of the Bankruptcy Act (Comp. St. § 9631), provides that the trustee has power to collect and reduce to money the property of the estate, "and shall be deemed vested with all rights, remedies and powers of a judgment creditor holding an execution duly returned and unsatisfied."

[4] It is well settled in this state that a judgment creditor of a corporation so situated may maintain an action in equity in the nature of a creditors' bill against the stockholders of a corporation to recover for the benefit of creditors the amount due on unpaid subscriptions to the capital stock of the corporation. As this court has said:

> "The action is sustained on the principle that such unpaid subscriptions are a part of the capital stock of the corporation, and, like other debts due to it, constitute a fund to which creditors may look for payment of their claims; and when the corporation neglects to call them in, a court of equity will enforce their payment," and the fact that the creditor has a concurrent remedy by an action at law on the

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[1] 37 Sup. Ct. 611, 61 L. Ed. 1200.

contract does not deprive him of his right to proceed in equity. Harmon v. Page, 62 Cal. 448; Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; Blood v. La Serena L. & W. Co., 150 Cal. 764, 89 Pac. 1090; Potter v. Dear, 95 Cal. 578, 30 Pac. 777.

Though objection has been made in this form of action for failure to join all the subscribers as parties defendant (Blood v. La Serena L. & W. Co., supra; Baines v. Babcock, supra), we find no instance where it has been contended or held that all persons liable for unpaid subscriptions were not properly joined in such creditors' bill.

[5] While it is ordinarily true that equity will not intervene merely to prevent a multiplicity of suits where the claims against numerous defendants are independent of each other and constitute entirely separate causes of action at law, yet such joinder in an equitable proceeding is frequently recognized even where there is a complete several liability at law, if the demands arise from a common source and involve the same general issues of law and fact, as in the present case, where all the subscriptions sued on were made in consideration of capital stock of the bankrupt corporation. Pomeroy's Eq. Juris. §§ 114, 251, 269; Bailey v. Tillinghast, 99 Fed. 801, 40 C. C. A. 93; Way v. Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147; Boyd v. Hoyt, 5 Paige (N. Y.) 78; 7 R. C. L. pp. 352, 381; Vermont Marble Works Co. v. Declez Granite Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; People v. Morrill, 26 Cal. 336, 361; Wilson v. Castro, 31 Cal. 420, 428; Whitehead v. Sweet, 126 Cal. 67, 77, 58 Pac. 376.

[6] In any event, we fail to see how the defendants, if improperly joined in this action, can obtain relief by a transfer of the action to another county. So far as appears all the numerous other defendants in this action are residents of San Bernardino county, and properly sued there. If a change of venue is granted, it becomes the duty of the court under section 399 of the Code of Civil Procedure to transfer all the pleadings and papers to the court to which the change is granted, and thereafter that court has jurisdiction of the entire action "as if it had been originally commenced therein." There is no means provided to segregate defendants improperly joined in an action under proceedings for a change of place of trial. If improperly joined in this action, appellants' remedy would seem to be by demurrer or answer. They have no right to take plaintiff's cause, so far as it affects defendants properly sued in San Bernardino county, to another county for trial.

The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.

185 Cal. 211

DUNNE v. INDEPENDENT ORDER OF FORESTERS. (S. F. 9005, 9155.)

(Supreme Court of California. Feb. 25, 1921. Rehearing Denied March 24, 1921.)

Corporations 🔑462—Corporation held precluded from asserting that assignment of mortgage to it was invalid.

A corporation's investment board's determination in good faith that amount of mortgage did not exceed 60 per cent. of the value of the property empowered it to take assignment of the mortgage, and it could not thereafter avoid its contract to take such assignment from persons acting in good faith on the ground that the mortgage exceeded 60 per cent. of the value of the land in violation of law; the determination as to value of the land being conclusive as to its power to make such a contract with third persons dealing with it in good faith.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by L. Dunne against the Independent Order of Foresters, in which the defendant cross-complained, from that part of the judgment denying her the relief asked in her complaint. The plaintiff appeals, and from that part of the judgment denying it relief upon its cross-complaint, and from an order denying its motion that the judgment entered be vacated and for the entry of a judgment in its favor on the cross-complaint, the defendant appeals. Reversed.

Gavin McNab, R. P. Henshall, and Nat Schmulowitz, all of San Francisco (F. W. Henshaw, of San Francisco, of council), for appellant.

Corbet & Selby, of San Francisco, for respondent.

SHAW, J. In this case three appeals are presented. By reason of the fact that the transcripts were filed at different times they received two numbers. No. 9005 is an appeal by the plaintiff from the part of the judgment denying her the relief asked in her complaint. No. 9155 presents appeals by the defendant from the part of the judgment which denied it relief upon its cross-complaint and from an order denying its motion that the judgment entered be vacated, and for the entry of a judgment in its favor on the cross-complaint. It is stipulated that the record filed in appeal No. 9005 may be used on all the appeals.

The complaint alleges that on April 6, 1916, the plaintiff and defendant executed an agreement whereby plaintiff agreed to sell and defendant agreed to buy a certain note and mortgage executed by Newark Realty & Development Company to said plaintiff and dated February 15, 1916, covering 2,186 acres of land in Alameda county, and the defendant agreed that on February 15, 1917, it would pay for said note and mortgage the sum of $225,000 and all interest accrued thereon from February 15, 1916, to February 15, 1917; the note and mortgage to be transferred to the defendant upon payment by it to the plaintiff of said sum of money and interest. The agreement is awkwardly expressed, but we have stated its legal effect. It is alleged that on March 1, 1917, defendant paid $20,000 on the agreement, and that on October 3, 1917, plaintiff tendered the note and mortgage to the defendant, together with an assignment conveying to it all plaintiff's title thereto, and demanded payment of the balance of the principal and interest under said agreement, which the defendant then refused to pay. The prayer was for judgment for $205,000 with interest.

The defendant answered, setting up several defenses. Its first defense was that it had not executed the agreement sued on. The second defense alleged that the defendant had paid $42,500 on the agreement set forth in the complaint and that it was induced to execute the same by reason of certain false and fraudulent representations made by plaintiff to defendant. The third defense was that the defendant is a Canadian corporation, and that under its articles, and the laws of Canada governing it, it was without authority to purchase the said mortgage described in said agreement, and that any agreement executed by it purporting to agree to purchase the same was void for that reason. It also filed a cross-complaint wherein it alleged the same facts as are set forth in the answer, and in reliance thereon asked for a recovery of the $42,500 alleged to have been paid upon said agreement, and for the cancellation thereof.

The court found that all the allegations relating to fraud were untrue. With regard to the execution of the agreement of April 6, 1916, it found that Stevenson, who was the president and attorney in fact of the defendant, on the one part, and the plaintiff, on the other part, "went through the form of making, delivering and executing, as and for the contract of the" defendant, the said agreement. As to the power of the defendant to make the agreement, it found that it never at any time was authorized or empowered by law to enter into such contract; that it was not authorized by law to invest any of its funds in the purchase of mortgages where the amount paid therefor exceeded 60 per cent. of the value of the land covered by such mortgage; and that on April 6, 1916, the value of the land covered by the mortgage to be purchased under said agreement did not exceed $231,803.55. It also found that the defendant had, by mistake, paid $42,500 upon the agreement; that the agreement was void; that the defendant was not guilty of laches and had done nothing whereby it was estopped to contend that the agreement was beyond its powers.

The judgment was that the plaintiff take nothing by her action, that the defendant take nothing by its cross-complaint, and that defendant recover of plaintiff its costs.

To authorize the defendant to invest $225,000 on a real estate mortgage, the real estate should have been worth $375,000. If the theory of the court below that it could inquire into and revise the decision of the corporate authorities of the defendant as to the value of that land is correct, its conclusion that the defendant was not empowered to purchase said mortgage at that price is sustained by the facts; otherwise not, as we shall presently see.

Upon the trial it appeared that the denial of the alleged execution of the agreement of April 6, 1916, was based entirely on the theory that the execution of such a contract was not within the corporate powers of the defendant. The formal execution of the agreement was fully proven and found. The defense of the nonexecution of the contract, therefore, need not be considered, except as it may be connected with the defense that it was ultra vires.

The defendant is a corporation organized in Canada, under the laws of Canada. Those laws confer upon it power (a) "of loaning and of investment prescribed by the Insurance Act of 1910"; (b) to "constitute an investment board * * * to have charge of the loaning and investment of the funds of the society, * * * and to exercise such powers and under such regulations, * * * applicable thereto, as the society, or the executive council thereof, may from time to time determine"; (c) under the "Insurance Act of 1910," to "invest its funds, or any portion thereof, in the purchase of * * * mortgages * * * on real estate in Canada, or elsewhere where the company is carrying on its business, provided that the amount paid for any such mortgage * * * shall in no case exceed sixty per cent. of the value of the real estate covered thereby"; and (d), under said act, to "loan its funds or any portion thereof on the security" of such mortgages, "provided, however, that no such loan shall exceed sixty per cent. of the value of the real estate or interest therein which forms the security for such loan."

The defendant corporation was, at all times here involved, doing business in California. Consequently, its power to invest its money on the security of mortgages on real estate extended to this state and included authority to buy mortgages on California real estate in order to invest its money on such security. The only limitation upon this power is found in the proviso "that the amount paid for any such mortgage shall in no case exceed sixty per cent. of the value of the real estate covered thereby."

It appears from the uncontradicted evidence that Elliott G. Stevenson was the president, chief executive officer, and general manager of the defendant at the time the transactions involved in the action occurred; also, that prior to the making of the agreement sued on the "investment board" of the defendant, by resolution duly adopted, had authorized Stevenson, as its "president and general manager," "to undertake to purchase for" the defendant the mortgage described in the agreement sued on, "for such sum and upon such terms as to payment as he may deem expedient," and to execute as such president, in the name and on behalf of the defendant, a contract by which the defendant should "undertake to purchase said mortgage and to pay for the same the face value, plus accrued interest from the date of transfer, upon such terms as to time of payment as aforesaid as he shall deem expedient."

The decision of the court below that the defendant did not have power to make the contract for the purchase of the mortgage is based entirely on the theory that defendant's power depended on the conclusion of the court as to the value of the land covered by the mortgage at the time the agreement was made, and that the belief and decision of the investment board of the defendant that the land then had the necessary value to empower the defendant to invest the proposed sum in the mortgage was immaterial. There is no finding that Stevenson did not believe that the sum to be paid for the mortgage exceeded 60 per cent. of the value of the land, nor any finding of any kind on the subject of the belief, opinion, or knowledge of Stevenson, or of the investment board, as to the value of the land. No question with respect to the effect of fraud of any sort, or of any breach of trust, is involved in the case.

We are of the opinion that the court below was in error. The purposes of the defendant are those of a life insurance company or mutual benefit association. It has a large fund which it invests both in Canada and other countries for the purpose of obtaining money to pay to the beneficiaries of its policies or certificates. It is authorized to invest these funds in real estate mortgages to the extent of 60 per cent. of the value of the real estate mortgaged. Its "investment board" invests these funds and it is charged with the duty, before making an investment thereof upon a real estate mortgage, of ascertaining and determining that the sum invested does not exceed 60 per cent. of the value of the property, and, consequently, of determining to its own satisfaction the value of that property. It is not required to obtain the sanction of any court or tribunal before making the investment. Therefore, when it has, in good faith, determined that the value is sufficient, it has the power to invest the money upon that security. In the absence of any allegation and proof to the contrary, the law presumes that legal duty has been performed. The board authorized Stevenson to enter into an agreement on its behalf to buy this mortgage at its face value. He did so, and the evidence shows that it received the agreement and paid part of the price stipulated therein. These facts raise the presumption that the board satisfied itself by due inquiry that the sum to be paid did not exceed 60 per cent. of the value of the mortgaged land, and that the members of the board then believed that the land was worth at least $375,000. We think that with respect to third persons dealing with the corporation, in the absence of fraud, the decision of the board on the question of that value is conclusive as to the power to make the contract. We need not go so far as to say that it is conclusive in any action against the unfaithful officers of the defendant or against third persons chargeable with participation in a fraudulent valuation, or with notice that the officer or officers acting for the company did not believe that the value of the mortgaged property was sufficient to authorize the taking of the mortgage in accordance with the defendant's articles.

Any other rule would make it practically impossible for the corporation to carry on its business successfully in such matters. The validity of its contracts relating thereto would remain undecided until some attempt was made to enforce them in the courts and until the court had finally determined that the value was sufficient to give the corporation power to enter into the particular contract. In effect the investment of the funds would be committed to the courts instead of the board. It is apparent that with this condition it would not be able to obtain such contracts. The value of property rests on opinion. There is no subject of inquiry in the courts upon which opinions are more widely variant or more positive. If such contracts could be set aside whenever a court should find that the investment board had, even to a slight extent, overestimated the value of the property, no one could safely deal with the defendant in such matters, however cautious the board might be in coming to a decision.

The language of Chief Justice Field in Natoma Co. v. Clarkin, 14 Cal. 552, is pertinent here. Speaking of a corporation with power to buy and hold "such real and personal estate, as the purposes of the corporation shall require," and referring to a proposal to have the court determine whether certain property was so "required," he said:

> "Whether or not the premises in controversy are necessary for these purposes, it is not material to inquire; that is a matter between the government and the corporation, and is no concern of the defendants. It would lead to infinite inconveniences and embarrassments, if, in suits by corporations, to recover the possession of their property, inquiries were permitted as to the necessity of such property for

the purposes of their incorporation, and the title made to rest upon the existence of that necessity."

In Bates v. Coronado B. Co., 109 Cal. 163, 41 Pac. 856, where a corporation having similar powers sought to avoid its contract as ultra vires, the court said:

> "Whether a contract is 'essential' to the transaction of its ordinary affairs, or for the purposes of the corporation, is to be determined by * * * those to whom the management of its affairs is intrusted. If it is within the apparent scope of its organization, the fact that the contract has been entered into by it, or by its representative, is a determination on the part of the corporation that it is essential, and the corporation will not be permitted * * * to question its effect."

And in Savings Bank v. Barrett, 126 Cal. 417, 58 Pac. 915, the court said:

> "Whether the purchase of the mortgage in question was 'such as the purposes of the corporation required' was to be determined by its board of directors (Civ. Code, § 305), and is not open to investigation at the instance of the defendant."

The provisions considered in these cases were limitations upon the power of the corporation, and the principle enunciated is applicable to any limitation of a similar nature where the action of the corporation is to be taken according to the discretion or judgment of the officers in charge of its affairs, as is the case here. Such limitations are for the benefit and protection of the corporation and its beneficiaries or creditors, or the state. The corporation, or its beneficiaries or creditors suing in its name or on its behalf in equity, on the ground that its officers had acted fraudulently or in bad faith or that it had been defrauded by third parties, might perhaps impeach the finding as to value. But where there is no fraud or bad faith charged, the contract in such cases cannot be shown to be ultra vires by proof that the property was not of sufficient value to justify the investment made.

It follows from what has been said that the judgment in favor of the defendant is not supported either by the pleadings or the findings and that it cannot stand. This renders it unnecessary to consider the appeals of the defendant further than to state that the allegations of the answer and cross-complaint, so far as they were found to be true, do not, upon the principles we have stated, constitute grounds for any relief to the defendant against the plaintiff. The entire judgment should be set at large for a new trial.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

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185 Cal. 121

HEDEN v. POINT REYES LAND CO. et al.

(S. F. 8935.)

(Supreme Court of California. Feb. 15, 1921.)

1. Appeal and error 🔑878(1)—Whether finding against party not appealing is justified cannot be considered.

In a suit to rescind a contract for the purchase of land, where the court found that plaintiff's right to rescind for fraud had been lost by laches, but found for plaintiff on other grounds, and plaintiff did not appeal, the question whether the finding of laches was justified cannot be considered.

2. Vendor and purchaser 🔑112(1)—Purchaser entitled to rescind and recover purchase price, if sale to third person constituted repudiation by vendor.

If a sale by a vendor to a third person of a part of the land sold to the vendee was such an invasion and impairment of the vendee's rights as amounted to a repudiation of the contract, the vendee was entitled to a judgment rescinding the contract, and for the recovery of the money paid by him.

3. Principal and agent 🔑103(7)—Agent, authorized to resell land on cancellation of contract, held without authority to resell if contract not canceled.

A landowner's selling agent, authorized on the final cancellation of the contract of sale with any purchaser to resell the lot covered by such contract, had no authority to resell a lot sold to plaintiff if plaintiff's contract had not then been canceled, and in such case the sale was without validity, and could not impair plaintiff's rights.

4. Vendor and purchaser 🔑101—Notice by vendor held recognition of contract and of vendee's right to make payment by date specified.

A notice, served on the vendee by the vendor, stating that if arrears were not paid on or before a specified date the vendor would be released from any obligation to convey and the vendee would forfeit all rights under the contract, and all moneys paid thereunder would vest in the vendor, was an express recognition of the contract and an extension of the vendee's time to make payments thereunder until the date specified.

5. Vendor and purchaser 🔑102—Sale to third person does not cause cancellation or rescission if it does not prevent performance.

A sale by a vendor to a third person of property covered by the contract with the vendee does not operate as a cancellation or rescission of the contract if it preserves the rights of the vendee under the original contract or does not prevent the vendor from making good his agreement to convey title within the time specified.

6. Vendor and purchaser 🔑86—Vendor's notice to purchaser to make payments held not a rescission or acceptance of purchaser's effort to rescind.

Where a contract of sale provided that on default by the vendee the vendor at its option was released from all obligation to convey, and the purchaser should forfeit all rights and all money paid under the contract, a notice from the vendor to the vendee, demanding overdue payments on or before a specified date, and stating that if not made, the vendor would consider himself released and all rights of the vendee forfeited, was not a rescission or repudiation of the contract or a ratification and acceptance of the vendee's previous effort to rescind.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by John Peter Heden against the Point Reyes Land Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

Walton C. Webb, of San Francisco (C. F. Reindollar, of San Francisco, of counsel), for appellants.

William F. Rose, of San Francisco, and Alva S. Sherlock, of Concord, for respondent.

SLOANE, J. The plaintiff brought this action in rescission and to recover money paid as vendee upon a contract with defendant Point Reyes Land Company for the purchase and sale of farming lands. The cause of action under the original complaint was based upon fraudulent representations alleged to have been made by defendants whereby plaintiff was induced to purchase.

The vendor, Point Reyes Land Company, was represented in the contract of sale by its selling agent, Locke-Paddon Company.

[1] The trial court found on the evidence that the plaintiff had been induced to purchase by false representations of the defendants. But it was further found that there had been laches on the part of plaintiff in giving notice of rescission, such notice not having been given for nearly two years after plaintiff went into possession of the land. It might be questioned from the evidence if some delay in declaring a rescission was not excusable. Whether such finding of laches was justified cannot, however, be considered on this appeal, as plaintiff, against whom the finding was made, is not appealing. It is therefore not necessary to go into details concerning issues presented by the original complaint stating a cause of rescission for fraud.

The issue raised on this appeal is presented under a supplemental complaint alleging transactions had pending the suit, which plaintiff claims were a breach of the contract by the vendor. The allegations of the supplemental complaint, under which judgment was given for plaintiff, are as follows:

"That during the month of January, 1918, defendant Locke Paddon Company, as agent for Point Reyes Land Company, sold and delivered to one Miller five acres of the said land mentioned and described in plaintiff's original complaint; that said land was a portion of the land purchased by plaintiff from defendant Point Reyes Land Company, as described in the original contract, copy of which is attached to said complaint, and which land is involved in this suit."

It was found by the court on the trial that by virtue of this sale the defendants ousted plaintiff from possession of the land in question and retook possession thereof, and that by a sale of a portion of said land "defendants accepted and ratified the rescission and cancellation of said contract existing between plaintiff and defendant Point Reyes Land Company," and thereby released plaintiff from further liability under the contract, and entitled him to a recovery of money theretofore advanced in the transaction. Judgment was for plaintiff under this alleged mutual rescission for the sum of $790 against both defendants, Point Reyes Land Company and Locke-Paddon Company.

[2] If this sale of five acres of plaintiff's land by the vendor was such an invasion and impairment of plaintiff's rights as to amount to a repudiation of the contract, plaintiff is entitled to his judgment under the well-established rule in such cases. Merrill v. Merrill, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; Glock v. Howard & Wilson Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Heilig v. Parlin, 134 Cal. 99, 66 Pac. 186; Shively v. Semi-Tropic Land & Water Co., 99 Cal. 259, 33 Pac. 848; Gaume v. Sheets, 183 Pac. 535.

The appealing defendants, however, dispute the effect or sufficiency of the evidence to support the finding upon which the judgment rests. On the filing of the supplemental complaint it was stipulated that all its allegations were to be deemed denied, and defendants also filed a separate answer thereto.

[3] It was alleged by defendants, and we think the undisputed testimony supports the allegation, that this sale to Miller of five acres of land contracted to plaintiff was made by the Locke-Paddon Company. There is no evidence that the Point Reyes Company, the owners of the legal title to the land, had anything to do with or in any way authorized this sale. It was shown that the only authority possessed by the Locke-Paddon Company to make contracts for the sale of any of these lands was under a general contract which had been in existence previous to plaintiff's purchase, and under which, indeed, the plaintiff's contract was executed, whereby the Point Reyes Land Company had empowered the Locke-Paddon Company to act as its sales and collection agent for the sales of its lands. This contract contained the following provision:

> "After the final cancellation of the contract of sale with any purchaser, the party of the second part [Locke Paddon Co.] may resell the lot covered by said cancelled contract to any other purchaser it may procure on the same terms and conditions as if said lot had never been sold, such resale to be subject to all the terms and conditions of this agreement."

This, according to the evidence, was the only authority the Locke-Paddon Company had under which it could in any way contract or sell lands embraced under plaintiff's contract.

Now, there seems no escape from the alternatives presented by this state of facts. Either at the time the alleged sale of five acres to Miller was made the contract with plaintiff had already been canceled, in which event the sale was entirely legitimate and could not injuriously affect the rights of plaintiff, or the Locke-Paddon Company was without power or authority to sell, and its contract with Miller was without validity, and could not impair plaintiff's rights. It may be said in this connection that there is no evidence in the record that plaintiff was disturbed in his possession, and the finding of the court in this respect is unsupported.

[4] With regard to the status of plaintiff's contract at the time this alleged sale was made, we are of the opinion that the evidence shows that it was still effective. The court having found that plaintiff's right of rescission was lost by delay in exercising it, the relations of the parties were still measured by the terms of the contract, and while plaintiff was in default in the stipulated payments, the defendant Point Reyes Land Company had on the 2d day of January, 1918, several days previous to the sale to Miller by the Locke-Paddon Company, served plaintiff with written and signed notice of his default in payments, and notified him that if such arrears were not paid on or before January 9, 1918—

> "that immediately upon such failure without further act on the part of the undersigned, then the undersigned will be released from any obligations to convey the premises described in the above contract or any part thereof and you shall thereupon forfeit all rights under said contract, and all moneys paid under said contract by you shall immediately belong to and vest in the undersigned in accordance with the terms and provisions of said contract."

This was an express recognition of the contract by the vendor, and an extension of plaintiff's time to make payments thereunder until the 9th of January. This attempted sale to Miller was made on the 7th of January, while the contract was still uncanceled.

[5] Under these circumstances, the most that can be said of the contract of sale to Miller of part of plaintiff's tract is that it was a contract which would be subject to plaintiff's rights. That was the utmost of the authority vested in the Locke-Paddon Company under its contract as sales agent. It is not every sale by a vendor of property covered by a contract of purchase and sale that will effect a breach of such contract. It has been repeatedly held that such a sale which preserves the rights of the vendee under the original contract, or which does not prevent the vendor from making good his agreement to convey title within the time specified, will not operate as a cancellation or rescission of the contract. Brimmer v. Salisbury, 167 Cal. 522, 140 Pac. 30; Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Shively v. Semi-Tropic Land & Water Co., supra; Garberino v. Roberts, 109 Cal. 125, 41 Pac. 857. There is no evidence in the record as to the terms and conditions of this purported sale of the five acres to Miller, excepting the testimony of one of defendants' witnesses that "the Locke-Paddon Company sold it to Mr. Miller on a contract of sale." So far as is alleged in the complaint or shown in evidence, this contract may have been made expressly subject to existing rights under plaintiff's previous contract. We do not undertake to say that if the Point Reyes Land Company had authorized and its agent, the Locke-Paddon Company, had executed a sales contract of part of this land to Miller, pending the period covered by the demand that plaintiff pay up or forfeit his rights, which impaired plaintiff's contract or disturbed his possession, it might not be held a rescission by defendants, but such was not the case.

[6] As to the effect of the notice of January 3d demanding that plaintiff make his overdue payments on or before January 9th or the vendor would consider himself released from obligation to convey the premises and all rights of the vendee forfeited, this was not a rescission or repudiation of the contract, but a declaration of reliance upon it. The contract by its terms provided that should the purchaser fail to comply with any of the covenants or agreements therein contained "said seller at its option is thereby released from all obligations in equity to convey said premises or any part thereof and said purchaser shall (at the seller's option) thereupon forfeit all rights under this contract and all money theretofore paid under this contract by said purchaser."

Such a demand as was here made cannot be construed as a ratification and acceptance of plaintiff's previous effort to rescind the contract under allegations of fraud, as it is an express demand that he carry out the terms of the contract. Oursler v. Thacher, 152 Cal. 739, 93 Pac. 1007; Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 Pac. 363; Cross v. Mayo, 167 Cal. 594, 140 Pac. 283; Lemle v. Barry, 183 Pac. 148.

Plaintiff, having lost, by delay in taking action, his right to rescind for fraud, was left subject to all the terms of the contract, and in the absence of further breach of the contract by his vendor, constituting a new cause of action, is not in a position to recover any of the money previously paid in pursuance of his contract.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

185 Cal. 152

PEOPLE v. ANTHONY. (Cr. 2312.)

(Supreme Court of California. Feb. 24, 1921.)

1. Criminal law 🔑369(1)—Evidence of similar offenses excluded.

In a prosecution for lascivious acts upon the body of a girl under the age of 14 years, contrary to Pen. Code, § 288, evidence of similar acts by defendant with other girls is excluded, not because it has no tendency to prove the offense charged, but to protect the defendant from being required to meet charges other than that contained in the indictment; the only exception to the rule being evidence of other similar conduct with the complaining witness.

2. Criminal law 🔑706, 730(3)—Asking series of improper questions held prejudicial.

In a prosecution for lascivious acts upon the body of a girl under the age of 14 years, contrary to Pen. Code, § 288, where defendant introduced all the evidence possible to rebut the charge, the conduct of the district attorney in persistently asking questions which suggested he had information that defendant had been guilty of similar acts and had had sexual intercourse with other girls in the institution of which he was in charge necessarily impressed the jury with the idea that the district attorney had such information and was prejudicial to defendant, notwithstanding the court sustained objections to the questions and instructed the jury to disregard them.

3. Criminal law 🔑1171(1)—Good faith in asking improper questions does not remove prejudicial effect.

The fact that the district attorney was acting in good faith in asking a series of improper questions, to all of which objection was sustained, does not remove the prejudicial effect of his questions.

4. Criminal law 🔑785(6)—Court need not give requested instruction that charge was hard to disprove.

In a prosecution for lascivious acts upon a girl under 14, it was not error for the court to refuse to give an instruction requested by defendant that the charge could be easily made and was difficult to disprove, and that it was the duty of the jury to scan carefully the testimony of the prosecuting witness and to view it with caution, though the court might properly have instructed the jury to view the testimony of prosecutrix with caution.

Lawlor, J., dissenting.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Fred G. Anthony was convicted of lascivious acts on the body of a female child under the age of 14 years, and he appeals. Reversed.

George W. Smith, of Santa Cruz, and Kenneth I. Jones, of Fairfield, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones and Arthur Lindauer, Deputy Attys. Gen., for the People.

WILBUR, J. The defendant was convicted of the offense of lewd and lascivious acts done upon the body of a female child under the age of 14 years, with the intent to arouse and appeal to his own sexual desires, contrary to the provisions of section 288 of the Penal Code. He appeals from the judgment.

A reversal is asked upon three grounds, as follows: (1) Misconduct of the district attorney during the trial; (2) the refusal to give an instruction requested by the defendant; (3) the insufficiency of the evidence to sustain the verdict of conviction.

The third ground was not pressed upon the argument. The testimony of the complaining witness was alone sufficient to support the verdict, and her testimony was corroborated by another girl 11 years of age.

The principal point urged in support of the appeal is the misconduct of the district attorney. Several instances of asserted misconduct are assigned. A further statement of the facts is necessary to explain them.

The Good Templars home is an institution maintained at Vallejo for the care and support of small children of both sexes. At the time of the offense charged the affairs of the home were under the actual management of the defendant and his wife, who were living at the home. The defendant was called as a witness in his own behalf and denied the charge made against him. Without the slightest basis therefor in the direct or cross-examination, the district attorney asked the defendant if he had not hesitated to mention a certain room in his description of the premises because in that room in the months of January, February, and March he had sexual intercourse with two girls whose names were mentioned in the question, one of whom was 9 and the other 13 years of age. The defendant assigned this as misconduct and moved that the answer be stricken out. Thereupon a recess was taken for the argument of the question, the objection was sustained, and the answer stricken out. The jury were thereupon instructed by the court at the instance of the defendant to give absolutely no consideration to the question and to dispel from their mind anything in relation thereto and to disregard it.

A Mrs. Hansen was called as a witness by the prosecution in rebuttal and testified that the defendant's general reputation for morality in the community in which he lived was bad. Thereupon the district attorney asked the witness if she had heard anything prior to the 2d of March, 1919, concerning Mr. Anthony having sexual intercourse with one of the girls in the home, naming her. The question was objected to, the conduct of the district attorney in asking the question was assigned as error, and the court sustained the objection and admonished the jury substantially as before, to disregard the same.

Miss Nellie Bresnan, who was called by the defendant as a witness on cross-examination, was asked the following question:

> "Q. Now, Miss Bresnan, have you ever heard, while you were at the home, of Mr. Anthony making a practice of committing lewd and lascivious acts and having improper intercourse with the girl inmates there, and in particular with those whom you have mentioned?"

This question included the same girls who had been mentioned in the question subsequently asked of the defendant. The objection to this question was sustained, but no request was made for the admonition of the jury to disregard the asking of the question. The only excuse for this question is that the district attorney assumed that the witness had testified to the reputation of the defendant for morality on direct examination. It appears that on the direct examination the defendant sought to show his general course of conduct towards the girls in the home and his care and efforts on their behalf at the time of the influenza epidemic on the theory that this would tend to show his character for morality. The district attorney objected to this line of evidence, and the questions were then postponed and were not subsequently asked. The questions asked by the defendant's counsel did not relate to the reputation of the defendant, but to his course of conduct, and were as follows:

> "Now, Miss Bresnan, up to the time of the making of this charge, did you ever have occasion to observe Mr. Anthony about the home? A. I have. Q. Now, up to the time of the making of the charges did you ever have occasion to observe Mr. Anthony's attitude and conduct toward the children?
>
> "Mr. Lindauer: What purpose, what trait?
>
> "Mr. Smith: Morality. A. Not any way—just in a fatherly way.
>
> "Mr. Lindauer: I move to strike it out, 'just in a fatherly way,' if your honor please; this is a question of morality.
>
> "Q. You understand, do you, Miss Bresnan? A. Yes.
>
> "Q. Mr. Smith has asked you the question. A. Beg your pardon; I have never seen anything wrong in morality.
>
> "Mr. Smith: I submit it should stand."

Later, in response to this question:

> "Did you see him with the girls about him many times or not? A. Yes; many times, as I would any man that goes around greeting him, you know, in a nice way."

At this juncture the examination was halted by the objection of the district attorney that this was not the way to prove the reputation for morality.

The question is whether the asking of these questions, assigned as error, and particularly that addressed to the defendant himself, constituted misconduct of so grievous a character that it could not be cured by the instructions of the court to the jury to utterly and wholly disregard it. In determining that question it is proper also to observe that the district attorney called several of the young girls from the institution in rebuttal who testified that the reputation of the defendant for morality was bad. The questions were directed to his reputation in the orphans' home and not in the community in which he lived. For instance, one girl, aged 14, testified as follows:

> "Q. Now, what was Mr. Anthony's reputation or general reputation at the orphans' home for morality, good or bad? A. It was bad."

She had been previously asked by the defendant on cross-examination in testing her knowledge as to what morality means:

> "Q. And when was the first time you ever heard any one talk about Mr. Anthony's morality before the 2d day of March, 1919? A. Before then? Q. Yes. A. Why, I don't remember before. Q. You don't remember before? A. I don't remember how long he told me before."

She also testified that she had heard statements before the 2d of March. On her redirect examination she was asked the following question:

> "Q. * * * Do you remember an occasion in the month of February, 1919, on which occasion you were up in the barn with Mr. Anthony, and you left the barn in anger, do you remember that occasion? A. Yes, sir. Q. Why did you get angry?"

This question was objected to, and the objection sustained. It was clearly improper and very suggestive.

Among the girls from the home so questioned by the district attorney as to the reputation of the defendant for morality were the two named in the above question addressed to the defendant, concerning repeated acts of sexual intercourse committed with them in January, February, and March. The 13 year old girl testified that his reputation in the home for morality was bad. The 9 year old girl was unable to qualify as a witness because she did not understand the nature of an oath. These two character witnesses and one other were also included in the above question asked of Miss Bresnan by the clause "and in particular with those whom you have mentioned?" The latter question was broad enough to include the prosecuting witness, who was also among those "mentioned" by Miss Bresnan.

In determining the prejudicial character of the district attorney's conduct, it will be necessary to consider the situation presented by the record.

The defendant was confronted with the charge made by an 11 year old girl that he had placed his hands upon her person. The incident occurred in a room where a number of children were gathered. It was a comparatively public place. His duties called upon him to come in contact with these young girls. He was alongside the girl as he testifies, showing her a book. Under such circumstances the only defenses that he could make to such charge are: First, his own flat and positive denial; second, evidence of his good character; third, evidence tending to discredit the complaining witness. The defendant made a defense along all these lines. He flatly denied the misconduct charged. He not only showed that his reputation for truth, honesty, and integrity and morality was good, but in addition it appears that he has been in charge of this quasi public institution in which children are kept and maintained; that he has instructed them in the Sunday school and has been active in religious work. He also produced evidence tending to impeach the veracity of the complaining witness. Under these circumstances the jury is called upon to determine whether beyond a reasonable doubt the testimony of the complaining witness is true, and thus to determine whether or not beyond all reasonable doubt the testimony of the defendant is untrue. The defendant has offered all the proof that any man, however unjustly accused, could offer, and yet, so far as this court is concerned, it is powerless to interfere with the verdict of guilty where there is a conflict of testimony, even though the verdict was based entirely upon the uncorroborated testimony of the complaining witness. However, in considering the question of whether or not the misconduct of the district attorney is prejudicial, it is necessary for us to consider the whole case as presented by the evidence. In a case of this kind the district attorney is confronted with the difficult task of convicting a man of previous good reputation for an offense so odious as to indicate a perverted mind. This conviction must be secured by the testimony of the young and immature girl whose testimony not only flatly contradicts that of the defendant, but also stamps his whole life as hypocritical and false. Under these conditions the district attorney not only sought to corroborate the complaining witness in every possible and legitimate way, but, it is evident from the record, sought to create an atmosphere of suspicion by the improper questions asked. Experience would indicate that jurors are eager to get evidence which may be wholly improper, but which seems to them to elucidate the truth. If under our system of criminal practice it had been permissible for the prosecution to show that the defendant had been guilty of acts of sexual intercourse with the young girls in his custody, and if it could have been shown that he had also made a practice of committing lewd acts upon the persons of other young girls in his charge, such evidence would not only have shown the lewd character of the defendant and strengthened the probability that he committed the particular offense charged, but the jury, instead of being confronted with the problem of deciding which of two witnesses had told the truth, namely, the prosecuting witness or the defendant, would have either had the defendant contradicting all the witnesses offered upon that subject or admitting the truth of the other charges or remaining silent with reference thereto. It is vastly more likely that one young girl might be untruthful in making such charge than that half a dozen would make similar untrue charges.

[1] Our law wholly rejects this character of testimony, not because it does not tend to prove the truth of the charge, but because of a just regard for the rights of the defendant, who, if confronted by such witnesses, instead of being compelled to stand trial on one charge made against him, would be confronted by half a dozen or more charges. Our rule confining the testimony to the crime charged in the information has only been relaxed so far as to permit testimony of similar conduct with the complaining witness.

[2] In view of the fact that jurors instantly perceive the probative value of such improper testimony and are also unfortunately inclined to attach weight to the insinuations or suggestions of counsel as to the proof in his possession, which is excluded by the rules of law enforced by the court, it is clear that, however good the intentions of the jury, or however sincere they may be in endeavoring to follow the instructions of the court to disregard such suggestions, it is well-nigh inevitable that they should give weight to such suggestions. It is true that the asking of a question is neither proof of the fact nor a declaration of its truth. Where, however, a series of questions were asked, as they were here, each suggesting to the court and to the jury that the district attorney was advised that this man was guilty of lewd and lascivious conduct with numbers of his young female charges, and that he had had sexual intercourse with several of them, one as young as 9 years, it is a psychological impossibility for the jury to wholly eradicate

the impression made by such questions from their minds in weighing the evidence as to the guilt or innocence of the defendant on the particular item charged. It would be as impossible for the jury to believe as it is for us to conceive that the district attorney would ask questions of this character without any information whatever upon which to predicate the question. If he had no such information and sought by a question of that type to instill in the minds of the jury the idea that there was some information in his possession which justified the question, the misconduct would have been immeasurably greater than if the facts were that he had information which justified the question. A district attorney is charged with the public duty of seeing that the defendant has a fair trial. The jury is aware of this fact and must have assumed that he had information which justified the question. The question of the district attorney asked of the defendant amounted to a charge against the defendant that he had been guilty of the offense of rape committed upon two small girls in his custody. The human mind is not so constructed that a thing of that kind can be either forgotten or overlooked by a jury.

[3] We are not called upon to consider the good intentions of the district attorney in asking the question. The good faith of the district attorney in asking questions upon debatable ground is always an element to be considered. But the good faith of the district attorney in a case of this kind in asking questions that are clearly improper does not take away from the question the prejudicial effect resulting to the defendant. The real question is: Has the defendant had a fair trial? It is clear under the circumstances of this case, where the evidence and the conflicting considerations are so evenly balanced, that, if the jury attached the slightest weight to the innuendoes of the district attorney, this weight might be sufficient to turn the scales.

Ordinarily the prompt sustaining of objections to improper questions, coupled with instructions to the jury to disregard the question, will cure an error of this kind. But where the offense has been repeated in various forms and where the evidence is so evenly balanced and the district attorney after being warned by the court continues in his course, we must hold that the misconduct was so prejudicial as to entitle the defendant to a new trial.

The court refused the following instruction requested by the defendant:

> "And in the prosecution of a crime of lewd and lascivious conduct conviction may be had upon the testimony of the prosecuting witness alone if it be sufficient to be accepted by the jury as true. But such a charge is one of which it is particularly difficult for a defendant to clear himself. No charge can more easily be made and none is more difficult to disprove. From the nature of the case, the complaining witness and the defendant are usually the only witnesses to the act complained of. For this reason it is the duty of the jury in such a case to carefully scan the testimony of the prosecuting witness and to view the same with caution."

[4] It has been said that in cases of this character the court may properly instruct the jury that they should carefully scan the testimony of the prosecuting witness before reaching a conclusion that the defendant is guilty. People v. Rangod, 112 Cal. 669, 44 Pac. 1071; People v. Benson, 6 Cal. 223, 65 Am. Dec. 506; People v. Fraysier, 36 Cal. App. 581, 172 Pac. 1126; People v. Curry, 16 Cal. App. 737, 117 Pac. 941; People v. Liggett, 18 Cal. App. 372, 123 Pac. 225.

The statements that it is particularly difficult for a defendant to clear himself of such a charge, that no charge is more easily made or more difficult to disprove, and that the two parties are usually the only witnesses to the act are statements of fact, not of law. They may be proper in an opinion of this court in the course of discussion, but they are not proper in an instruction to the jury, though they may be entirely harmless. Some of these remarks have been included in instructions given and which have not been condemned as error in the above-cited cases. But the court is not bound to give an instruction containing them, and error cannot be predicated upon the refusal to do so.

Judgment reversed.

We concur: SLOANE, J.; LENNON, J.; OLNEY, J.

I dissent: LAWLOR, J.

(185 Cal. 49)

In re VAN WYCK'S ESTATE.

(S. F. 9295–9297.)

(Supreme Court of California. Feb. 5, 1921. On Rehearing, March 7, 1921. Rehearing Denied April 5, 1921.)

1. Wills 🔑682(1) — Devise in trust for "grandchildren" held not applicable to children of testator's child not named in will.

Where will devised residue in trust stating that it was testator's intention that on death of testator's named children the corpus of the estate should go to their descendants, and directing trustees on the death of "both of my said children" to pay the income "to my grandchildren and to the lawful issue of any deceased grandchild" and to distribute the estate "to my grandchildren then surviving and the lawful issue of any deceased grandchild" on the "youngest grandchild" becoming 21 years of age, the children of a deceased unnamed child did not take under the will; the word "grandchildren" throughout the clause having reference only to the children of the named children of testator.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grandchild.]

2. Descent and distribution 🔑47(1)—Grandchildren omitted from will held entitled to share in estate under laws of intestacy.

Under Civ. Code, § 1307, children of a deceased child of testator not mentioned in will took the share to which they would have been entitled if testator had died intestate.

3. Perpetuities 🔑6(7)—Trust to continue during life of testator's "youngest grandchild" held void.

Testamentary trust to continue until the youngest grandchild of testator shall have become 21 years of age *held* void in that it suspended the power of alienation for a longer period than that of life in being at the time of testator's death, in violation of Civ. Code, §§ 716, 771, 772, and section 715 as amended by St. 1917, p. 699, since testator's "youngest grandchild" included a grandchild born after his death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Youngest.]

4. Wills 🔑81—Rule as to validity of provisions of will containing invalid provisions stated.

Where a will contains both valid and invalid provisions, the valid provisions will be given effect unless the provisions are parts of a single plan or scheme, or are so dependent on one another that by avoiding the invalid provisions and allowing the valid to stand there will result a disposition of the estate so different from what the testator contemplated, or so unreasonable that it must be presumed that the testator would not have made the valid provisions if he had been aware of the invalidity of the others.

5. Wills 🔑81—Trust held invalid in toto, by reason of suspension of power of alienation.

Where will gave residue of estate to trustees, directed them to pay income to his children, and provided for termination of the trust and distribution of estate to his grandchildren on the youngest becoming 21 years of age, the invalidity of the provision providing for trust to continue until youngest grandchild became 21 years old because of the suspension of the power of alienation invalidated other provisions of the will providing for payment of income to testator's children for life; the trust being invalid in toto.

On Rehearing.

6. Wills 🔑687(6) — Decree of distribution made after termination of trust should not direct distribution upon the trust.

Where testamentary trust directing payment of income from designated portion of testator's estate to testator's sister for life terminated by sister's death before making of decree of distribution, the decree should not direct distribution upon the trust but should direct distribution of corpus to remainderman and of income accruing between testator's death and sister's death, to which sister was entitled, to sister's heirs or successors.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

In the matter of the estate of Henry L. Van Wyck, deceased. From that portion of the decree of distribution distributing one-third of the estate to certain children as pretermitted heirs, the Union Trust Company of San Francisco as executor and trustee appeals, and from that portion distributing the residue of the remaining two-thirds upon the trust created by the will Lawrence H. Van Wyck and Edna Boyd Callaghan appeal. Affirmed as to that portion distributing one-third of the estate to pretermitted heirs, and reversed with directions as to that portion distributing the residue upon the trust.

Edwin H. Williams and R. M. F. Soto, both of San Francisco, for appellants Van Wyck and Callaghan.

Morrison, Dunne & Brobeck and Edward Hohfeld, all of San Francisco, for respondents Van Wyck and others.

J. W. Dorsey, W. E. Cashman, and Heller, Powers & Ehrman, all of San Francisco, for appellant Union Trust Co. of San Francisco.

OLNEY, J. Henry L. Van Wyck died testate December 3, 1917, leaving as his heirs at law a son and a daughter and two minor children of a deceased daughter by the name of Potter. His will was duly probated and his estate administered upon, and the executor, a trust company, petitioned in due course for distribution in accordance with the terms of the will. The two Potter children contested distribution in this manner, claiming that the will omitted to make provision for them and that it did not appear that such omission was intentional, so that under our statute they were pretermitted heirs and entitled as such to take one-third of the estate by way of inheritance. The son and daughter also each contested distribution in accordance with the terms of the will, claiming that the trust created by the will as to the residuum and bulk of the estate was void as suspending the power of alienation for a period not permitted by our statute. Upon these contests the probate court held that the Potter children were pretermitted heirs and entitled to one-third of the estate as such, but that the trust created by the will was valid, and made its decree of distribution accordingly. From the portion of the decree distributing one-third of the estate to the Potter children as pretermitted heirs, the trust company, which was both executor and trustee, appeals. From the portion distributing the residuum of the remaining two-thirds upon the trust created by the will the son and daughter each appeal.

The two questions presented are, then: First, are the Potter children pretermitted heirs under our statute? and, second, does the trust created by the will suspend the power of alienation for a period not permitted by our statute? In case the second question is decided in the affirmative, a third question presents itself, namely, is the trust wholly void or void only in part, and, if void only in part, what part is valid and what part void?

The statute as to pretermitted heirs is section 1307 of the Civil Code, which reads:

> "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, has the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section. * * *"

The statute as to the suspension of the power of alienation is section 715, as amended by St. 1917, p. 699, and sections 716 and 771 of the same Code, which reads:

> "Sec. 715. Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than as follows:
>
> "(1) During the continuance of the lives of persons in being at the creation of the limitation or condition; or
>
> "(2) For a period not to exceed twenty-five years from the time of the creation of the suspension.
>
> "Sec. 716. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."
>
> "Sec. 771. The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section seven hundred and fifteen."

It should be noted that the present case does not come under section 772, and so does not come within the exception provided in section 715, and also that the second subdivision of section 715 (added by amendment in 1917) has no application. The question, then, as to the suspension of the power of alienation, turns on whether or not the trust created by the will suspended that power for a possible period other than that of lives in being at the death of the testator.

The will to which these sections are to be applied, after making certain minor and immaterial provisions, reads:

> "Item V. I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, wheresoever situated, whereof I may die seized or possessed, or to which I may be in any manner entitled, or in which I may be interested at the time of my death to the extent of such interest, to my executor and trustee hereinafter named.
>
> "In trust, nevertheless, as follows:
>
> "Item VI. To pay the whole of the net income of my distributive share of the estate of my grandfather, the same being a one-fortieth undivided interest or thereabouts, to my said sister Eveline, if she survives me and so long as she shall live thereafter.
>
> "Item VII. To pay the net income of every sort derived from my estate (excluding, while my said sister Eveline lives, if she shall survive me, that portion thereof above provided for her use,) in equal shares to my son Lawrence H. Van Wyck and my daughter Edna Boyd Callaghan if both shall survive me, or the whole thereof to the survivor if either shall predecease me; and to pay the whole thereof to the survivor when either shall die after my death.
>
> "Item VIII. It is my intention that when both of my said children shall have died their or its descendants shall take the corpus of my estate, and that the lawful issue of any child or children of any deceased grandchild shall stand in the stead and take the place of its parent; accordingly, I will and direct said trustee, after the death of both of my said children, to pay the whole of the net income above provided for them and the survivor of them, to my grandchildren and to the lawful issue of any deceased grandchild by right of representation, share and share alike, until the youngest grandchild shall become twenty-one years of age, and then to divide among and deliver absolutely to my grandchildren then surviving and the lawful issue of any deceased grandchild by right of representation, in equal shares, all of my estate then remaining in the hands of my trustee.
>
> "Item IX. I hereby nominate and appoint Union Trust Company of San Francisco, the executor and trustee of this my last will and testament, and request that it shall be allowed to serve in each of said capacities, whether in the state of California or elsewhere, without giving any bond or security whatever.
>
> "Item X. I authorize said executor and trustee, with the consent of both of my children, during the life of both, or with the consent of the survivor of them, and after the death of both, with the consent of a majority of my grandchildren, to sell any of my bonds, stocks, or other securities or properties of my estate, and with the proceeds arising therefrom to purchase such other securities or properties as may seem most for the benefit of the beneficiaries herein provided for.
>
> "Item XI. I revoke all former wills and codicils by me ever made."

The two primary questions turn very largely, if not entirely, on the construction to be given to item VIII. There is nothing in the will indicating an intention to omit the Potter children, and, unless they are beneficiaries as "grandchildren" under item VIII, they are entirely omitted and entitled to inherit as pretermitted heirs. The claim of the Potter children is that by "grandchildren," as the word is used throughout the item, is meant only descendants of the son and daughter. Likewise as to the suspension of the power of alienation, the claim of the son and daughter is that under item VIII the trust is to continue after their deaths until the youngest grandchild reaches the age of 21, and that the youngest grandchild may be one born after the testator's death, in which case the trust would continue for a period not dependent on the life of a person in being at the time of the testator's death.

It is to be noted that item VIII divides itself into two parts. There is first a declaration of the intention that when the son and daughter of the testator die, their descendants shall take the corpus of the estate. The will then goes on to say that, in accordance with the intention so expressed, the trustee shall pay the net income of the trust to the testator's grandchildren until the youngest becomes 21, when the trust estate is to be divided among the living grandchildren and the issue of any deceased grandchild. If it were not for the preliminary declaration of intention, there could, of course, be no question but that the Potter children would come within the description "grandchildren." But it is also equally clear, we think, that, in view of the declaration to the effect that it is the descendants of the son and daughter whom the testator desires to take the corpus of the estate, and in view of the fact that the provision for the disposition of the property which immediately follows is expressly stated to be in accordance with this intention, the grandchildren, among whom the property is to be finally divided, are the descendants of the son and daughter and do not include the Potter children. This, in fact, is conceded. The claim is that, while the grandchildren whom the testator designates as the final recipients of the corpus of the estate are the descendants of the son and daughter alone, the grandchildren whom he designates as the recipients of the income after the death of the son and daughter until the youngest grandchild is 21 are not so limited and include all the testator's grandchildren.

[1, 2] We cannot so read the will. There is nothing whatever to indicate any distinction between the grandchildren who are to receive the corpus of the estate and those who are to receive the income. The direction for the payment of the income and the direction for the division of the corpus are parts of a single provision contained in a single sentence, and are locked together in such intimate fashion that it must be that the word "grandchildren" means the same thing throughout the sentence. Taking the will as a whole and reading it, we think it quite apparent that its plan and scheme was to provide for the son and daughter of the testator during their lives and for their descendants after their death, and for no one else. If the testator had in mind the children of any other child, it is hardly possible that he would have used the language he did or have failed to indicate that he had other grandchildren in mind than those he mentions. Furthermore, it is hard to see why, if the testator intended to make provision for the children of his deceased daughter, his sole provision for them should be that they should receive a share of the income of his property only after the death of his living son and daughter and before the arrival of his youngest grandchild at the age of 21, on the happening of which event they were to have no further interest in the estate. In such a case, if either the son or daughter lived until the youngest grandchild became 21, the Potter children would receive nothing. There would be no reason in a gift of income to minors for a postponed, limited and contingent period of this character. Our conclusion is that by the word "grandchildren," as used throughout the will, the testator meant always the same thing, and that that thing is stated in almost so many words to be the descendants of the son and daughter, and that no other construction of the will is reasonable or can be reconciled with its language. It follows that the Potter children were omitted from the will, and are entitled to take one-third of the estate by way of inheritance, and that the portion of the decree of distribution so directing must be affirmed.

[3] The foregoing discussion has to a certain extent cleared the way for a construction of the will in connection with the question as to the suspension of the power of alienation. The provision is in effect that the trust shall continue "until the youngest grandchild shall become twenty-one years of age." If this means what it says, the testator's youngest grandchild, it would include a grandchild born after the testator's death, and the trust, if continued for the period contemplated by the testator, would continue for a period other than that of lives in being at the time of his death. We are not entirely clear as to the exact contention of the executor and trustee which would avoid this result, but it is apparently twofold.

It is, first, that by "youngest grandchild" the testator meant his youngest grandchild living at the time of his death, and did not refer to any grandchild that might be born after his death. This contention, we think, can be very easily tested. Certainly, when the testator provided that upon the death of his son and daughter it should be the duty of the trustee to pay the income to his grandchildren "until the youngest grandchild shall become twenty-one years of age and then to divide among and deliver absolutely to my grandchildren then surviving and the lawful issue of any deceased grandchild by right of representation in equal shares all of my estate then remaining in the hands of my trustee," he meant by the "youngest grandchild" the youngest of those grandchildren among whom the estate was to be divided on that grandchild reaching 21. If, then, the youngest grandchild meant only the youngest of those living at the testator's death, excluding any born thereafter, it would follow that the estate should be divided only among those, or the descendants of those, living at the testator's death, and that all grandchildren that might be born after that time should be excluded from any share in the testator's estate. The result so reached as a necessary consequence of the construction contended for by the trustee demonstrates the impossibility of that construction. We think it is hardly open to argument but that the testator did not intend to exclude from the benefit of his estate such of his grandchildren as might chance to be born after his death. No reason for any distinction between those born before his death and those born after appears, and the testator makes no such distinction. On the contrary, he uses the general expression "my grandchildren," and declares his intention that the descendants of his son and daughter should finally take the corpus of his estate without making any distinction whatever between such descendants. Reading the provision as a general one intended for the benefit of all the testator's grandchildren by his son and daughter, the provision is a natural and reasonable one. Reading it as a provision for such grandchildren only as should be born prior to the testator's death, it is an unnatural and unreasonable provision, and one contrary to the natural meaning of the language used. We think it certain, therefore, that by "youngest grandchild" the testator meant exactly what he said, his youngest grandchild, whether born before or after his death.

The second contention of the trustee is apparently that by virtue of the testator's declaration of intention that when both the testator's children should die their descendants should take the corpus of his estate, it must be held that immediately upon the son and daughter dying the beneficial interest in the corpus would vest in their descendants, the trust to continue until the youngest grandchild reaches 21 merely as a trust to pay to those same beneficiaries the income of the estate, the corpus of which has already vested in them. The claim seems to be that if this is the character which the trust will assume upon the death of the son and daughter, then, although the trust term as contemplated by the testator would endure beyond that time and for a period not permitted by the statute, yet the trust does not offend the statute for the reason that a trust merely to pay income to those already vested with the principal is a vain thing and may be terminated at any time at the desire of the beneficiaries, or, at least, may be terminated by the trustee and the beneficiaries jointly. We need not examine into the question of whether a trust of the character so assumed may or may not be terminated contrary to the expressed intention of the trustor at the instance of the beneficiaries alone or of the beneficiaries and the trustee jointly. It is manifest that, unless it is true in this case that upon the death of the testator's son and daughter those who are to take the corpus of the property are then determined and in being, the whole contention of the trustee falls. Putting it in another way, if those who are to take the corpus of the testator's estate are not then determined and in being, it is plain that all those whose interests must be acquired for a complete alienation are not then in being, and the power of alienation is necessarily still suspended. The question, then, is: Is it true that under the will those who are to take the corpus of the estate are persons determined and in being at the time of the death of the son and daughter?

The correct answer to this can, it seems to us, be easily determined by inquiring as to what would be the right of the child of a grandchild who was living when the son and daughter died but who died before the youngest grandchild reached 21. Would such great-grandchild of the testator have a right to share as an immediate beneficiary in the division of the estate when the youngest grandchild became 21, or could he share only as the heir or successor of his deceased parent? Putting it in another way, would such a person have a right to share in the division because of his character as the child of a deceased grandchild, or would he share only as the legal successor to the interest of his parent? If he shares in the latter capacity, it is evident that the parent might alienate his interest so that his child would take nothing. If he shares, however, because of his character as child of a deceased grandchild, his interest cannot be alienated except by himself. In the latter case, since it is possible that he be born after the death of the testator's son and daughter, it is evident that upon their deaths all persons necessary for a complete alienation may not be in being, and the power of alienation will still be suspended.

The terms of the will leave no doubt upon this point. They are that it shall be the duty of the trustee, after the death of the son and daughter, to divide the income as directed "until the youngest grandchild shall become twenty-one years of age, and *then* to divide among and deliver absolutely to my grandchildren *then* surviving and the lawful issue of any deceased grandchild by right of representation" the principal of the estate. The second "then" italicized in the quotation just made plainly refers back to the first "then," and that in turn plainly refers to the time when the youngest grandchild becomes 21, and not to the time when the son and daughter of the testator die. In other words, the persons among whom the estate is to be divided upon the youngest grandchild becoming 21 are the grandchildren surviving at that time and the lawful issue of any grandchild who did not survive until that time. This means, of necessity, that the child of such a deceased grandchild is entitled to share in his character of lawful issue of a deceased grandchild of the testator and as an immediate beneficiary designated by the will, and not merely as the heir or other successor of his parent. It follows that if, after the death of the testator's son and daughter but before the youngest grandchild had reached 21, all of the beneficiaries under the will should unite in an alienation, the alienation would not be complete, since there would still be outstanding the possible interest of any child born thereafter to a grandchild then living and joining in the alienation but who should die before the arrival of the time provided by the will for division. Under the will, then, it is possible that, upon the death of the testator's son and daughter, the trust must continue with the power of alienation suspended until the youngest grandchild reaches 21, since it may not be possible to determine sooner who is entitled to receive the corpus of the estate; that such, in fact, will be the situation if more than one grandchild survives the son and daughter. The possible period, therefore, during which the power of alienation may be suspended extends to the time when the youngest grandchild reaches 21, and since such grandchild may be one born after the death of the testator, such period is other than one for the lives of persons in being at the time of the creation of the trust, and the trust comes within the prohibition of the statute.

The vital point in the foregoing line of reasoning is, of course, the construction which we have put upon the will to the effect that upon the youngest grandchild reaching the age of 21, it is the grandchildren then surviving and the issue of any deceased grandchild among whom the property is to be divided. This construction, it seems to us, is plainly necessitated by the testator's use of the word "then" previously referred to. Counsel for the trustee recognize the decisive character of this word and contend that it refers, not to the time of the youngest grandchild reaching the age of 21, but to the time of the death of the testator's son and daughter. Their argument is that the opening words of item VIII, "It is my intention that when both of said children shall have died their or its descendants shall take the corpus of my estate, and that the lawful issue of any child or children of any deceased grandchild shall stand in the stead and take the place of its parent," are more than a declaration of intention as we have termed them, and are words of gift, effective to vest the corpus of the estate in the persons designated immediately upon the death of the testator's children, and that the word "then" must be taken to refer to this time, since otherwise there would be a gift of the principal to certain persons in existence at a certain time and a provision for division of the principal at a later time among persons who might not be the same. This argument wholly overlooks the connection in which the word is used. The provision containing it is, to repeat, that it is the duty of the trustee, after the death of the testator's children, to divide the income "until the youngest grandchild shall become twenty-one years of age and *then* to divide among and deliver absolutely to my grandchildren *then* surviving and the lawful issue of any deceased grandchild, etc.," the corpus of the trust estate. It does not seem to us possible to read this language in any other way than that the word "then" in both instances refers to the time when the youngest grandchild becomes twenty-one. To justify any other construction, the intent of the testator to the contrary would have to appear so clearly and unmistakably as to warrant the conclusion that the use of the word "then" as it occurs in the will was through inadvertence or mistake and should be disregarded. The only thing relied upon to warrant such a conclusion is the declaration that it is the testator's intention that when both his children die their descendants shall take the corpus of his estate. But we cannot agree with the contention that this declaration was intended as effective words of gift. While, if it had stood alone, there would be no doubt but that it was so intended, it does not stand alone. As the will reads, the testator first declares his intention, and then goes on to direct particularly what shall be done "accordingly," that is, to accomplish the intention expressed. There is, it seems to us, but one rational construction, and that is that the testator first declares his general intention, not intending such declaration as in itself an operative provision, and then goes on to say just what he wishes done in that behalf. It is the latter portion that is the operative portion of this item of the will, and if there is any inconsistency between the general declaration of intention and the particular provisions as to what shall be done, it is the latter that must govern. There is, however, no inconsistency in fact. The descendants of the testator's son and daughter do take the corpus after their death under the subsequent particular provisions. The only difference is that the general statement of intention omits to mention the somewhat minor fact that they are not to take at once but only upon the youngest grandchild reaching 21, and that in the meantime they are to receive only the income of the property.

The trustee also contends that the case is at most one of alternative limitations, one of which is bad but the other valid, and that the rule in such cases is that the invalidity of one alternative will not affect the other. It is said that the case is one of alternative limitations because whether the period of suspension of the power of alienation provided by the will will or will not in fact be for other than the lives of persons in being depends on whether the youngest grandchild proves to be one born after or one born before the testator's death. But such a case is not one of alternative limitations. There is but one limitation, namely, that the trust shall remain intact with a consequent suspension of the power of alienation until the youngest grandchild reaches 21. This event may or may not happen within the lives of persons in being at the testator's death, and therefore the period fixed is a period not measured by the lives of such persons and is not permitted by the statute.

[4] The conclusion so reached necessitates a consideration of how far the invalidity of the trust goes. Manifestly, the trust is void as to the period after the death of the son and daughter. Is it void for the period of their lives as well? The question is one of separability. The provision that the trust shall continue through the lives of the son and daughter, with them as beneficiaries of the income, and the provision that upon the death of the survivor of them it shall continue until the youngest grandchild reaches 21 and then be divided among the surviving grandchildren and the issue of any deceased grandchild, are stated in separate items of the will. This, however, is by no means determinative. The real question presented where a will contains both valid and invalid provisions is whether the two are so parts of a single plan or scheme or otherwise so dependent one upon the other that by avoiding the invalid provisions and allowing the valid to stand there will result a disposition of the estate so different from what the testator contemplated or so unreasonable that it must be presumed that the testator would not have made the valid provisions if he had been aware of the invalidity of the others. The rule in fact is frequently stated more strongly against allowing the valid provisions to stand than we have just stated it. Thus, in Estate of Fair, 132 Cal. 540, 60 Pac. 459, 84 Am. St. Rep. 70, it is said:

> "The question whether the valid clauses can stand depends upon whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator. In Darling v. Rogers, 22 Wend. [N. Y.] 495, Senator Verplanck correctly stated the rule as follows: 'When a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as, from the whole testament taken together, was evidently never the design of the testator. Otherwise when a good part is so far independent that it would have stood had the testator been aware of the invalidity of the rest.'"

[5] Applying this test to the present will leaves little doubt as to the correct conclusion. If the trust in this case is invalidated only for the period subsequent to the death of the son and daughter, the period as to which it offends the statute, it means that the trust must terminate on the death of the survivor of the son and daughter, as the beneficial life tenants, with remainder over free of the trust, and that as to this remainder the testator has died intestate, so that it vested immediately upon his death in his heirs. But his son and daughter are his heirs as to the portion of the estate given in trust, so that we would have the very anomalous situation of the same people owning both the beneficial life estate in the property and also the remainder over in fee after the termination of the life estate, but with the life estate and the remainder in fee kept from merging by the interposition of a trust. The trust under such circumstances would accomplish nothing and would be practically futile. The son and daughter could alienate as they pleased both their beneficial life estate and the remainder in fee, so that the trustee might come to manage the property and preserve it intact for the benefit solely of strangers to the testator. If the son and daughter did not alienate the property during their lives, they could dispose of the future remainder vested in them by will so that it would not go to their descendants as the testator intended, or, if it did, would be divided very differently than as he directed. Moreover, if they died intestate, and the remainder went to their heirs, it would not necessarily go to their descendants exclusively, as the testator desired, for their descendants might not be their only heirs. They would not be, if either son or daughter left a spouse surviving, and it is worthy of note that the son is married and his wife is living. There can be no presumption that if the testator had known of the invalidity of the portion of the trust which offends the statute, he would yet have wished the trust to stand for the lives of his son and daughter, futile and unreasonable as long as it should stand, and upon its termination resulting in the property very possibly going to others than those to whom he desired it should go. The presumption is quite the contrary. In other words, it appears that the valid and invalid portions of the trust which the testator attempted to create are so intimately connected and so dependent one upon the other that the invalid portions cannot be taken away without the whole scheme and plan of the testator falling. The trust must therefore be declared invalid in toto.

This conclusion is supported by the authority of Estate of Whitney, 176 Cal. 12, 167

Pac. 399, where a trust identical in all material respects with that under consideration was involved and was held both to offend the statute as to the suspension of the power of alienation and to be void in toto, for reasons which we have in effect but repeated here.

What we have said as to the trust being void in toto has, of course, reference only to the trust for the son and daughter and their descendants. It has no reference to the trust created by item VI as to a part of the property for the benefit of a sister of the testator. The provision for her benefit is not a part of the testator's general scheme for the disposition of his estate, and is very evidently a provision the making of which would not have been affected had the testator known of the illegality of the provision he was making for his children and their descendants.

The portion of the decree distributing one-third of the estate to the Potter children as pretermitted heirs is affirmed. The portion of the decree distributing a part of the estate to the Union Trust Company of San Francisco in trust is reversed with direction that in lieu thereof distribution of that part be decreed as follows: The portion specified in item VI of the will to said trust company for the life of the sister of the testator named in said item and upon the trust therein declared, with remainder over to the son and daughter of the testator; and the balance to the son and daughter absolutely.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

On Rehearing.

PER CURIAM. [6] Since the rendition of the foregoing opinion it has been brought to our attention that, while the decree appealed from directs distribution to the Union Trust Company upon the trust provided by item VI of the will, the section providing for the sister of the testator, which trust we hold to be valid, as well as upon the trusts provided in the other sections of the will, which we hold to be invalid, the testator's sister had died subsequent to his death, but before the making of the decree, and that that fact is found by the decree of distribution itself. The result was, of course, that the trust provided for in item VI had terminated before the making of the decree, and the decree should not have directed distribution upon that trust, but should merely have distributed to the heirs or successors of the sister the income to which she was entitled under item VI between the death of the testator and her own. Misled by the decree, the incorrect character of which in this respect was not called to our attention, we directed distribution to the trustee named upon the same trust. This error in the decree, also, should be corrected. It is therefore ordered that our judgment be modified to read as follows:

> "The portion of the decree distributing one-third of the estate to the Potter children as pretermitted heirs is affirmed. The portion of the decree distributing a part of the estate to the Union Trust Company of San Francisco is reversed, with direction that in lieu thereof distribution be made to the heirs or successors of the testator's sister, Eveline, of the income of the portion of the estate as to which a trust is declared in her favor by item VI of the will for the period between the testator's death and her's, and that the remainder of the two-thirds of the estate not distributed to the Potter children be distributed to the son and daughter of the testator equally."

All concur.

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185 Cal. 165

EARL et al. v. TIMES-MIRROR CO. et al.
(L. A. 5498.)

(Supreme Court of California. Feb. 25, 1921.)

1. Libel and slander ⚷104(3)—Previous publications admissible to show malice.

In action for libel against a newspaper, previous publications, even of a nature dissimilar to the one sued for, are admissible to establish malice.

2. Appeal and error ⚷970(2)—Libel and slander ⚷104(3)—Court has discretion as to limits of remoteness of evidence of provocation.

In libel action by newspaper publisher against a rival newspaper and its publishers, where the trial court sustained defendants' contention that publications of plaintiff were admissible as explaining or in connection with defendants' articles offered to show malice, the trial court had a certain discretion in determining whether articles published by plaintiff were too remote in time or effect to be admissible, which would not be interfered with on appeal unless abused.

3. Libel and slander ⚷107(1)—Plaintiff's testimony admissible as to his belief in effect of publication upon his wife.

In libel action, testimony was admissible as to plaintiff's belief respecting the influence that the libel complained of had upon his wife's feelings and as to his own sympathetic sufferings in consequence.

4. Libel and slander ⚷71, 124(7)—Instruction as to repelling libelous charge by denial or explanation held properly refused; counter libels not allowable.

In libel action, instruction as to defendants' justification in repelling a libelous charge by denial or explanation, which would be "privileged though false," *held* properly refused, being of doubtful correctness as a statement of the law, in view of Civ. Code, § 47, expressly defining what articles are and what are not privileged, and being, in any event, inapplicable to the case, as the article complained of was neither a denial nor explanation nor a fair answer to plaintiff's alleged charge, and was, at most, a mere counterlibel; for one libel cannot be repelled by another of similar import.

5. Libel and slander 🔑124(1)—Instructions as to offsetting damages from libel held correct.

In libel action by a newspaper publisher against a rival newspaper and its publishers, an instruction in effect advising the jury that they could not subtract from the damages they found plaintiff entitled to any offset due to damages to defendants from publication of articles in plaintiff's paper *held* correct.

6. Appeal and error 🔑1033(6), 1067—Refusing instruction as to nominal damages held harmless.

In libel action, where plaintiff recovered a verdict of $25,000 compensatory damages, and where the jury were instructed that they could award only compensatory damages, refusal to instruct that a verdict for nominal damages might be rendered if the jury found that the article was published without malice and plaintiff was not appreciably injured thereby was harmless, both because the requested instruction would have been to plaintiff's advantage as authorizing nominal damages rather than no damages, in case they found no substantial injury, and because the verdict actually rendered indicated that the requested instruction was inapplicable.

7. Libel and slander 🔑124(7)—Instruction correct that provocative article may be considered only in mitigation of punitive damages.

In libel action by newspaper publisher against a rival newspaper and its publishers, an instruction that an alleged provocative article published by plaintiff should be considered only in mitigation of punitive damages based upon malice was correct.

8. New trial 🔑42(2)—Properly denied for false testimony of juror on the voir dire.

In libel action against a newspaper, new trial was properly denied upon ground of misconduct of juror in stating on voir dire that he could try the case impartially and failing to volunteer the information at that time that he had, six weeks before the trial, stopped his subscription to the paper because incensed at its editorial policy upon another matter; for disagreement with the paper's policy in that respect would not necessarily affect the juror's views as to the merits of the libel suit.

9. Trial 🔑321½—Verdict for compensatory damages alone supported by required number of jurors.

In libel action, where $30,000 verdict was returned, composed of a verdict for $25,000 compensatory damages and $5,000 punitive damages, and on polling the jury, pursuant to Code Civ. Proc. § 618, it developed that nine jurors were in favor of the $25,000 compensatory damages and ten jurors in favor of the $5,000 punitive damages, but three who voted for the $5,000 punitive damages did not concur in the $25,000 compensatory damages verdict, and two who did not concur in the $5,000 punitive damages were in favor of the $25,000 compensatory damages, the verdict would be set aside, as failing to be concurred in by the requisite number of jurors, only as to the $5,000 punitive damages; nine having agreed that plaintiff had been damaged to the extent of $25,000, and only seven concurring in the conclusion that in addition to the compensatory damages defendant should be compelled to pay $5,000 additional.

10. Libel and slander 🔑121(1)—$25,000 compensatory damages held not excessive.

A verdict for $25,000 compensatory damages in libel action against a newspaper for article charging plaintiff, a newspaper publisher, with being a defender of degenerates for hire, *held* not excessive.

11. Set-off and counterclaim 🔑29(3)—Demurrer held properly sustained to cross-complaint in libel action.

In action for libel by a newspaper publisher against a rival newspaper and its publishers, demurrer *held* properly sustained to defendants' cross-complaint for alleged libel by plaintiff; it not being a proper counterclaim under Code Civ. Proc. § 438.

12. Libel and slander 🔑9(8)—Article held libelous per se.

A newspaper article charging plaintiff, the proprietor of another newspaper, with being a defender of degenerates for hire, *held* libelous per se, under Civ. Code, § 45.

13. Libel and slander 🔑48(1)—Attacks on newspaper proprietor not justified on ground of his public character.

That a man is the publisher of a newspaper does not justify libelous attacks on him on the theory that he is a public character.

Olney, Shaw, and Lawlor, JJ., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by E. T. Earl against the Times-Mirror Company and others. From judgment for plaintiff, defendants appeal. Plaintiff dying pending appeal, Emily Jarvis Earl and others, his executors, were substituted as plaintiffs. Modified and affirmed.

H. C. Beach, Joseph L. Lewinsohn, Geo. P. Adams, Daniel M. Hunsaker, Hunsaker & Britt, and Le Roy M. Edwards, all of Los Angeles (Hunsaker, Britt & Cosgrove and Robert B. Murphy, all of Los Angeles, Samuel Poorman, Jr., and Leon R. Yanckwich, of Los Angeles, of counsel), for appellants.

Meserve & Meserve, Joseph Scott, and Anderson & Anderson, all of Los Angeles, for respondents.

WILBUR, J. This is an action for libel in which E. T. Earl recovered judgment for the sum of $30,000. The defendants appeal. The article complained of was published in the Los Angeles Times of December 3, 1914. E. T. Earl was the publisher and owner of two daily newspapers, the Los Angeles Express, an evening newspaper, and the Los Angeles Tribune, a morning newspaper, while the defendant corporation published the Los Angeles Times, a daily morning newspaper, and the other defendants were also engaged in the publication of that newspaper.

The article complained of by the plaintiff is as follows:

> "Defense of Degenerates.
>
> "The theory of the editor of the Morning Sodomite and the Evening Degenerate seems to be that those who violate the laws of God and man should be protected from punishment and sheltered from publicity, while those newspapers whose proprietors publish the news, and by so doing aid decent people to avoid ignorantly contaminating their households with well-dressed cultivated Pharisaical moral lepers, are to be denounced as 'brutal journalists.'
>
> "The Toopious system is to coddle criminals, to conceal their crimes, and to denounce those who expose crime as 'brutal journalists.' The system of the Times is to publish the news, and if the news includes an account of the misdoings of a lot of pretentious Pharisees, who are as lecherous as goats and as conscienceless as jackasses in April, the acts of the evildoers will be exposed, notwithstanding the purchased defense of the editor of the Morning Sodomite and Evening Degenerate."

Pending the appeal the respondent, E. T. Earl, has died and the executors and the executrix of his estate have been substituted as plaintiffs. We will, however, refer to E. T. Earl as the plaintiff. In its concluding brief respondent's counsel states:

> "* * * In view of the importance of this case to our client's memory, and in view of the fact that a reversal upon technical grounds would mean a complete termination of this action without any opportunity whatever for a retrial and the vindication of Mr. Earl against the vicious attacks of the defendant newspaper, we have felt impelled to exercise the utmost care" in presenting this case.

Therefore, before considering the various points advanced for a reversal of this case, it may be well to state at the outset that the defendants do not count upon the truth of the article published, and throughout their briefs concede that the inferences against the character of Mr. Earl contained in the article were not true, but claim that the article was merely a journalistic fling in retaliation for similar attacks made upon the defendant H. G. Otis and the Los Angeles Times. In short, the defense is that this publication is but one item in an extended and acrimonious newspaper controversy; that it was provoked by articles published by the plaintiff in his newspapers concerning defendants, and should only be considered in the light of this controversy and as a part of it and not as a separate and independent charge against plaintiff. This being true, there was not and is not now any issue as to the moral character of Mr. Earl, and our decision one way or the other cannot affect that question.

[1] The first question very elaborately presented in the briefs, as defendants' counsel concede in their final briefs, is determined in the case of Scott v. Times-Mirror Co., 184 Pac. 672, wherein it was held that previous publications, even of a dissimilar nature, might be properly received in evidence for the purpose of establishing malice.

Provocation.

Thirty editorials and cartoons from the Los Angeles Tribune and the Evening Express were received in evidence on behalf of the defendants for the purpose of showing provocation, while twenty others, offered for the same purpose, were rejected, and the ruling of the court excluding them is assigned as error. In view of the fact that the trial court fully sustained the contention of the appellants, namely, "that any publication of the plaintiff which related to, induced, tended to explain, or was in any way connected with the articles, or any of the articles, of defendant offered to prove malice was admissible," and admitted a large number of articles upon that theory, it is, as respondent contends, "incumbent upon the plaintiff, seeking to show error in the rejection of these various publications, to point out in each instance its relevancy and importance in the case." The appellant does not discuss in detail the particular objections interposed to each offer of the rejected evidence or the theory upon which they were sustained by the trial court. The rejected articles are classified by the appellant under four heads:

> First: "Articles wherein the journalistic activities and business of defendant Otis are excoriated." Second: "Articles charging defendant Otis and the owners of the Times with hypocrisy." Third: "Articles charging defendant Otis and the Times with dishonesty of assorted varieties, chiefly of a political character." Fourth: "Articles, according to defendants, the customary journalistic amenities."

[2] Nine articles are classified under the first head, five of which were published in 1911, three in 1913, and one in 1914. It appears from the transcript that the objection to some of these articles was sustained on the ground that they were too remote. Under the second head three articles are classified, one dated October 30, 1914, another dated July 21, 1911, and one dated January 30, 1913. Under the third head four articles are listed, three of them dated in 1911, one in 1913, and under the fourth, one article, dated April 11, 1914. As the trial court fully recognized the principle involved in the introduction of these articles, and the objection is on the ground of remoteness, or of its probable effect on or connection with the article

published, and as a large number of articles were received in evidence which cover the same general ground, the trial court must have some discretion in determining whether or not articles are too remote in time or in effect to be admissible. This discretion, if reasonably exercised, ought not to be interfered with on appeal unless it can plainly be seen that it has been abused. It is evident from the record that the defense of provocatory articles was fully presented to the jury. In view of the fact that the appellant has not more specifically pointed out the alleged error of the trial court in rejecting this evidence, we think it unnecessary to discuss the matter further.

Evidence of Plaintiff's Feelings and Belief.

[3] It is next contended by the appellants that—

> "The court erred in admitting the testimony of plaintiff's belief respecting the influence that the libel complained of had upon the feelings of his wife, and also his testimony respecting his own sympathetic sufferings in consequence."

One of the elements entering into damages for a libel is the injury to the feelings of the person libeled. That injury may be inferred by the jury from the testimony with relation to the social status of the person libeled. There seems to be no good reason, however, why this inference should not be supplemented by the direct statement of the plaintiff to the effect that his feelings were injured and that he did believe that the community were influenced by the publication and that the members of his family were affected thereby. Such testimony is not received to establish the actual effect upon the community or upon the members of his family, but to prove the effect upon himself. The general purport of the defense in this case is that the libel occurred in a prolonged newspaper controversy which nobody took very seriously, not even the newspapers themselves. If the plaintiff also took this view of the matter, it is clear that his feelings were not greatly injured; whereas, on the other hand, if he believed, as he testified he did, that it had affected his standing in the community and the happiness of members of his family, it was clearly proper for him to so testify, as tending to prove the injury to his feelings. Appellants state that the record would seem to indicate that the evidence must have been proffered and admitted upon the untenable theory that plaintiff's belief—irrespective of its being a correct belief—constituted an element of damages for which plaintiff was entitled to recover, namely, injury done to him through his sympathetic participation in what he took to be his wife's resulting humiliation and sadness.

Appellants call attention to Dennison v. Daily News Publishing Co., 82 Neb. 675, 118 N. W. 568, 23 L. R. A. (N. S.) 362, in which it was held that the plaintiff should not have been allowed to testify to his wife's agitation on reading the newspaper publication, and that her crying worried him all the time so that he could not eat or sleep as he had been accustomed to. The plaintiff here did not testify to the effect of the article upon his wife, or of her grief, if any, upon him, but merely as to his own belief as to its effect upon her; that is to say, as to its effect upon his own mind. The case of Couch v. Mining Journal Co., 130 Mich. 294, 89 N. W. 936, is cited to the same effect. In that case the plaintiff sought to prove the effect upon the members of his family, which was held to be improper, while in this case the court was careful to instruct the jury that they were not to consider the plaintiff's testimony as evidence of the fact that the wife was affected by the article. The case of Sheftall v. Central of Georgia Ry. Co., 123 Ga. 589, 51 S. E. 646, is also cited to the same effect. The distinction between these cases and the one at bar may be made manifest by an illustration. Suppose that a man feared that his wife might commit suicide when she read the article in question? This belief, however erroneous it might be, is one which would cause him mental suffering. The wife might commit suicide, and neither that fact nor the effect of the suicide upon the husband could be offered in evidence to establish the measure of his damages. On the other hand, the wife might take a very cheerful view of the situation and comfort her husband instead of committing suicide. In either view the plaintiff is entitled to recover for such mental worry as is proximately caused by the article, although not by the mental worry caused by the suicide, for such worry would not be a proximate result of the article. A similar conclusion was reached by the Circuit Court of Appeals in the case of S. S. McClure Co. v. Philipp, 170 Fed. 910, 96 C. C. A. 86, where the plaintiff was permitted to testify, over objection, that when he read the libel he was much distressed because of the effect it would have upon his family, friends, business acquaintances, and his social and financial standing. It was there said:

> "It is quite true that in, perhaps, the majority of cases the question is presented to the jury as a deduction from established facts. In the case at bar, with all the facts relating to the plaintiff's domestic, social, and business relations established, arguments as to the effect of the false charges upon his mind might, it would seem, have been presented as effectively without the testimony complained of as with it. Before coming to the question of damages the jury necessarily had to reach the conclusion that the defendant had falsely accused the plaintiff of being a criminal and the conclusion that he had suffered great mental anguish from such a charge would naturally follow. But what may be considered by the jury may be

proved, and where the question relates to the mental suffering of the plaintiff no witness can speak ex cathedra but the plaintiff himself."

To the same effect is the case of Chesley v. Thompson, 137 Mass. 136.

While the question of such mental suffering might ordinarily be most properly left to be inferred by the jury, it is evident that under the peculiar circumstances of this case the plaintiff felt compelled to offer direct testimony on that subject. There was no error in the reception of this evidence.

Instructions as to a Libelous Retort to a Libel.

[4] The defendants complain of the refusal of the trial court to give the following instruction:

> "The law justifies one in repelling a libelous charge by denial or an explanation, * * * and if he does so in good faith, and what he publishes is fairly an answer and is published for the purpose of repelling the charge, and the same is not published with malice, it is privileged, though false."

Even if this instruction were a correct statement of the law, which may well be doubted, in this state, where the statute itself expressly defines what articles are privileged and what are not (Civ. Code, § 47), it is sufficient to say that the principle of law has no application to the case at bar. The article complained of does not in any sense comply with the specifications in the instruction as to what constitutes a privileged communication. It is neither a denial nor an explanation, nor a fair answer to the charge, and for that reason, under the instruction, as submitted, it could not be "privileged, though false." It would be germane to the discussion of this point to state at this time the nature of the so-called "newspaper controversy" but we will postpone that statement to a later portion of this opinion, but such statement will emphasize what we have just said. It is sufficient at this time to say that the appellants' claim of the relevancy of the instruction to the facts in the case at bar is thus summarized by them:

> "In brief, plaintiff accused defendant of being a character assassin, either for hire or for the money that was to be made out of printing sensational items of news looking to the ruining of private reputations, and defendant replied in kind that plaintiff's silence with regard to crime —and particularly with regard to crimes of the character of those committed by the Long Beach perverts—constituted a defense of the guilty to which plaintiff was moved for what there was in it, and also that his attacks upon defendants for their journalistic policy was pharisaical."

Accepting this statement for the moment as a fair characterization of both articles, it appears therefrom that defendants merely replied to one libel by another one of a somewhat similar type. This course is not approved by the law.

Appellants' contention, when applied to the facts of this case, amounts to the proposition that one libel can be repelled by one of similar import. The instruction was properly refused.

Instruction as to Relevancy of Injury to Defendants.

[5] The appellants complain of the giving of the following instruction during the progress of the argument of defendant's counsel:

> "The question of any injury that may have been done Mr. Otis or Mr. Chandler or Mr. Andrews is wholly irrelevant to any of the issues in this case, and not to be considered by the jury."

This instruction resulted from a prolonged colloquy between court and counsel during the argument. The defendants' counsel was arguing to the jury that the plaintiff had not shown a dollar's worth of injury. Plaintiff's counsel protested to the court against the propriety of the defendants' argument on the ground that as there was no special damages pleaded in the complaint they were not entitled to prove damages in terms of dollars, but that they were limited to presenting the facts and circumstances of the plaintiff to the jury, who were therefrom to appraise the injury to the plaintiff. During the course of this colloquy respondent's counsel stated:

> "The Court: What is the instruction asked?
>
> "Mr. Meserve: I want your honor to instruct the jury that Mr. Earl could not make proof to this court of any damages in this case except by the showing of his standing in the community, his position, the character of his business, and his family. He could make no proof of special damages or special money loss.
>
> "The Court: Gentlemen of the jury, you are instructed that Mr. Meserve's statement of the law is adopted as correct by the court in its application to this case, wherein there is no claim in the plaintiff's complaint for any special damages."

Thereupon Mr. Beach, arguing the case for the defendants, said:

> "Well, gentlemen, since his honor's instruction and Mr. Meserve's objection, we are confined to the question of Mr. Earl's feelings. Was Mr. Earl hurt one bit more by that publication than Harry Andrews or Harry Chandler or General Otis, sitting over there, when they came out with that publication calling him a pervert?"

To this respondent's counsel objected, stating, among other things:

> "* * * They cannot offset one libel against another, or one damage against another, and the jury are not to consider that question at all."

Thereupon the court gave the above instruction. We think it must have been clear to the jury, from the foregoing colloquy and from other portions which we will not quote, that the purpose of the instruction was to advise them that they could not subtract from the damages they found plaintiff was entitled to any offset due to damages to the defendants. So understood, the instruction was correct.

It was evidently not intended, either by the court or by respondent's counsel, by this instruction, asked and given during the argument, to completely reverse the rulings which had been uniformly made by the court during the trial that such articles as were offered on behalf of the defendants to show provocation were relevant. The court consistently ruled that the provocation was relevant matter, and in the instructions to the jury, given after the argument, the relevancy of the evidence of provocation was fully explained to the jury. We do not think the jury could have been misled by the instruction under consideration, even if it were not literally true that the feelings of the defendants were irrelevant.

Their feelings were relevant, and the court so instructed the jury upon the question of provocation, and thus indirectly upon the question of the amount of punitive damages.

Refusal of Instruction Authorizing Nominal Damages.

[6] Appellants next complain of the fact that the court refused to give several instructions to the effect that the jury might render a verdict for nominal damages if they found that the libel was published without malice and that plaintiff was not appreciably damaged thereby. The defendants are not entitled to such an instruction. As the jury were instructed that they could only award compensatory damages, if they found that there had been no actual damage suffered, the verdict, without the instruction, would necessarily be for the defendant. The instructions asked, therefore, instead of being to the advantage of the defendants, would be to the advantage of the plaintiff, for they are to the effect that the jury must bring in a verdict for at least nominal damages even if they found there was no substantial injury. In any event, the verdict of the jury having been for $25,000 compensatory damages, error cannot be predicated upon the fact that the court failed to instruct them that they could, if in their judgment no damages whatever were suffered, allow nominal damages.

The Nature of the Newspaper Controversy.

A further statement of facts is necessary in order that the situation presented by the record may be understood. The Los Angeles Times had published the fact that some 30 or more residents of Long Beach had been convicted of the charge euphoniously described as "social vagrancy." It had also published an account of the arrest of an agent of a charitable corporation who was charged with the offense of rape upon one of his wards. The plaintiff's newspapers characterized these publications as "brutal journalism," and roundly denounced the course of the defendants' newspaper in making such publications. The defendants in reply took the position that it was the proper function of a newspaper to print these news items. This controversy has been extended into the briefs in this case, and each side not only contends for the righteousness of its own position but also denounces the attitude of its opponent. Whether or not such publications should be made is one of the difficult problems of all newspapers which claim to publish all matters of current interest. On the one hand the emphasis is put upon the welfare and the desires of the public, and on the other hand upon the welfare of the individual and the corresponding welfare to the public. The various articles and cartoons published in the course of this controversy were all admitted in evidence. The plaintiff's newspaper, The Tribune, in addition to denouncing the defendants' newspaper for its "brutal journalism," printed a cartoon entitled "The Brute" on December 1, 1914, to which it is claimed the article herein sued upon was a legitimate reply. The central figure in the cartoon is a hog wearing eyeglasses, and with a pencil over his left ear. The hog is dressed in a man's clothing, and has features characterizing those of a man. The nostrils are indicated by a dollar sign. Its snout and left fore foot are dripping with mud from a mud hole. This mud hole in which the hog is wallowing is labeled "Filth," "Indecency," "Character Assassination," "Salaciousness," and "Unverified Rumor." The hog is pictured as saying, "This story will wreck a dozen innocent lives but—I should worry." The purpose and effect of the cartoon is thus described in the innuendo of the cross-complaint of the defendant corporation, to wit:

> "That in and by said cartoon plaintiff intended to charge, and was understood by the readers of said paper as charging, that cross-complainant is a brute; that it is a hog; that, like that animal, it wallows in filth and indecency; that it is an assassinator of character; that salacious matter and unverified rumor is its entire stock in trade, and that it uses both to ruin the lives of men and women; that it is controlled neither by conscience nor feeling; that it carries on its business in a brutal and conscienceless manner; that it practices constantly, and is the embodiment of, brutal journalism; and that it is controlled and actuated solely by a desire to accumulate money, regardless of the means employed to accomplish that purpose; that each of said charges is false and untrue, and was known by plaintiff to be false and untrue when made by him, as herein alleged."

Provocation in Mitigation of Compensatory Damages.

[7] It is claimed that the court erred in refusing to instruct the jury that the articles and cartoons published by plaintiff and set up in the answer might be considered in mitigation of compensatory as well as punitive damages. The court did instruct the jury that such cartoons and articles might be considered in mitigation of exemplary damages. The court also instructed the jury that if it appeared from the evidence that there existed between the newspapers a newspaper controversy, the jury could also consider the fact of such controversy in determining the amount of compensatory damages. In other words, that provocation, considered as a separate and distinct element in the case, was only to be considered as disproving actual malice or mitigating the punitive damages resulting from actual malice. But the articles relied on as showing provocation might also establish the fact that a newspaper controversy was in progress, and the fact of such a controversy was entitled to be considered by the jury in assessing compensatory damages. By these instructions all the defendants who were responsible for the libel, whether aware of the provocative articles or not, were responsible for the same amount of compensatory damages. Defendant H. G. Otis, for instance, who knew nothing about the provocative articles or about the article made the basis of plaintiff's complaint, was assessed for the same amount of compensatory damages as was the defendant Harry Andrews, who knew of the provocative articles and approved the article complained of by the plaintiff. If merely provocative articles are to mitigate compensatory damages, it would seem to follow inevitably that the amount of the verdict against the different defendants should have been for different amounts, according to whether or not the respective defendants were thereby provoked.

It is evident that the articles of the plaintiff may be characterized both as provocative and controversial. In the first aspect the court instructed the jury that the articles should only be considered in mitigation of punitive damages based upon malice. On the other subject the jury were instructed that they had a right to take the controversy into consideration in determining the amount of compensatory damages awarded to the plaintiff. It is not necessary for us on this appeal to determine whether or not the court was correct in its instruction to the effect that the controversy could be taken into consideration in determining the amount of compensatory damages, as this instruction is, to that extent at least, in harmony with the contentions of the appellant, and if it is true that the defendants were not entitled to have the compensatory damages mitigated because of provocation the appellants cannot complain of the instructions. We think it clear that under our practice, wherein an award may be made for both compensatory and punitive damages, the only purpose of showing provocation is for the purpose of mitigating the punitive damages which might otherwise result from the finding of malice. If there are no punitive damages imposed by the jury, then the question of provocation becomes of no moment on the question of damages. In so far as such articles were a part of a controversy between the papers, they were received in evidence, and the court instructed the jury to consider the controversy in connection with the question of compensatory damages. Whatever may have been the ancient rule, particularly in jurisdictions where the distinction between punitive and compensatory damages is not carefully maintained, it is clear that the instruction of the jury limiting the effect of the provocative articles to the exemplary damages was correct. 25 Cyc. 523; Taylor v. Hearst, 118 Cal. 366, 50 Pac. 541; Turner v. Hearst, 137 Cal. 232, 70 Pac. 18, Ann. Cas. 1914D, 894, note.

Juror's Alleged Misstatement on His Voir Dire.

[8] It is claimed that the court erred in refusing a new trial upon the ground of the misconduct of a juror named William Noble. It is contended by appellants that his testimony upon the voir dire was so false and misleading as to constitute misconduct on his part by which the defendants were surprised into accepting him as a juror.

Upon his voir dire he was questioned and answered as follows:

"Q. Which one of the daily papers do you take? A. I am not subscribing for either one of them at the present time.

"Q. But as a rule? A. The Times, usually; sometimes I read them both.

"Q. So far as you know, there is nothing in your own mind that is in any way prejudicial to either party, plaintiff or defendant, in this case? A. No, sir.

"Q. And you know of nothing that would cause you to hesitate to accept the responsibilities of a juror in this case? A. No, sir.

"Q. Mr. Noble, have you any feeling of prejudice or bias against the Times or any of the defendants? A. No, sir.

"Q. If selected as a juror in this case, would you be guided solely by the evidence adduced here, and the law as given you by the court? A. Yes, sir.

"Q. Did you say whether you take either of those papers—the Times, the Tribune, or Express? A. I am not taking either one of them regularly; I buy them occasionally.

"Q. Do you take any paper? A. As I say, I buy them—I am not a subscriber for either one.

"Q. Not a subscriber for any Los Angeles paper? A. No, sir.

"Q. You say you buy any of them and read any of them? A. I buy the Express, Tribune, or Times generally once a day, one or the other of them.

"Q. If you were a litigant would you be willing to have your cause tried by 12 men each of whom entertained the same feelings towards the parties and the matters in controversy that you do in this case? A. Yes, sir."

Upon the motion for a new trial the defendants offered an affidavit of Charles Burton, who was in charge of the Times route covering the district within which the juror Noble resided, who made affidavit that on October 2, 1916, he had called upon said Noble for the purpose of collecting the subscription rate for the previous month; that Noble then stated:

> "I don't want the Times any more; I want you to stop my subscription to the paper. I have nothing against you personally, but since the Times came out for the wets I have decided to stop it. * * * There are one or two saloons in the block in which I own property, and the saloons are a detriment to my property and an injury to me, and I will not support a paper that supports the wet proposition. * * * The Times is always knocking the laboring man, and for that reason I have no use for the editorial policy of the paper."

The affiant further stated:

> "That at that time said Noble appeared from his manner and tone of voice incensed against the policies of said Los Angeles Times."

The examination of the juror on his voir dire occurred November 16, 1916.

George P. Adams, one of the attorneys for the defendants, made affidavit for use on the motion for a new trial that on November 30, 1916, Mr. Adams casually met Mr. Noble and in the course of the conversation Noble stated:

> "If affiant had pressed the said Noble upon his examination touching his qualifications as a juror that the said Noble would have been compelled to have stated that he had been a subscriber to the Times, but that he had become so enraged at the said Times that he had fired it from his home; but that as he was not asked the question he did not volunteer the information."

The defendants argue their right to a new trial on the theory that the statement made on October 2, 1916, to the reporter, and the one subsequently made to Mr. Adams, convict the juror of perjury in his answers on voir dire, wherein he stated that there was nothing in his own mind in any way prejudicial to either party and nothing which would cause him to hesitate to accept the responsibility of a juror; that he had no feeling of bias or prejudice against the Times or any of the defendants; that he would try the case on the evidence adduced; and that if he were litigant he would be willing to have the case tried by a juror who was in the same frame of mind as he was towards the parties in the matters in controversy in the case. At the threshold of the matter the question that presents itself is this: Does the fact that a month and a half before he was examined as a prospective juror he made the statements attributed to him, while angry at the Times for its editorial policy concerning prohibition and labor matters, show his testimony to be false, or prove him, notwithstanding his direct statements to the contrary, to be so prejudiced as to require a new trial of the case? It is to be noted that he had at that time become angry with the newspaper and terminated his subscription thereto, but, according to his testimony given at the trial, he continued to read the Times more frequently than either of the other papers. He expressed no opinion concerning the merits of the controversy that was to be tried in court, and he swears that he felt himself competent to decide that controversy on the merits. As to the statements made to Mr. Adams, it is evident that the juror had fully in mind at the time he testified the fact that he had stopped his subscription to the Times and was prepared to make that statement if the questions had been directed to that point. Instead of a confession of a guilty withholding of information, it seems to be an indication that he was perfectly willing and intended to answer the questions fully and fairly if they were propounded. Any juror who has been long in court knows how strenuously counsel object to any volunteer information given by witnesses under examination. Such volunteer statements are almost invariably stricken out instantly by the court upon motion as not responsive to the question.

Unless we are prepared to indulge in the presumption of guilt rather than that of innocence it must be apparent that in the mind of the juror there was nothing inconsistent between his statement that he could try the case fairly and impartially and the fact that six weeks before he had in a fit of anger stopped his subscription to the Times. If the witness upon his voir dire had been asked the very questions which it is now suggested that he evaded, namely, whether or not he had at any time stopped his subscription to the Times because he was angry with the editorial policy of the paper, and, if he had answered in the affirmative and had stated that notwithstanding that fact he could fairly try the case and the court under those circumstances had accepted him as a juror, the action of the trial court would have been sustained on an appeal. The case differs altogether from numerous cases cited by the appellant in his brief, wherein jurors either had expressed an opinion upon the merits of the case which they were about to try or had indicated a desire to get upon a jury for the purpose of deciding the case against one of the parties. It is apparent from the foregoing discussion that the order of the trial court denying a new trial cannot be reversed for the reason stated.

As to a Defective Verdict.

[9] The next point urged by the appellant is that the court erred in refusing to grant a new trial upon the ground of the failure of the jury to agree upon a verdict. It appears that the jury returned two separate verdicts: The first, a verdict for compensatory damages of $25,000 against all the defendants; second, a verdict of $5,000 punitive damages against the defendant corporation alone. When the jury were polled it developed that nine of the jurors were in favor of the $25,000 compensatory damages and ten jurors in favor of the $5,000 punitive damages, but three of the jurors who voted for $5,000 punitive damages did not concur in the verdict for $25,000 compensatory damages, and two of the jurors who did not concur in the $5,000 punitive damages were in favor of the $25,000 compensatory damages. Only seven of the individual jurors, when polled, stated that they concurred in both verdicts. The following occurred on the polling of the jury:

> "The Court: Poll the jury, Mr. Clerk, first on the question of compensatory damages. Gentlemen of the jury, this is now on the $25,000 portion of the verdict for the plaintiff. If it is your verdict answer yes.
>
> "The Clerk: Mr. Ives, is this your verdict?
>
> "Juror Ives: Your honor, there were two votes—whether there was any compensatory damages, then the amount.
>
> "The Court: The question is, Mr. Ives, is this your verdict?
>
> "Juror Ives: Can I answer that in part?
>
> "The Court: No; the question is merely, did you and do you agree to this verdict which is returned here?
>
> "Juror Ives: No, sir.
>
> "The Clerk: Mr. Shafer, is this your verdict?
>
> "Mr. Scott: Could they not—
>
> "The Court: They are being polled as to compensatory damages.
>
> "Juror Shafer: And, your honor, it is not a poll as to whether we find for the plaintiff or not?
>
> "The Court: No; the poll is whether you agree in this verdict which has been returned, namely, a verdict for the plaintiff in the sum of $25,000 as compensatory damages.
>
> "Juror Shafer: No."

Juror Adams also answered "no," and the others, "yes." Whereupon the clerk announced: "Nine 'yes,' your Honor; three 'no.'" The court thereupon directed the clerk to poll the jury upon the question of punitive or exemplary damages against the defendant Times-Mirror Company. Jurors Noble and Sydnor voted "no," all the others "yes"; whereupon the following occurred:

> "Mr. Beach: I now move for a judgment for defendants, nine jurors not having agreed upon a verdict, there being five of them who have not agreed.
>
> "The Court: I do not understand what you mean.
>
> "Mr. Beach: It is one of our contentions in this case that there can be but one verdict.
>
> "The Court: Oh, the motion is denied."

It is clear that the point now insisted upon here was not made clear to the court at that time, namely, that the defendants contend the same nine jurors must agree upon both items of the verdict.

It should be observed that the jurors who dissented from the $25,000 compensatory damage verdict were not given the opportunity of explaining their position at all. They may have been in favor of a larger verdict. Juror Ives volunteered the proposition that the jurors first voted upon whether or not there should be any compensatory damages and then took a second ballot on the amount. When Juror Ives asked if he could answer the question in part the court informed him that his answer must be "yes" or "no."

There can be no question under this state of facts that, nine jurors having agreed upon a verdict of $25,000 compensatory damages against all the defendants, a judgment against all the defendants following this verdict would be proper. Whether or not the verdict of $30,000 against the Los Angeles Times, which includes an item of $5,000 punitive damages, can be sustained is not so clear. Two of the jurors, Noble and Sydnor, who voted for $25,000 compensatory damages, voted against the imposition of the $5,000 punitive damages upon the defendant corporation. The question is whether two jurors who voted against the item of $25,000 compensatory damages and who voted for the $5,000 punitive can properly be considered in place of the two jurors who voted for $25,000 compensatory damages and against the punitive damages to make the nine necessary to return a verdict. It is true, as counsel stated to the trial court, in one sense, that the verdict is an entirety. That is to say, the net result of any verdict is the imposition of a judgment against the defendant for a certain amount fixed in the verdict. So far as the judgment is concerned and the collection thereof, it is utterly immaterial whether the damages are classified as punitive or compensatory. They constitute the amount of the award made by the court in favor of the plaintiff. The only reason for segregating items of punitive and compensatory damages is to aid the trial court and the appellate courts to determine the basis upon which the jury has acted. It is always desirable, for that reason, to segregate the verdict, so that if it appears from the verdict that the jury has made no award whatever for punitive damages the rulings of the trial court and the instructions with reference to punitive damages, although erroneous, may be seen to be without prejudice to the parties, in view of the fact that no punitive damages are allowed. The advantage of such segregation is manifest here, for the reason that it appears that nine jurors concurred in the verdict of compensatory damages against all the defendants, and thus such verdict can stand, notwithstanding the complications arising with reference to the question of punitive damages. The total verdict against the Los Angeles Times is $30,000. It is clear from the record that only seven jurors united in the determination that the defendant corporation should pay $30,000, to wit, $25,000 compensatory and $5,000 punitive damages. It is clear, therefore, that the verdict for punitive damages cannot stand against the corporation. In aid of the verdict we might assume that the two jurors who were not allowed to express their opinion on compensatory damages, other than to say that they did not agree in the amount of the verdict as returned, fixed the compensatory damages at a higher figure. Even with this assumption, however, such jurors did not concur in the verdict as rendered, and not being willing to join therein, either because this verdict was too large or too small, their votes cannot be now considered as giving validity thereto. If the objection of the appellant had been made more clear to the court at the time the verdict was returned, the matter could have been quickly cleared up by questions that would show the exact status of the jurors and by then requiring the jury to retire for further deliberation. The procedure upon such a situation is outlined in section 618 of the Code of Civil Procedure. It is therein provided that upon the polling of the jury that—

> "If upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury may be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case."

It is clear, however, that nine jurors did not agree upon the verdict of $30,000 against the Los Angeles Times. If at the time the verdict had been returned the jury had been advised of that fact and required to retire, they might have returned a verdict against the defendant corporation in which nine jurors concurred, but, as the record stands, we must conclude that nine jurors concurred in a verdict of only $25,000 against the Los Angeles Times, and that the verdict for punitive damages failed because, so far as the record shows, some of those who voted for the $5,000 verdict as punitive damages might not have been willing to vote for a general verdict for as much as or more than $25,000. The situation may be summed up thus: Nine jurors agreed that a libel had been committed upon the plaintiff and that he had been damaged thereby to the extent of $25,000. Only seven of these nine jurors concurred in the conclusion that in addition to the compensatory damages the defendant corporation should be compelled to pay an additional amount by way of punishment. The three other jurors who were willing to agree to $5,000 as punitive damages, so far as the record discloses, did not concur in the amount of $25,000 compensatory damages, and may have been unwilling to have returned a verdict for more than $5,000 all told. In other words, although their verdict shows that they believed that there should be a $5,000 penalty imposed, this conclusion may have resulted from their belief that the actual damages suffered were very small, and that a public example should be made of the defendant by the imposition of a penalty.

Excessive Verdict.

[10] Appellants' next contention is that the verdict for compensatory damages is excessive, and that for that reason the trial court should have granted a new trial. It is, of course, conceded that this court is powerless to interfere with the determination of the jury unless "there is reason to believe * * * that passion, prejudice, or sympathy has influenced the jury to give more than the facts reasonably warrant." Bond v. United Railroads of San Francisco, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. See, also, Aldrich v. Palmer, 24 Cal. 513; Wheaton v. N. B. & M. Railroad Co., 36 Cal. 591; Wilson v. Fitch, 41 Cal. 363; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845; Howland v. Oakland Cable Street Ry. Co., 110 Cal. 513, 42 Pac. 983; Dunn v. Hearst, 139 Cal. 239, 73 Pac. 138; Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 273, 104 Pac. 312; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 Pac. 83; Diller v. Northern California Power Co., 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908; Meek v. Pacific Elec. Ry. Co., 175 Cal. 53, 164 Pac. 1117; Nolen v. F. O. Engstrum Co., 175 Cal. 464–467, 166 Pac. 346; Scott v. Times-Mirror Co., 184 Pac. 672. Appellants quote, as the only evidence upon which compensatory damages could be imposed, the following testimony of the plaintiff as to the effect of the libel upon himself:

> "It affected me and my feelings. It humiliated me. It disturbed my peace of mind; it disturbed my home; it made my wife very unhappy; it destroyed my sleep, and since its publication it has affected me. It has injured my reputation. It has discredited me with many people who read it, whom I have reasons to believe believed the accusations. * * * It is my belief and conviction that many people believed the article and believed I was dishonest, and believed I had been purchased to defend criminals, and indirectly that I was a sodomite and a degenerate."

Appellants then argue that—

> "There does not seem to be any evidence that plaintiff suffered any serious pain, mortifi-

cation, humiliation, or injury to his feelings. To say that one's 'peace of mind' and his 'home' are 'disturbed' and his sleep 'destroyed' is to employ terms more fitted to describe the effects of the usual spring housecleaning than to depict the results of a cataclysmic soul quake."

Appellants then proceed:

"There is left, then, for consideration the extent of plaintiff's injury due to his loss of reputation, and this also is to be determined from plaintiff's own testimony."

Counsel then states:

"Assuming, then, the correctness of our position that the sole evidence of any importance before the court on the question of damages related to plaintiff's loss of reputation—and that the evidence of plaintiff himself—it must be plain, after even a casual consideration, that an award of $25,000 compensatory damages is not supported by the evidence, even if it be true, as stated in Childers v. San Jose Mercury Printing & Pub. Co., 105 Cal. 284, 289, 38 Pac. 903, 45 Am. St. Rep. 40, that damages for loss of reputation 'may be recovered in the absence of actual proof; and to the amount that the jury estimates will fairly compensate plaintiff for the injury done.'"

The respondent in his brief prints a summary of the evidence upon which he relied to sustain the verdict, and we cannot better present his view than by quotations from his brief, as the facts are uncontroverted:

"The plaintiff was a man in the prime of life. He had lived in Los Angeles for 20 years. He entered the newspaper business early in 1901, nearly 14 years before this * * * attack. * * * On July 14, 1911, * * * he commenced the publication of the Tribune, a morning paper, sold for one cent. * * * He was, and for many years had been, engaged in many large and extensive business enterprises in Los Angeles, in Los Angeles county, and throughout the state, and was a particularly active and enterprising citizen of Los Angeles county, and throughout the state, and was a particularly active and enterprising citizen of Los Angeles, the community in which he lived, having been, besides acquiring and conducting the far-flung business of publishing his two newspapers, a large and active investor in real estate, stocks, and bonds, and the erector and owner of several of the most important business blocks in Los Angeles, including the Central building, at Sixth and Main streets, the Union Oil building, at Seventh and Spring streets, and Bullocks, at Seventh and Broadway. In other words, he was a man of large affairs and many enterprises, the success or failure of which was dependent largely upon his personal character and his reputation for business integrity. Moreover, these various business interests naturally and necessarily made him widely known throughout the state, and caused him to be directly or indirectly connected with a vast number of people in a business way. Besides that, by reason of his widespread business activities, he, of course, had a wide circle of business acquaintances and friends, and his social circle must, of necessity, have been large. All of this was obviously true, not only as to the place of his immediate residence and adjacent thereto, but throughout the state of California and elsewhere.

"He was also a man of family—a husband and father—the head of a household, the natural protector of a wife and four minor children, three boys and one girl, of whom he was doubtless the idol, and upon whom any breath against his reputation (as he conceived and believed) must have fallen like a blight. * * * It [the Times] circulated far and wide in the community where the plaintiff and the plaintiff's family lived, where he had built up and was building up and carrying on his many splendid public-spirited enterprises, and where the larger number of his business friends and enemies lived, and where any stab at his reputation, either personally or in the matter of his business ventures, would sink most deeply. It [the Times] also circulated largely throughout this, his native, state of California and elsewhere in the United States.

"At the time of the publication of the editorial which forms the basis of this suit [the Times] * * * had a daily circulation of between 60,000 and 70,000 a day—in other words, commanding a reading public of 200,000 or 300,000.

"To this great reading public in this home of the plaintiff, and throughout the state of his nativity, in which he had struggled to succeed and had succeeded, to his family—his wife, his boys, and his girl just on the verge of young manhood and young womanhood, to his friends and to his business associates and business clientéle, and (perhaps even worse) to his enemies and business antagonists (for every redblooded, successful business man, in this world where there obtains much malice, hatred, and all uncharitableness, has many enemies who would gloat over and use to his detriment every morsel of possible detraction, every hint of any step aside from rectitude), there went forth broadcast on this morning of December 3, 1914, thousands and tens of thousands of the defendants' great and widely influential newspaper; and on its editorial page, the very heart of this publication, was the * * * attack upon plaintiff and upon plaintiff's newspapers—'The Defense of Degenerates.'

"In the homes of his fellow citizens, upon the streets of his home city, with his subscribers everywhere, in the business houses of his advertisers, among the social friends of himself and his wife, with the schoolmates and companions of his children, all up and down the length and breadth of this great state, and even in widening circles all throughout this great country—his country—he was, by this article, branded in unmistakable terms as a defender of degenerates for hire, in the general business of taking money from such for the suppression of their malodorous practices, * * * and as the hired protector of 'those who violate the laws of God and man,' as the degraded and degrading publisher of a 'Morning Sodomite' and an 'Evening Degenerate,' and * * * with countenancing and defending those unspeakable things and sheltering and protecting for a paid price those who indulged in them. * * * The success or failure of such enterprises depends absolutely upon the good will of the community in which the papers circulate, and the confidence of that community in such publication. Destroy that confidence, and you destroy the very foundation of their successful existence."

While we have quoted somewhat fully from the statement of facts and the argument of the respondent in favor of the verdict, we have omitted many considerations pressed in the respondent's brief in justification for the verdict. Sufficient has been said, however, to indicate that the article in question might have caused a very direct and serious pecuniary loss to the plaintiff growing out of the attack upon his reputation and character. Such attack would necessarily affect him in his business as a publisher, not only by destroying the influence of his newspapers, but also by affecting their circulation, and while no special damages were pleaded in that regard and none are claimed, the respondent relying solely upon the injury to the plaintiff's feelings and to his reputation, enough has been said to indicate the extent of the plaintiff's reputation, growing partly out of his publication of two daily newspapers and partly out of his business activities, to indicate that any impairment of his reputation for honesty or integrity would have a very serious effect upon him in his future business as a publisher of newspapers and as a man of large affairs in the business world. In measuring the effect of a libel upon an individual, the jury is not confined to a consideration of the nature or purport of the words used, but is to consider also the effect upon the reputation of the plaintiff. It follows that, even though smaller judgments for more opprobrious words have been sometimes held to be excessive, it may, nevertheless, be true that the reputation of a man widely known, and who is seeking to maintain a reputation for public-spiritedness and broad-mindedness, may be greatly damaged by words of much less serious import. A man of less extensive reputation may, to some extent, overcome the effects of a libel by moving from one location in a city to another or from one community to another, while the man who is well known throughout the entire city or community cannot escape the effects of a libel, even if he had the desire to move from one place to another for that purpose.

It is sufficient for us to state that in view of the uncontradicted acts we cannot say that the jury was influenced by either passion or prejudice in appraising the compensatory damages awarded the plaintiff, and that therefore we cannot interfere with their verdict.

The Cross-Complaints of the Times-Mirror Company and of H. G. Otis.

[11] Appellants claim that the court erred in sustaining the demurrer to the cross-complaints of the defendant corporation and of the defendant Otis for damages for libel alleged to have been published concerning them by the plaintiff, to wit, the publication of the cartoon entitled "The Brute," heretofore described.

The contention that the cross-complaint should have been allowed to stand seems to be met and disposed of by the decision of this court in MacDougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98. In that case the defendant had committed a libel against the plaintiff and the next day the plaintiff committed an assault upon the defendant because of the libel. It is there held that these two torts were not a part of the same "transaction," within the meaning of the Practice Act (St. 1851, p. 57) § 47, which is the same as the provisions of section 438 of the Code of Civil Procedure. The court there said:

> "The matter set up is clearly not a counterclaim, within the meaning of this provision. Pattison v. Richards, 22 Barb. 143; Murden v. Priment, 1 Hilton, 76; Barhyte v. Hughes, 33 Barb. 320; Schnaderbeck v. Worth, 8 Abb. 38. * * * The party may have an independent cause of action, but it has no relation to the pending action."

The court there quoted with approval from Pattison v. Richards, as follows:

> "The court said, 'If the defendant has a remedy against the plaintiff upon the matter set up, he must seek it in a separate suit.'"

By parity of reasoning a cause of action for libel on one day could not be set up as a counterclaim to a cause of action for libel arising the next day, even though the second libel was the result of the first. They are separate and distinct transactions, and, though connected in the sense that one is the result of the other, they are, in contemplation of law, entirely separate. Nor can it be said that the second libel "relates to the transaction" upon which the action is brought, within the meaning of section 442, C. C. P., authorizing the filing of a cross-complaint "whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought * * * he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross complaint." Appellants, however, base their claim that the court erred upon section 438, defining a counterclaim, which contention, as we have shown, is disposed of in MacDougall v. Maguire, supra. We need not consider the question of whether a slander occurring in the course of the same conversation or assault or counter assault in the same fistic encounter is a part of the same "transaction." within the meaning of section 438, Code of Civil Procedure. In such cases it has been held by some courts that a cross-complaint or counterclaim is permissible. Powell v. Powell, 160 Wis. 504, 152 N. W. 168, Ann. Cas. 1917D, 113; 34 Cyc. 706, 710. Appellants suggest as a reason for allowing the counterclaim the desirability of settling the entire dispute between the parties in one action. We need not discuss the question of whether or not such a procedure would be desirable, as our decisions heretofore made have established a rule of action in this state under which the parties herein and the court below have proceeded. Furthermore, we have heretofore held that the mere desirability of settling all the disputes between the parties in one action is not a sufficient reason for permitting a cross-complaint or counterclaim to be filed. Meyer v. Quiggle, 140 Cal. 499, 74 Pac. 40, cited to the same effect in Clark v. Kelley, 163 Cal. 207, 124 Pac. 846. If the rule is now to be changed, it should be done by the Legislature and not by the court.

Is the Publication Complained of Libelous Per Se?

[12] In appellants' reply brief, filed nearly 2½ years after the transcript herein, the appellants for the first time claim that the complaint herein does not state a cause of action, for the reason that the alleged publication is not libelous per se. It is also claimed that, even if the allegations of the complaint are sufficient to state a cause of action by reason of the innuendoes therein, under the evidence showing the facts and circumstances of the publication it was error for the court to instruct the jury that the publication was libelous per se.

The contention of the appellants may best be stated in their own language, as contained in their final brief, as follows:

> "(1) That mere vituperation does not constitute a libel. (2) That charging the doing of a lawful act is never a libel, no matter how opprobrious the epithets are by which the writer characterizes the acts. (3) That in determining the purport of the publication, the article must be read as a whole; its publication must be taken into consideration, so that words apparently actionable may, in the light of the context and in view of the circumstances attending their publication, appear not to be actionable. (4) That when an article is mainly directed at one person or one proposition, and harsh expressions are also applied hypothetically and by way of argument or incidentally to a second person, the second person cannot maintain an action for libel based on the article, even though the expressions applied to him might be libelous if they stood alone. * * *
>
> "And after analyzing the article sued upon, and applying the foregoing principles of law to it, appellants pointed out that it could be justly said that the language in the article here sued upon did not import anything of a defamatory character concerning the plaintiff; that the force of the article was directed against sodomites and degenerates, and the avowed policy of plaintiff and his newspapers that such persons should be shielded from publicity, which it had the legal right to adopt, and was not directed to plaintiff; that the defendant might have used daintier language, but that mere vituperation does not constitute libel."

In support of these propositions the appellants have carefully and elaborately reviewed the cases, not only in this but in many other jurisdictions, upon the subject. In view of the character of this publication and our own decisions upon the question of libel, we believe it entirely unnecessary to review these authorities. It is perfectly manifest on the face of the article that it accuses the plaintiff of conduct so reprehensible that it must necessarily affect his standing in the community and expose him to obloquy and contempt. It thus comes clearly within the statutory definition of libel in this state, and, although it was said in Schomberg v. Walker, 132 Cal. 224, 226, 227, 64 Pac. 290, that the statutory definition of libel (section 45, Civ. Code) is a mere codification of the common-law definition, we deem it sufficient to point to the language of our statute and to call attention to our decisions upon similar contentions heretofore made without discussing these cases or quoting therefrom. The effect of the article, we think, is justly characterized by the respondent in the following paragraph which we take from his reply brief. While the statement in the brief is in the form of a question, we will omit the question:

> "* * * It had the strongest possible tendency to ruin the plaintiff's reputation personally by holding him out as the protector and champion of the lowest class of degenerates and the most disgusting types of degeneracy, and to destroy his standing as a newspaper man by charging him with taking hire from those sodomites for defense."

The respondent gives the following illustration to show the effect of the article which we think is apt and therefore quote:

> "To illustrate: Suppose the plaintiff, as the proprietor of his two newspapers, had changed their names, the one to 'the Morning Sodomite' and the other to 'the Evening Degenerate,' and had advertised in their columns that it would thereafter be his policy in their publication and through them to 'coddle criminals,' 'to conceal their crimes,' to protect 'those who violate the laws of God and man' from punishment, and shelter them from publicity, and to defend for hire—for money—make a 'purchased defense' of—degenerates and the acts of evildoers 'who are as lecherous as goats and as conscienceless as jackasses in April,' would such names for his papers, and such an announcement of his policies, have exposed him, as their proprietor and editor—the formulator of their policies—to hatred, contempt, ridicule, or obloquy, or have caused him to be shunned by his fellow men, or have tended to injure him in his occupation as a newspaper publisher?"

We think it is obvious that the foregoing question must be answered in the affirmative and that the article was libelous per se; that therefore the complaint states a cause of action and the court correctly instructed the jury. This view is in accord with our decisions on what renders an article libelous per se. Bettner v. Holt, 70 Cal. 270, 11 Pac. 713; Tonini v. Cevasco, 114 Cal. 266, 46 Pac. 103; Schomberg v. Walker, 132 Cal. 224, 64 Pac. 290; Adams v. Cameron, 27 Cal. App. 625, 150 Pac. 1005, 151 Pac. 286; Fitch v. De Young, 66 Cal. 339, 5 Pac. 364.

As to the contention that the surrounding circumstances in evidence disprove the innuendoes in the complaint and show that the article was not libelous per se, it is only necessary to compare the plaintiff's statement of his purposes in refraining from the publication of such incidents as the Long Beach scandal with the purposes of the plaintiff, as stated by the defendant in the article complained of, to show that the latter article in effect charged plaintiff with rank hypocrisy, and such a charge has been held libelous per se. In Newby v. Los Angeles Times, 173 Cal. 387, 160 Pac. 233, Ann. Cas. 1917E, 186, it is said: "It is libelous per se to falsely charge that a person is a hypocrite." Defendants' statement concerning plaintiff's purpose in suppressing such "news" in the article complained of has already been stated herein. The plaintiff's statement of his purpose is of a directly opposite character and is contained in an editorial from the Tribune, published November 19, 1914, which we quote, as follows:

"Journalism That is So Brutal That It Kills.

"Brutal journalism sometimes becomes homicidal journalism. Several instances are supplied by the recent record of local events. Driven to desperation because they were made the victims of sensational publicity, men have sought refuge in death from the attacks that were made upon them. They preferred to meet the instant judgment of God rather than face the merciless clamor of men.

"It is the business of newspapers to print the news, but that duty should be performed in decency and with discrimination. No man is so well fortified in the respect and regard of the community, by even a lifetime of good conduct, as to be immune against causeless attack. It is within the power of any abnormal person actuated by malice, moved by blackmail or stirred merely by a love of sensationalism, to bring accusations of a frightful character. Such charges ought not to be given publicity until proof of their truth formally has been adduced. Otherwise an irreparable injury is inflicted even upon the wholly guiltless.

"No interest of society is subserved by the premature exploitation of such accusations. The public will be as well protected against the offender if publicity is withheld until conviction shall have been secured. The adoption of such a policy would spare the victims of false witness the frightful shame and unendurable disgrace that now so often permanently attaches itself to the accused even when acquitted. Sometimes it happens that men of high spirit and extreme sensitiveness, unable to endure the reflection that they have been held up to public scorn, take their lives rather than to face, even though innocent, the biting contempt of a censorious world too prone to give prejudgment on insufficient evidence.

"It should not only be the policy of decent newspapers to withhold publication of charges affecting honor and character until there shall have been a legal adjudication of guilt or innocence, but public officials themselves should exercise a superior discretion in dealing with cases of this nature. Morbidity that finds gratification in publicity, abnormal natures that are in fact affected with psychic disturbances, blackmailers ever seeking to find victims—all these go in endless procession to the offices of public officials with tales and accusations that ought not to be the basis of public official action except after the most rigid and exacting inquiry.

"The character of an honorable man is dearer to him then his physical life. His good name is esteemed by him as is his most precious possession, and accusations of infamy, supported by official proceedings based thereon, and reinforced by the publicity given by a sensational newspaper, inflict a strain that never can be eradicated. The world should act upon the principle that the accused is innocent until he is proved guilty.

"Let us have an end of the wicked, cruel system that now obtains and begin here a reformation that will reach in its influence to the uttermost extent of the Union. Guilt must be punished! True, but punishment of the guilty is not endangered by withholding publicity until proof makes it certain that innocence takes no injury."

Again, in an editorial in the Tribune of November 22, 1914, it is stated:

"The Tribune and the Express do not believe that there is any 'scoop' in printing scandalous stories which frequently are untrue, or founded on blackmail, the publication of which will serve no good purpose and the only result of which will be to harm and injure the individual. The Tribune and Express do not believe that the public ever want to read this sort of stuff, and are resolved, even if there is a demand for this class of matter existing in a few depraved minds, that those persons will have to look elsewhere for the filth they seek. It long has been the custom of the Tribune and the Express to throw such matter in the waste basket."

We therefore think that the surrounding circumstances of the publication accentuate its libelous character rather than diminish the effect imputed thereto in the complaint.

[13] It is also contended by the appellants that in view of the fact that the respondent was a publisher of two daily newspapers, and therefore in a sense a public character, they were entitled to discuss his character with more freedom than they would a more private individual. The fact that a man is the publisher of a newspaper does not justify libelous attacks on him on the theory that he is a public character. If the fact that he is a publisher in any way reduces the damage he actually suffers by the publication, it can be

considered by them in appraising his damages. That the publication of a newspaper by the plaintiff, as a matter of the law, affects either the liability of the defendants to respond in damages, or the right of the plaintiff to recover for a publication which would be considered libelous as to any other person, is a proposition that cannot be successfully maintained. The decision in the case of Newby v. Times-Mirror Co., supra, supports this conclusion. It is there stated:

> "The duty of a newspaper to the public does not justify the publication of false and defamatory matter concerning a private citizen merely because he is active in promoting his own political views."

The trial court is directed to reduce the judgment to $25,000 against all the defendants, and, as so modified, the judgment is affirmed.

We concur: LENNON, J.; SLOANE, J.

ANGELLOTTI, C. J. I concur in the judgment and in the foregoing opinion.

On the question of the reduction of the judgment to $25,000 it is perfectly clear that nine jurors did not agree upon a total award of more than $25,000, and without such concurrence I do not see how judgment for a larger amount can be sustained. There seems to me to be no authority for the practice followed in this case of allowing the jury to render separate and distinct verdicts upon the questions of compensatory and punitive damages, or, at any rate, in regarding, for the purposes of judgment, each of such verdicts as a separate and distinct verdict. Whatever may be the special issues submitted to a jury in a case of this character, there can be but a single award, and this single award must be concurred in by three-fourths of the jury. Of course, there is no objection to a jury finding a verdict for say $30,000 stating in its verdict that $25,000 thereof is for compensatory damages and $5,000 for punitive damages, but in such a case it is essential that three-fourths of the jury shall concur in the total award of $30,000. Otherwise we have a judgment against a defendant for a larger sum than three-fourths of the jury have agreed on. In this case the concurrence of every one of the nine jurors who declared for $25,000 compensatory damages was essential to the award of the additional $5,000 included in the judgment, for without this there could be no concurrence of three-fourths of the jury in the total award against the defendant. Under the practice followed in the trial court the concurrence of only six of the jurors who agreed on the $25,000 award for compensatory damages would be essential to the award of an additional $5,000 punitive damages, provided the three who did not concur in the $25,000 award were willing to agree on a $5,000 award of punitive damages. In such a case we would have an award for a total sum concurred in by only one-half of the jury. In this case, as appears in the main opinion, only seven of the jurors concurred in both of the awards.

OLNEY, J. (dissenting). I concur with Judge WILBUR except in his conclusion that because the same nine jurors who agreed upon the verdict of $25,000 for compensatory damages did not also agree upon the verdict of $5,000 for punitive damages, the latter verdict cannot stand. With that I cannot agree. The two verdicts are separate and each is supported by the requisite number of jurors and that would seem to be enough.

Judge WILBUR'S reasoning, as I understand it, proceeds upon the proposition that—

> "So far as the judgment is concerned and the collection thereof, it is utterly immaterial whether the damages are classified as punitive or compensatory. They constitute the amount of the award made by the court in favor of the plaintiff."

With this proposition as the basis, he then reaches the conclusion that there was but one verdict for $30,000, and that nine jurors are not shown to have concurred in this verdict. If this reasoning be true, it would certainly seem to mean that the verdict for $25,000 compensatory damages must fall as well as the verdict for $5,000 punitive damages. The reasoning whereby he holds that the verdict for $5,000 punitive damages cannot stand can be applied with equal force to the verdict for compensatory damages. If there is but one verdict, then it is for $30,000, and nine jurors have not concurred in it. Why it should be void as to one element and not as to the other, I do not see.

The fallacy in the reasoning seems to me to consist in the assumption that there was in reality but one verdict. There was not one verdict, but there were two. The statement that—

> "So far as the judgment is concerned and the collection thereof, it is utterly immaterial whether the damages are classified as punitive or compensatory. They constitute the amount of the award made by the court in favor of plaintiff"

—is, of course, true, but we are not dealing here either with the judgment or its collection. We are dealing with the matter of rendering a verdict, and certainly two verdicts were rendered, as the opinion itself states, and each upon a separate and distinct issue, and each supported by the requisite number of jurors. Furthermore, there is no inconsistency between the verdicts. Each verdict implies that the defendant is liable for a libel. Upon the issue as to the amount of actual damages, nine jurors believed that such damages in the amount of $25,000 had been suffered, and so found. On the other hand, on the issue as to punitive damages, nine jurors likewise believed that the libel was malicious and that the proper amount to be allowed because of this element was $5,000, and so found. Two or three of the jurors who had concurred in the verdict fixing the amount of compensatory damages did not agree with this, either because they did not believe the libel was malicious or because they did not agree with the amount fixed as punitive damages. The point of the matter is that there were two verdicts, not one; that all the jurors who concurred in either verdict agreed that the defendant was liable for a libel; that they disagreed only upon the separate and distinct issues as to the amount of damages actually suffered, and the amount of punitive damages, if any, which should be assessed; that upon each of these distinct issues a verdict supported by nine jurors as required by law was returned, and that the vote of no juror upon either of these verdicts was inconsistent with his vote upon the other. The case is nothing more than one wherein what were really special verdicts were asked upon distinct and separate elements of damage, and such verdicts were returned. Upon their being returned, the court took the assessments so arrived at of the two elements of damage, added them together to obtain the total amount for which the defendant was liable, and gave judgment accordingly. This would seem to be exactly what the Code provides may be done. Sections 624 and 625, Code Civ. Proc.

We concur: SHAW, J; LAWLOR, J.

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51 Cal. App. 32

KLEIST et ux. v. PRIEM et ux. (Civ. 3638.)

(District Court of Appeal, First District, Division 1, California. Jan. 6, 1921.)

1. Fraud 🔑52—Evidence of value of property given in exchange admissible.

In an action for damages for false representations, made in exchange of lands, evidence as to the value of the property delivered by defendant in exchange *held* admissible.

2. Trial 🔑165—Facts elicited on cross-examination of adverse party may be relied on to take case from jury.

Where facts brought out on defendant's own cross-examination tended to support the allegations of the complaint, motion for nonsuit was improperly granted.

3. Frauds 🔑64(1)—Representation as opinion or statement of fact, question for jury.

In an action for damages for fraud in an exchange of lands, the question whether defendant's statements as to values were mere expressions of opinion or statements of fact is for the jury.

4. Fraud 🔑52—Evidence of value of lands exchanged admissible.

In an action for damages for fraud in an exchange of lands, evidence as to the value of the lands exchanged by plaintiff is admissible on the issue of fraud and as a circumstance to be considered in construing the contract, and evidence that certain of defendants' properties did not have the improvements represented, etc., and were subject to limitations contrary to representations, is also admissible.

5. Trial 🔑139(1)—Nonsuit must be denied if there is any substantial evidence to prove plaintiff's case.

A motion for nonsuit must be denied if there is any substantial evidence tending to prove plaintiff's case without passing on the sufficiency of such evidence.

6. Evidence 🔑434(11) — Parol evidence of fraud admissible.

Where defendant was alleged to have been guilty of false and fraudulent representations as to lands which he exchanged for those of plaintiff, evidence as to defendant's oral representations is admissible, although the agreement of exchange was reduced to writing, for a contrary rule would be for the protection of those contemplating fraudulent schemes.

7. Trial 🔑165—In passing on motion for nonsuit, every favorable inference should be given to plaintiff's evidence.

In determining whether the evidence is sufficient to require submission of the case to a jury, every favorable inference and every favorable presumption arising from the evidence produced must be considered as facts proved in favor of plaintiff.

8. Trial 🔑165—On motion for nonsuit, favorable construction must be accepted in favor of plaintiff.

Where evidence is fairly susceptible of two constructions, the construction in favor of plaintiff must be accepted on motion for nonsuit, and contradictory evidence must be disregarded.

9. Trial 🔑165—Plaintiff entitled to benefit of all evidence.

On motion for nonsuit, plaintiff is entitled to the benefit of every bit of evidence which tends to prove his case.

10. Trial 🔑165—Evidence improperly admitted may be considered on question of nonsuit.

On motion for nonsuit, evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given by the court the benefit of its full probative strength, and any question arising from the fact of variation between the evidence of witnesses cannot be considered.

11. Trial 🔑139(1), 165—Where plaintiff has made out prima facie case, nonsuit must be denied; on motion for nonsuit, evidence taken strongly against defendant.

On motion for nonsuit, the evidence must be taken most strongly against defendant, and, if plaintiff has introduced proof sufficient to make out a prima facie case, the motion, if made on the close of his case, should be denied.

12. Fraud 🔑64(1)—Nonsuit held improper.

In an action for damages for fraud, in an exchange of land, the granting of a motion for nonsuit *held* improper.

13. Fraud 🔑49—Elements of damage not pleaded cannot be considered.

Proper elements of damage in an action for misrepresentations in effecting exchange of lands cannot be considered, where not pleaded.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by John H. Kleist and wife against B. E. Priem and wife. From a judgment for defendants and an order denying new trial, plaintiffs appeal. Judgment and order reversed.

Marcus D. Wolff, of San Francisco, for appellants.

Olin L. Berry, of San Francisco (A. Walter Allen, of San Francisco, of counsel), for respondents.

SEAWELL, Presiding Justice pro tem. Plaintiffs, husband and wife, brought this action against defendants, husband and wife, to recover damages alleged to have been sustained by the former in the sum of $11,360 as the result of an exchange of real properties by and between said parties induced by false and fraudulent representations made by defendant B. E. Priem, acting for himself and his said wife. The wives of the parties were made parties solely because of respective marital relations. This being so, reference will be made only to the principals.

The property parted with by plaintiff is situated in Douglas county, Or., and will be referred to as the Oregon property, while the property received by him from defendant, consisting of several lots, parcels, and tracts of land situated in the counties of San Francisco, Alameda, San Mateo, Contra Costa, and Napa, in this state, will be referred to as the California properties.

The gravamen of the action is to be found in the allegations of the amended complaint charging false and fraudulent representations made by defendant as to the values of the several lots or tracts of the California properties, the state of improvements thereon and subsisting liens standing against the same.

Defendant denied specifically all of the material allegations of the amended complaint, and, in turn, by cross-complaint, charged plaintiff with falsely and fraudulently misrepresenting the value of the Oregon property to his damage in the sum of $11,000. At the close of plaintiff's case the court granted defendant's motion for nonsuit, and judgment was accordingly entered. Plaintiff appealed from said judgment and from an order denying his motion for a new trial.

A statement of the facts essential for an understanding of the orders appealed from, and the court's decision, may be thus briefly made: Plaintiff was at the time of said exchange, and for several years prior thereto had been, a resident and owner of farm and orchard lands situate eight miles from the nearest town or village in Douglas county, Or., and engaged in conducting the same. His property consisted of 75 acres, 50 of which were planted to bearing fruit trees. The remaining 25 acres were used chiefly for growing grains. The improvements and equipment were modern and fully ample for the purposes to which the land was devoted. The uncontradicted evidence is that the Oregon property on the day of the exchange, was of the value of $18,000, but carried an incumbrance of $1,500.

Plaintiff and his wife had grown anxious to become residents of California, preferably San Francisco. It seems that the husband had fallen into conversation with one E. J. Sanford, "a neighbor," whom he describes as having known for a period of about one week. Sanford, having thus been made aware of plaintiff's desires, represented that he was a real estate operator of 35 years' activity and volunteered to go to San Francisco and obtain for him a "good trade." This occurred during the latter days of September, 1917. Plaintiff furnished Sanford with a list of his property, together with photographic views, and the latter very shortly thereafter arrived in San Francisco and very promptly wrote to plaintiff that he had procured a good trade, and advised him to make the exchange. The evidence indicated that upon arriving in San Francisco Sanford went direct to the offices of defendant B. E. Priem, who then had offices in the Phelan building. Whether a prior acquaintance existed between the two does not appear. On October 1, 1917, Sanford wrote a letter to plaintiff from San Francisco, in which he enclosed a list of properties made out and offered by defendant Priem in exchange for his Oregon property. The list described in a general way several lots or "tracts" of land.

Closely following the Sanford letter, defendant Priem forwarded a second list to plaintiff. Sanford hurried back to Oregon and advised plaintiff to make the trade. At this juncture Sanford withdrew from the transaction as mysteriously as he had entered it. Plaintiff at once came to San Francisco. It was his first trip to this state, and consequently he was a stranger. He went to Priem's office, was entertained by him, and received his close personal attention throughout his stay. He seems to have had no independent advice or to have conversed or advised with any one but defendant. He was hurriedly shown the several pieces of property afterwards passed to him by the exchange, except the Napa City and Mathews lots, which he did not see. His visit to or examination of any one of said lots or tracts of land did not exceed five minutes and in some instances not more than one minute. The properties were quite widely separated, being in four counties. At the expiration of the third day of his visit plaintiff informed defendant that he had concluded not to make an exchange of properties, and announced his intention of starting for his home. Defendant insisted on accompanying him, and did accompany him to Oregon, stating that he wanted to see his "ranch anyway" and also the country. After three or four days of negotiations at the Oregon ranch, defendant revised his property list by adding two Berkeley lots, and represented by positive statements that the properties listed, exclusive of said two Berkeley lots, were worth $18,000, and that said two lots were worth $2,500, less an $800 mortgage. This was sufficient to induce plaintiff, who had been theretofore in an uncertain frame of mind, to execute, on October 23, 1917, the contract of exchange. An exchange of deeds soon followed, both sides executing warranty deeds.

[1] It is an allegation of the amended complaint, and was the offer of plaintiff at the trial, to show by competent testimony that the value of the California properties had been grossly misrepresented by defendant, and that the aggregate value thereof was inequitable as compared with his Oregon property. The aggregate value of the California properties as represented by defendant, after balancing incumbrances and liens, had been so adjusted by the second list, exclusive of the Berkeley lots afterwards included, as to make them appear to equal the actual value of plaintiff's Oregon property. At the trial plaintiff offered to show by numerous witnesses that the actual or market value of each lot, piece or parcel of the California properties was at least 50 per cent. below its represented value. Defendant objected to any and all offers to prove values, and the court sustained each of his objections. This ruling was erroneous. The only evidence as to the value of the California properties permitted by the court was brought out on the cross-examination of the plaintiff.

[2] Upon what theory evidence of this character was excluded under the issues as framed does not clearly appear. Possibly it was excluded on the theory that plaintiff had full or equal opportunity with the defendant to investigate for himself, or that the representations as made were mere expressions of opinion rather than the affirmation of facts. Under the facts and circumstances as disclosed by the record of the case, these questions were matters of fact to be determined by the jury, and not mere questions of law for decision by the court. The cross-examination of plaintiff on the subject of values seems to have been made on the theory that it afforded an opportunity of impeachment by a comparison of the allegations of the original complaint with the allegations of the amended complaint. Whatever the purpose may have been, the evidence was elicited, and, under the rules governing motions for nonsuits, it must be given its full probative effect. The cross-examination showed the actual values to be far below the values as represented.

It was the evidence that plaintiff had been a farmer practically the whole of his life, had had no previous real estate knowledge or business training, and was wholly ignorant of California conditions and values, and therefore relied solely upon defendant's statements of values. In fact, he had never seen the Napa City property. Defendant, on the other hand, was the owner of lands situate in several counties of the state, occupying a business office, and, doubtless, was well informed as to realty values. A fair inference from the facts stated would be that he was a real estate broker. His assertion, rather boastfully, was that he did not need an attorney to transact business for him.

[3, 4] Whether statements as to values are tantamount to an affirmation of an existing fact rather than a mere expression of opinion, and were the inducing cause of entering into a contract of exchange, are questions of fact for the determination of the court or jury. Herdan v. Hansen, 189 Pac. 440. "Evidence as to the value of lands exchanged at the time of the exchange is admissible and relevant to an issue of fraud connected with the exchange, and also as a circumstance to be considered in construing the contract." Beverly v. Blockwood, 102 Cal. 83, 36 Pac. 378; Bonnarjee v. Pike, 185 Pac. 479. Surely the representation that the Napa City property, property situate in a county he had never visited and about which he had no knowledge, possessed certain valuable sidewalk, curb, sewer, and street improvements and was of a value greatly in excess of its actual value, standing in the face of uncontradicted testimony that it did not possess said improvements and was far below its represented value, brings this case within the rule above announced.

It was while in Oregon, several hundreds of miles removed from the situs of the California properties, that plaintiff was induced to make the exchange. Whether plaintiff, judged from the circumstances of the situation, had reasonable means of investigating the question of values for himself, and whether he relied upon the statements of value made by defendant, were questions of fact that should have been submitted to the jury. There was no such acquaintance with, examination or tests made by plaintiff of, the properties received in exchange as is found in the cases cited by defendant. There was direct evidence that the Napa City lots did not possess anything like all the street improvements as represented. This would very substantially affect value. It constituted an element of damage. There was evidence, perhaps not as definite or satisfactory as was obtainable or desirable, touching the costs of making the improvements agree with the representations set out in the contract of exchange.

[5] But a motion for nonsuit must be denied if there is any substantial evidence tending to prove plaintiff's case without passing on the sufficiency of such evidence. Grummet v. Fresno Glazed Cement Co., 185 Pac. 388.

It appears that the Burlingame property, which was warranted to be "free and clear of all incumbrances," was subject to a lien for street improvement work in the sum of $110, which had not been wholly paid at the day of the trial. The Behrens tract was warranted by the agreement of exchange to be "free and clear of all incumbrances." It subsequently developed that Mrs. J. M. Hamill held a contract for the purchase of said tract. As a part of the original agreement, defendant covenanted to clear the title either by obtaining a quitclaim deed from Mrs. Hamill or by the institution of an action to quiet title thereto. Neither was done. As an answer to plaintiff's complaint for failure to comply with said covenant defendant at the trial of the case presented to plaintiff for the first time a quitclaim deed executed by Mrs Hamill long after suit had been commenced, asking damages because of such failure. Surely defendant should not be permitted to profit by such methods.

The Cortland avenue lot, the most valuable of the listed properties, was shown to be materially less in area than it was represented to be. It was described as "75 feet on Cortland avenue." Its full dimensions were at no time given, not even in the deed. As a matter of fact, it was of "flat-iron" shape, 75 feet on Cortland avenue, and tapered down to a width of 47 feet at the rear. It was the testimony of plaintiff that this lot was represented to be 75x70 feet. Strange as it may appear, the complaint contains no allegation of damage because of such misrepresentation. The dimensions of the lot were admissible, however, as affecting value. The treatment of this lot throughout the transaction, whenever reference was made to it, was such as to leave room for an unwary person to be misled as to its actual size.

[6] There is no merit in defendant's contention that because the agreement of exchange had been reduced to writing no evidence concerning false representations should have been received with respect to any statement made prior to its execution. No attempt is here made to vary the terms of a written contract nor to explain away an ambiguity. Its purpose was to establish the fact that the instrument was procured by fraud and the transfer of properties was made because of fraudulent representations as alleged in the complaint. Parol evidence has always been held to be admissible to establish fraud. Persons contemplating fraud may not be expected to reduce their fraudulent purposes to writing. To exclude parol evidence in such cases would bar inquiry into many fraudulent transactions. Such a rule would afford a fortress of protection to those contemplating fraudulent schemes. The decisions decisive of this question are: Zirbes v. Mounsey, 176 Cal. 677, 169 Pac. 368; Ayres v. S. P. Co., 173 Cal. 75, 159 Pac. 144, L. R. A. 1917F, 949; Isenhoot v. Chamberlain, 59 Cal. 630; Bechtold v. Coney, 183 Pac. 841; Troy, etc., Co. v. Drivers, etc., Co., 14 Cal. App. 152, 111 Pac. 121.

The case of Harding v. Robinson, 175 Cal. 534, 166 Pac. 808, relied upon by defendant, is not in conflict with the rule that has always obtained in this state. It simply reaffirms the familiar rule that the terms of a written contract cannot be varied by parol evidence. By an agreement in writing, as stated in said case, the vendor sold a tract of land by metes and bounds with no reference to acreage. Inasmuch as the contract described it as a sale in gross, parol evidence was not admissible to show that false representations were made as to its acreage. This principle of law has no application to the instant case. No attempt was made to vary the terms of a written agreement. The inquiry here is as to the means employed in procuring the execution of an instrument faultless on its face.

Not only the two lists sent to plaintiff from San Francisco, the second of which contained a brief description of each separate parcel of land offered and containing the words, "My price" (naming a stated sum), or statements as to its cost to defendant, or amounts expended by him for improvements, or prices which nearby lots had brought, were admissible in evidence, but also the oral representations made to plaintiff in Oregon to the effect that the property offered by him was of the value of $18,000. The acts and conduct of the parties are also important.

[7-11] In determining whether or not the evidence is sufficient to require the submission of a case to a jury, every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced, must be considered as facts proved in favor of the plaintiff. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. If contradictory evidence has been given, it must be disregarded. Estate of Arnold, 147 Cal. 583, 82 Pac.

252. The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments, and such evidence must be viewed in the light most favorable to plaintiff's claim. Anderson v. Wickliffe, 178 Cal. 120, 172 Pac. 381. Evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given by the court the benefit of its full probative strength, and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly against the defendant, and if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made on the close of his case, should be denied. Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709; In re Estate of Daly, 15 Cal. App. 329, 114 Pac. 787; Wassermann v. Sloss, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; Lassen v. S. P. Co., 173 Cal. 71, 159 Pac. 143.

[12] Applying the foregoing rules to the evidence, we think the judgment of nonsuit was erroneous. It was also error to exclude evidence as to the values of the properties passed by the deeds of exchange. The discussion of the evidence in this decision must be considered solely in reference to a motion for nonsuit.

[13] In conclusion, it may be stated that the amended complaint is faulty both in substance and in form. The allegations as to value are weak and indirect, and those in reference to damages are somewhat vague and incomplete. Proper elements of damage not pleaded were attempted to be made issues at the trial. This cannot be done, and while these matters were not properly presentable upon motion for nonsuit, they are such as should be corrected upon a retrial of the case.

The judgment and order appealed from are reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

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50 Cal. App. 749

MERCHANTS' NAT. BANK OF SAN FRANCISCO v. CARMICHAEL. (Civ. 2171.)

(District Court of Appeal, Third District, California. Dec. 31, 1920. Hearing Denied by Supreme Court Feb. 28, 1921.)

1. Appeal and error 🔑1099(4)—Opinion on former appeal construed to hold instrument account stated.

Opinion on former appeal construed to have held that instrument sued on was an account stated.

2. Courts 🔑107—Opinion must be construed as a whole.

The entire opinion must be read as a whole to ascertain the precise conclusion arrived at and announced.

3. Appeal and error 🔑1097(5)—Supreme Court's opinion on prior appeal law of case on subsequent appeal to District Court of Appeals.

Supreme Court's opinion is the law of the case on subsequent appeal to the District Court of Appeals as to whether instrument involved an account stated, if the evidence received at the two trials was substantially the same in all vital particulars, regardless of whether the Supreme Court erred.

4. Account stated 🔑4—Written agreement entered into on settlement as to amount remaining due held account stated.

Where creditor and debtor had a settlement which resulted in the payment by debtor to creditor of the larger portion of the indebtedness and in the execution of written agreement which debtor acknowledged in writing that there was a balance due from him to creditor as the result of the transactions as to which the settlement was had, the agreement and acknowledgment thereof by debtor amounted to an account stated.

5. Contracts 🔑88—Presumption that written instrument is based on consideration may be controverted.

The presumption under Civ. Code, § 1614, that a written instrument is based upon a consideration is disputable, and may be controverted by proper evidence.

6. Account stated 🔑8—Presumption of consideration conclusive, in absence of equitable grounds for avoidance.

The presumption that a stated account was based upon a consideration under Civ. Code, § 1614, is not disputable in the absence of allegations of fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument.

7. Account stated 🔑1—Held supported by consideration.

Where landowner was indebted to water company in a large sum of money as a result of transactions which had been going on for some years, and where there was a controversy as to amount due for water supplied to a certain portion of the land, an account stated as the result of a settlement between them, in which the water company released lien for water supplied such land, and in which owner paid a large portion of the indebtedness, *held* based on a consideration.

8. Contracts 🔑108(2)—Water company's contract with owner to supply water at specified rate not contrary to public policy.

Water company's agreement to supply water to certain land at specified rate, where the rates for the use of such water had not been fixed by public authority, *held* not against public policy.

9. Waters and water courses 🔑249—Owner could compel water company to supply water though in arrears in payment for past service.

Landowner could compel water supply company engaged as a public service corporation in supplying water to the public to supply such owner with water at rates fixed either by the rate-fixing power, or in the absence of rates having been so fixed by the company itself, upon a reasonable basis or a basis not prohibitive, even though in arrears to the company in payment for past service.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by the Merchants' National Bank of San Francisco against D. W. Carmichael. Judgment for plaintiff, and defendant appeals. Affirmed.

C. E. McLaughlin and R. L. Shinn, both of Sacramento, for appellant.

Gavin McNab, Nat Schmulowitz, and H. S. Derby, all of San Francisco, for respondent.

HART, J. This is the second appeal in this cause. The first trial of the case resulted in a judgment for the defendant, from which judgment the plaintiff appealed, and the judgment was reversed by the Supreme Court, the decision being rendered and filed on June 18, 1918. See 178 Cal. 446, 173 Pac. 999.

On the former appeal, as on this, the principal question submitted for determination was whether a certain written instrument, which was and is made a part of the complaint, and which was identified evidentially as Exhibit B, does or does not constitute an account stated or evidence of such as account, the plaintiff's action being entirely based upon said instrument, as to which the theory of the complaint was that it was a stated account between defendant and the American Canon Water Company (subsequently transferred to plaintiff), whereby the former acknowledged an indebtedness to the said Water Company in the sum of $4,126.65, being a settlement of previous contracts or transactions between them. The pleadings are as they were originally settled, and upon which both the first and the present trials were had. The complaint sets out in sufficient detail the transactions culminating in the alleged stated account. The answer denies the making of a stated account, and then sets up some matters of affirmative defense, the general nature of which it will be the more convenient and just as orderly to refer to hereafter.

In the first trial, the trial court "made findings to the effect that no account had been stated by the said parties, and that no sum was found due to the water company from the defendant, Carmichael, and that he never agreed to pay said sum of money," and judgment was accordingly entered. At the last trial, resulting in the judgment from which this appeal is prosecuted, the court, presumably acting largely upon its understanding of the purport of the opinion of the Supreme Court in the case on the former appeal, and conceiving no doubt that the facts brought out by the evidence were substantially the same as those established at the former or first trial of the action, found that a stated account had been made and agreed to by and between Carmichael and the Water Company. As before suggested, however, it is here contended by the appellant that the finding that an account stated was made between Carmichael and the Water Company derives no support from the evidence. It is further contended that it is not squarely held by the Supreme Court in its opinion in disposing of the former appeal that the instrument upon which the action is founded constitutes an account stated. It is further urged that there was a failure of consideration.

The respondent contends that the facts brought out at both trials of the case are substantially the same, and therefore invokes the doctrine of the "law of the case," claiming that the decision on the former appeal must be accepted as the law applicable hereto as to all the questions involved in the controversy adjudicated by said decision; that the Supreme Court distinctly held, in its said decision, that the instrument pleaded and entirely relied upon by the plaintiff was an account stated, and that said account was made and agreed to by Carmichael and the Water Company.

The general facts established at the first trial are clearly stated, and the law applicable thereto plainly, unambiguously, and definitely expounded in the opinion of Mr. Justice Shaw, voicing the views of the court on the former appeal, as follows:

"Carmichael was the owner of a tract of land containing 1,126.64 acres, more or less, which he proposed to subdivide and sell to purchasers in small tracts. He desired to make some arrangement whereby water could be furnished for irrigation and domestic use on said tracts. With this in view he and said Water Company, on December 16, 1912, entered into an agreement whereby the Water Company agreed that for a sum equal to $10 an acre for each acre of Carmichael's land, the area to be determined by a subsequent survey, which sum Carmichael thereby agreed to pay to said Water Company, it would execute to each of the expected buyers of tracts of such land a contract to furnish the tract bought by them with water perpetually, at the yearly charge of $4 per acre for irrigation and $1 a month for domestic use, the said right to be appurtenant to such tract so bought. The agreement recited that Carmichael had paid to the Water Company $7,000 of the sum agreed to be paid by him as aforesaid. The second agreement was as follows:

" 'Sacramento, Calif. December 16, 1912. This is to acknowledge that American Canon Water Company has this day received from D. W. Carmichael on account of contract of even date herewith, for the furnishing of water on 1,126.64 acres of land on the Haggin grant, the sum of $7,000.00, gold coin of the United States of America, as part payment of the said contract. That the balance due on said contract is the sum of $4,126.65. American Canon Water Company, By O. G. Hopkins, Attorney.

"'I hereby acknowledge the foregoing to be a correct statement of the amount paid and the amount still due and unpaid on said contract. D. W. Carmichael.'

"An account stated is defined as 'an agreed balance of accounts; an account which has been examined and accepted by the parties.' It is not necessary that there should be cross-demands between the parties, or that the defendant's acknowledgment that a certain sum is due from him to the plaintiff should relate to more than a single debt or transaction. Baird v. Crank, 98 Cal. 297, 33 Pac. 63.

"'An account stated is a document, a writing, which exhibits the state of the account between parties and the balance owing from one to the other, and when assented to, either expressly or impliedly, it becomes a new contract.' Coffee v. Williams, 103 Cal. 556, 37 Pac. 504; Gardner v. Watson, 170 Cal. 574, 150 Pac. 994.

"The first agreement created an indebtedness from Carmichael to the Water Company. On its face it showed that the amount of the original debt was $11,266.40 with a credit thereon of $7,000, which would leave a balance of $4,266.40.

"The second agreement expressly states that the balance due on the original debt is $4,126.65. The evidence shows that the first contract is dated November 30, 1912, and that it was acknowledged on that day by the executing officers of the Water Company, that some time after that date the second agreement was prepared, and that both were finally executed by delivery on the same day, December 16, 1912. It is conceded that the second refers to the first. The recital in the second that the first is 'of even date' with the second was a clerical error. The difference in the balance shown in the respective documents would appear to have been the result of error, or of payments made after the partial execution of the first. It is apparent from the terms of the second that its delivery, in contemplation of law at least, succeeded the delivery of the first. It assumes the pre-existence of the first agreement as a subsidiary contract. It does not itself create the original obligation, as claimed by respondent; it refers to the first agreement as the foundation thereof. The authorities cited by respondent to the effect that 'an account stated cannot be made to create a liability when none existed before' are therefore not in point.

"Nor does the second agreement constitute a mere calculation of the amount due as fixed by the terms of the first agreement, so as to bring it within the rule declared in cases like Jasper v. Lamkin, 162 Ala. 388, 136 Am. St. Rep. 34, 24 L. R. A. (N. S.) 1237, 50 South. 337, where it was held that a statement of the amount due for principal and interest on promissory notes, made by the holder thereof and assented to as correct by the maker, is not an account stated. Here the amount to become due was not fixed with certainty by the first agreement. It was made to depend on the number of acres in the tract of land, which was to be ascertained by a survey. The second agreement obviated the necessity for a survey, or was the result thereof. In either case it differentiates this case from those referred to."

[1, 2] It seems to us that, after reading the above language, no one could doubt that it is thereby distinctly held that the instrument sued on is an account stated. The very fact that the court points out the distinction between this case, as it was presented to it, and the case of Jasper v. Lamkin, 162 Ala. 388, 50 South. 337, 24 L. R. A. (N. S.) 1237, 136 Am. St. Rep. 33, between which and this counsel for the appellant sought on the former appeal to establish an analogy if not a pronounced similarity, is itself sufficient to indicate that in its opinion the court intended to hold, and does squarely hold, that the action was on a stated account. Note the following language of the court in that connection:

> "Here the amount to become due was not fixed with certainty by the first agreement. It was made to depend on the number of acres in the tract of land, which was to be ascertained by a survey. The second agreement obviated the necessity for a survey, or was the result thereof. In either case it differentiates this case from those referred to."

Thus, it will be observed that, in referring to the instrument sued on and the circumstances bringing it into existence, the court by its own language describes an account stated—that is, an agreed balance due on an account subsisting between the parties. The court, however, followed the above quoted language from its opinion with this observation:

> "But even if it could be said that the instrument cannot be sued on as an account stated, the plaintiff would still be entitled to recover. The complaint alleges its execution, a copy of it is made a part of the complaint, and there are allegations that defendant agreed to pay the amount stated therein, that payment has been demanded of him, and that he has failed to pay the same or any part thereof. The instrument is an acknowledgment of a debt due, the law implies a promise to pay the same, and it is a good foundation for an action, being in effect a duebill."

It is from this particular language that counsel for appellant here educe the proposition they so vigorously press upon us here that the Supreme Court did not hold, in its decision disposing of the former appeal, that the instrument represents an account stated. We do not so understand the language just quoted. The entire opinion must be read as a whole to ascertain the precise conclusion arrived at and announced. Viewing the language referred to alone and by itself or without reference to the preceding parts of the opinion, it might be capable of the construction which counsel ascribe to it; but when it is considered in the light of the language preceding it, the observations of the court upon which counsel appear to place sole reliance to support their view of the purport of the decision clearly enough justifies the conclusion that what the court intended to and in effect does say is this: That, while the instrument sued on is an account stated, the defendant, under the allegations of the complaint, could not in any event prevail, since the instrument, whatever it may be designated technically, involves the acknowledgment by the defendant of a debt due the plaintiff. It will be noticed that the court, after declaring in effect that the instrument is an account stated, uses these significant words in introducing the proposition last stated, "Even if it could be said," etc., which clearly shows, as we have in different language stated, that what the writer of the opinion had in mind and all he intended to say was that even if the court was required to adopt counsel's theory of the nature of the instrument sued on—a theory which the preceding language of the opinion plainly shows that it did not adopt—still the plaintiff was entitled to recover, inasmuch as the instrument involved the acknowledgment of a debt, etc.

[3] If then, it be true that, as counsel for respondent contend is the fact, that the evidence received at the two trials of the action is substantially the same in all vital particulars, it of necessity follows that the doctrine of the law of the case applies, and per consequence the instrument sued on must be held to involve a stated account; and this would be so even if it were necessary to concede that the Supreme Court was in error in holding that said instrument involved an account stated. See 2 Hayne, New Trial and Appeal, p. 1658; Dewey v. Gray, 2 Cal. 374; Clary v. Hoagland, 6 Cal. 685; Gunter v. Laffan, 7 Cal. 588; Cordier v. Schloss, 18 Cal. 576; Phelan v. S. F., 20 Cal. 39; Haynes v. Meeks, 20 Cal. 288; Davidson v. Dallas, 15 Cal. 75; Ritter v. Stevenson, 11 Cal. 27; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Burton v. Burton, 79 Cal. 490, 21 Pac. 847; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Jaffe v. Skae, 48 Cal. 540; Sharpstein v. Friedlander, 63 Cal. 78; Blakenship v. Whaley, 142 Cal. 566, 76 Pac. 235; Franz v. Mendonca, 146 Cal. 640, 80 Pac. 1078; Lambert v. Bates, 148 Cal. 146, 82 Pac. 767; Ellis v. Witmer, 148 Cal. 528, 83 Pac. 800; Emerson v. Yosemite, 149 Cal. 50, 15 Pac. 122; Reeve v. Colusa, 151 Cal. 29, 91 Pac. 802.

In Brett v. S. H. Frank & Co., 162 Cal. 735, 739, 124 Pac. 437, 439, the court said:

> "It has been sometimes said that the doctrine of the law of the case is invoked only when the former decision as to the law is erroneous; that its application presupposes a previous error by which the court is bound. It does, indeed, go that far, if it becomes necessary to do so. But the last decision would be the same in a case where the first decision was not erroneous. The doctrine means simply this: That the court having once decided the law, and the cause having gone back to the lower court for further proceedings in accordance with the law as thus established, and the parties and the lower court having acted in reliance upon that law, this court will not, upon a second appeal, again enter into a consideration of the question, but, if the facts and circumstances are substantially the same, will treat it as settled law regardless of its accuracy. See Allen v. Bryant, 155 Cal. 258, 100 Pac. 704."

[4] We are, however, not to be understood as intimating the opinion that the Supreme Court was in error in holding that the instrument in question is an account stated. To the contrary, we think the court was right in so holding, and should ourselves say, upon further consideration of the case (this court originally held that the instrument sued on here was not an account stated—see 26 Cal. App. Dec. 302)[1] and, having again examined the documentary and oral evidence taken at the former trial, that it was thus clearly shown in said trial that the instrument was the culmination of a settlement of prior differences existing between the parties resulting from business transactions between them, and that it was agreed and so stated in the writing that a balance amounting to the sum of $4,126.65 remained due to plaintiff from defendant after said settlement was had. In other words, said evidence disclosed that defendant was indebted to plaintiff in a large sum of money; that they had a settlement of the account which resulted in the payment by defendant to plaintiff of the larger portion of such indebtedness, and that the parties then and there agreed and the defendant acknowledged in writing that there was a balance due from him to plaintiff, as a result of the transactions as to which the settlement was had in the sum of $4,126.65. This latter agreement and acknowledgment clearly amounted to an account stated within the definition of such a transaction as given by Mr. Justice Shaw in his opinion deciding the case.

To the above may be suggested an added consideration, viz.: That the Supreme Court, in its decision, distinctly holds, as we have seen, that, even if the instrument sued on could properly be held to be nothing more than a duebill or the acknowledgment of a debt, the plaintiff, under the averments of its complaint and the evidence disclosed by the former record then before the court, would be entitled to recover. Indeed, counsel for the defendant themselves, while not admitting that the instrument is a stated account, expressly concede that, if the instrument were supported by a consideration, it would form a sufficient basis for a recovery. This is the precise language of their brief:

> "We concede that this instrument [referring to the instrument sued on] admits an indebtedness. We concede that in a proper action this document could be made the basis of an action at law. We concede that if there was any consideration for this duebill, the defendant in this case cannot hope to escape."

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[1] For opinion of Supreme Court, see 173 Pac. 999.

Now, as to the evidence in the record now before us. As above stated, we have examined the evidence taken at the former trial and compared it with the evidence received at the second trial, and we have not been able from such examination and comparison to perceive any substantial difference in the evidence of the two trials. The defendant went into the details of the several transactions leading to the execution of the instrument in question a little more elaborately at the second than he did at the first trial, but we have found absolutely nothing in his later testimony which tended to show that there was not, after the settlement referred to, an agreed balance due from defendant to plaintiff in the sum specified in the stated account upon which the action is based.

There is, however, this additional testimony given by defendant (responding to allegations of the answer to that effect) that, at the time of the settlement and the balance due from him was struck, the Water Company agreed to accept certain notes of a corporation designated and known as the "California Corporation" of the aggregate equal value to said balance in full payment thereof —that is, if said notes were found by the company upon investigation to be valid. Upon this testimony the argument is predicated that the instrument sued on was intended as a mere memorandum or duebill of the balance due which was to be paid by the delivery to the company of said notes. But, assuming that this evidence was not incompetent because its effect would be to insert a provision in the writing that it does not contain, and further assuming that an agreement such as the defendant said was had as to the mode of payment of the balance would take from the instrument sued on the characteristic of a stated account, there is, in our opinion, a conflict in the testimony upon that proposition. Mr. Hopkins, an attorney, acting as such for the Water Company in all the transactions involved herein between the Water Company and the defendant (and so far as the evidence in the record shows, the only person who was present and acted for the company in the settlement) testified at the last trial that he had some recollection of the defendant on some occasion proposing to him, as the agent of the Water Company, to pay the balance which it was agreed was due the plaintiff from the defendant with the notes of the California Corporation, but that he knew that if he said anything to defendant about the proposition "it was only to the effect that I had no authority to accept the notes; I don't recall any conversation on that date (date of the execution of the instrument sued on) on those notes." It will be seen that, while Mr. Hopkins did not directly or specifically testify that no such agreement was had relative to the payment of the balance of the debt with said notes, he in substance and effect did so testify. It was, at any rate, sufficient to produce a conflict in the evidence upon the proposition.

Counsel, however, vigorously assert that the evidence shows that there was no consideration for the account, and also a failure of consideration for the preceding agreements.

[5, 6] A written instrument imports a consideration for its execution—that is to say, a written instrument carries with it the presumption that it was made for a consideration. Civ. Code, § 1614. And, while, as a general rule, such presumption is a disputable one and may be controverted by proper evidence, it has been held that it is not subject to be disputed in the case of a stated account, unless fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument, be pleaded or made an issue.

> "It is not open to a defendant," says the Supreme Court in Gardner v. Watson, 170 Cal. 570, 576, 577, 150 Pac. 994, 996, "to attempt to defeat the legal effect of such a contract by showing a lack of consideration in any other way [than that it was procured through fraud, etc.]. Thus, it is not open to a defendant in such a case merely to show that the account stated was based upon a disputed claim of the plaintiff's, which claim subsequently proved to be invalid. Nor would it be open to a defendant to show that the amount justly due was very much less than the amount named in the account stated. All such evidence going to a total or partial lack of consideration is forever debarred by the convention and agreement of the parties, for this is of the very essence of an account stated."

There is no claim here that the account stated was procured through fraud or duress practiced by the plaintiff or the mutual mistake of the parties or otherwise. Therefore, unless it was shown that there was, either in fact or in law, a total failure of consideration for the transactions or agreements out of which the stated account arose (and it was not so shown), the question of consideration is wholly foreign to the case.

[7] But, if it were important here to show that the record affirmatively discloses that the writing sued on and the agreements from which it resulted were supported by a consideration, there would be no difficulty in doing so, or in showing that there was not a failure of consideration. Indeed, from the defendant's own testimony, it clearly appears that he was indebted to the plaintiff in a large sum of money, that he paid in cash the larger portion thereof and at the same time executed a written acknowledgment that there was still due from him to the Water Company the sum of $4,126.65. His testimony that the Water Company had agreed to accept the notes of the California corporation as in payment of said sum is pregnant with an ad-

mission that he still owed that amount to the company, and that it was a debt incurred for a consideration. If there was no consideration for the instrument in question, it was a nudum pactum and not enforceable; he was under no obligation to pay it; then why offer to pay or express a willingness to pay as he does in his answer, in the said notes or at all? Moreover, the transactions, of which the stated account was the outgrowth, had been going on for some years, and involved several written agreements, one of which, in addition to the one to which the instrument sued on expressly refers, involved a lien given by him to the Water Company on certain of his lands, embraced in "Carmichael Colony No. 1," and other property, to secure the payment of money for water delivered and to be delivered to defendant's said lands, and in the negotiations culminating in the execution of the instrument evidencing the account stated, it was insisted by the defendant that said lien should be released, and it was released. There was also a controversy between the parties relative to unpaid water claims due the company for supplying water to "Carmichael Colony No. 1." The defendant said that, in securing an adjustment of all their previous transactions and in securing an agreement for water for Carmichael Colony No. 2, there was considerable "bickering" between them, he trying to get what he wanted for as little money as possible, while the Water Company was trying to get out of him all that it could. Finally an agreement was reached whereby the lien of Colony No. 1 was released and the agreement to supply Colony No. 2 with water and the instrument sued on were executed. It is not necessary further to go over the evidence herein, for we think we have stated enough of it to show that, as stated, the record discloses an abundance of evidence affirmatively showing that the stated account was and is supported by a consideration.

There are several other special matters of defense pleaded in the answer, but as to two of them there is no evidence in the record. These are: (1) That the property and water rights of the Water Company were, in the year 1913, under a trust deed, covering all said property and water rights, executed by the Water Company to the First Federal Trust Company, to secure a bonded indebtedness in the aggregate sum of $300,000, sold by said First Federal Trust Company, thereby divesting the Water Company of all right, title, and interest in and to said property and water rights, and therefore rendering the agreement of the Water Company to furnish Colony No. 2 with water impossible of performance; (2) that there was no promise by defendant to pay for water at rates in excess of $4 per acre per annum for irrigation purposes and $1 per month for domestic purposes, such rates being those fixed in agreements between the Water Company and water users owning lands adjoining those of the defendant. As to the latter proposition, it is to be added that it is at variance with the written agreement made at the time the stated account was executed and expressly referred to by the latter instrument.

[8] There is another point, however, which counsel for the appellant vigorously press upon us and it is this: That the agreement to furnish water to defendant at rates fixed by the agreement of the parties themselves is against public policy, and therefore void, inasmuch as the Water Company is a public service corporation, engaged in supplying a public use, which is subject to regulation by the public authorities vested by law with that power. This question was considered and disposed of adversely to the position of counsel on the first appeal by the Supreme Court. The court in its decision said:

> "Respondent suggests that the first agreement was an attempt to bind a public water company by a contract to furnish water for a fixed sum and at a fixed rate, and intimates such a contract is against public policy and invalid. But such a contract is valid unless the proper public authority interferes. Unless the public authorities find cause to abrogate or modify such contract, and until they do so, it is valid and enforceable between the parties" citing Southern Pac. Co. v. Spring Valley Water Co., 173 Cal. 291, 297, 159 Pac. 865, 867 (L. R. A. 1917E, 680).

In the last-named case, dealing with a contract whereby the Water Company agreed to deliver water into certain tanks of the appellants (Railroad Co. et al.) continuously and for an indefinite period of time and without further charge than that agreed to in said instrument, the court said, replying to the contention that said contract was against public policy and for that reason invalid:

> "We perceive no valid reason for holding the contract void because opposed to public policy. It is not claimed that it was not freely made, or that it was procured by fraud or undue influence. There is nothing inherently wrong in such a contract to give water service upon payment in advance. * * * Where the rates for water devoted to public use have not been fixed by public authority, the person in charge of the use and the consumer may freely contract regarding the price of service and the manner of payment, and such contracts will be deemed valid by the courts, and may be enforced by any appropriate mode. Fresno Canal, etc., Co. v. Park, 129 Cal. 437, 62 Pac. 87; Stanislaus W. Co. v. Bachman, 152 Cal. 725, 730, 15 L. R. A. (N. S.) 359, 93 Pac. 858; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 90, 29 L. R. A. (N. S.) 213, 106 Pac. 404.

There is sufficient in the evidence to warrant the conclusion that the American Canon Company was a public service corporation, engaged in supplying a public use, and was therefore subject, in the matter of its rates for water, and as to the manner in which such use should be administered, to regulation by public authority, but the record is absolutely barren of evidence tending to indicate or show that the public authorities had ever fixed the rates for the supplying of water by said company, or otherwise done anything or taken any step which would have the effect of interfering with or abrogating the agreement between the parties to this action.

We cannot see wherein the cases cited by the appellant are in point here. In Crow v. San Joaquin, etc., Irr. Co., 130 Cal. 313, 62 Pac. 562, so cited, the action was to recover damages for the refusal of the water company, which was engaged in supplying a public use, to furnish the plaintiff water for the irrigation season of a certain year. The Water Company undertook to defend against the action on the ground that the plaintiff had failed and refused to pay his water bills to said company for water furnished him in previous years, claiming that the contract under which it supplied the plaintiff water during said years had annexed to it the company's regulations, to which he subscribed, whereby it was made a condition precedent to the right to receive water from the company that all dues and claims for previous supplies should be paid. The court held that the use of water, in this state, is a public use (Const. art. 14, § 1), and that to carry out that provision of the Constitution the Legislature had passed an act (Stats. 1885, p. 95) making it the duty of the company administering such use, "upon demand therefor and tender of the established water rates, to sell, rent, or distribute such water to the inhabitants" within the territory of such water supply "at the established rates regulated and fixed therefor, as in this act provided, whether so fixed by the board of supervisors or otherwise," etc. The court in its opinion further said that if the regulations of the company referred to "could be considered as * * * binding upon the user of water for all future time, it would be without consideration; for it was the duty of the defendant company to furnish the plaintiff with water whether he agreed to the regulations or not."

[9] Of course, it would be doubted by no one that if this was a case where the company had refused to supply the defendant with water for any reason, the latter could compel the company to supply him with water at rates fixed either by the rate-fixing power or in the absence of rates having thus been fixed, by the company itself upon a reasonable basis or a basis not prohibitive, even though the defendant were in arrears to the company in payment for past service. As shown, the latter case is the situation here, so far as we are advised by this record, and there is no claim that the rates agreed upon between the parties or exacted by the plaintiff are exorbitant or so unreasonably high as to be prohibitive.

Among the other comparatively recent cases referred to by appellant on this question are Lowe v. Yolo Co., etc., Power Co., 157 Cal. 503, 108 Pac. 297; Lowe v. Yolo Co., etc., Water Co., 8 Cal. App. 169, 96 Pac. 379; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213, and many other earlier cases, in none of which have we been able to discern anything inconsistent with the view that a private contract between a water company and a water user for water in cases where the public authorities have not established the rates which the company may charge for supplying water to the public is not against public policy and void.

We have found no reason for disturbing the judgment, and it is accordingly affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

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51 Cal. App. 159

MITCHELL v. PRICE (POLK, Intervener). (Civ. 3747.)

(District Court of Appeal, First District, Division 1, California. Jan. 25, 1921.)

1. Estoppel 🔑9—Allegation in pleading binding on mortgagor, commissioner, and privies in subsequent action.

Where plaintiff in foreclosure of mortgage alleged that a certain person was a legal trustee under a deed of trust, such allegation was binding on the mortgagee, the commissioner in the foreclosure suit, and a subsequent purchaser of the lands from the mortgagee, which bid in the property, and they were estopped to deny that such person was the proper and legal trustee when he subsequently made tender to redeem; such person having performed the duties of trustee under the deed of trust and having been recognized as such, although he was not appointed trustee in strict accordance with the provisions of the trust deed.

2. Mortgages 🔑594(5) — Bondholder under trust deed entitled to redeem property sold under prior mortgage.

A bondholder under a trust deed was, as such, a creditor of a company owning the property, and was entitled to a lien upon the property by virtue of the deed of trust as security for the payment of the bonds held by him, and was in a position as a lien creditor to redeem the property from a sale under foreclosure of a prior mortgage, under Code Civ. Proc. § 701.

3. Mortgages 🔑606—Notice of redemption constructive notice to subsequent purchasers.

Where person having right to redeem from sale of land under foreclosure gave a sufficient notice in writing to the commissioner, and forthwith filed a duplicate thereof with the recorder of the county where property was situated, subsequent purchasers of the land had constructive notice thereof, and it was immaterial that a subsequent purchaser was led by purchaser at foreclosure sale to believe that no redemption had been attempted, and had exercised due diligence to learn from the records of the county if any notice of redemption had been filed, but, through some error or oversight in the recorder's office, obtained no actual knowledge of the filing for record of such notice.

Appeal from Superior Court, Kern County; M. L. Short, Judge.

Action by John Mitchell as trustee, etc., against George W. Price as commissioner, etc., in which Charles C. Polk intervened. From an adverse judgment, plaintiff appeals. Reversed, with directions to enter judgment in favor of the plaintiff.

C. L. Claflin and Kaye & Siemon, all of Bakersfield, for appellant.

Foster & Barnhart and T. F. Allen, all of Bakersfield, for respondent and intervener.

KERRIGAN, J. This is an action for a writ of mandamus. In the month of August, 1903, A. J. McVean was the owner of the real property described in the complaint, and in that month he executed a mortgage thereon to the Kern Valley Bank for the purpose of securing payment of a promissory note in the sum of $1,000. Thereafter and prior to August, 1905, he conveyed the property to the Buckeye Refining Company, a corporation, which on the 1st day of that month executed to Luther Allen a deed of trust thereof as security for the payment of bonds to the amount of $12,000, to be issued by the Buckeye Refining Company, and which were in fact issued to the extent of $10,000. Neither McVean nor said corporation paid the note given by the former to the Kern Valley Bank, and the corporation also defaulted in the payment of principal and much of the interest which became due upon said bonds. At some time prior to the month of February, 1908, the bank commenced an action to foreclose its mortgage, and obtained judgment, under which, in the said month of February, 1908, the defendant George W. Price, the commissioner in said foreclosure suit, sold the property at public sale; the Kern Valley Bank becoming the purchaser thereof.

In December, 1908, an action was commenced to foreclose the deed of trust by John Mitchell, the plaintiff herein, in which he alleged the death of Luther Allen and the appointment of himself as the successor of said trustee, and that such action was commenced by him in his capacity as trustee and also as one of the owners and holders of bonds secured by said trust deed, and in behalf of and for the benefit of all the bondholders. In that action judgment was entered in favor of the plaintiff and against the trustees of said Buckeye Refining Company, then a defunct corporation, for the amount due, with appropriate recourse against the security. In the meantime, and within one year after the sale under the bank's foreclosure suit, the plaintiff herein, as trustee and bondholder as aforesaid, on his own behalf and that of his fellow bondholders, offered in writing to redeem said property from said sale, and at the same time tendered to said commissioner the full amount due upon said judgment in favor of the Kern Valley Bank. The commissioner refused to accept the tender or to give to the plaintiff a deed to the property, whereupon the amount of money so tendered was deposited by the plaintiff in the Bank of Bakersfield, a bank of good financial standing, and written notice of said deposit was served upon the defendant. A duplicate of the notice of redemption was also filed with the county recorder.

After the expiration of one year from the entry of said judgment in foreclosure, and on February 6, 1909, the defendant executed and delivered a commissioner's deed of the property to the Kern Valley Bank, which shortly thereafter transferred its interest therein to certain persons, including Charles C. Polk, the intervener herein, who later acquired the interests of his cotenants.

With two exceptions, the trial court in the present suit found in favor of the plaintiffs substantially on all the issues, but found that no action had been taken as provided in the said deed of trust for the appointment of a successor to Luther Allen, the original trustee, and that John Mitchell was not the trustee under the deed of trust. The trial court also found that the intervener before purchasing the property made diligent search through the records of Kern county to ascertain the condition of the title thereto, and found nothing therein to disclose any tender to redeem said property from the foreclosure sale, and that neither he nor any of his predecessors in interest had any actual knowledge of the tender or offer to redeem the property, or that said plaintiff was at all interested therein. Upon these two findings judgment was entered in favor of the defendant, from which the plaintiff prosecutes this appeal.

[1] As to the first of these findings, it is true that the evidence fails to show that the plaintiff was appointed trustee in strict accordance with the provisions of the trust deed, but we think that neither the defendant nor the intervener is in a position to raise the point. From the record it appears that the plaintiff had performed the duties of trustee under the deed of trust, and had been recognized as such by the officers of the Buckeye Refining Company, for at least two years, and that while acting as such trustee he had recovered a judgment foreclosing the trust deed; that in the foreclosure suit of the Kern Valley Bank the Buckeye Refining Company and John Mitchell, plaintiff herein, were made parties defendant, and in the complaint therein it was alleged that John Mitchell was the

legal trustee under the deed of trust. This allegation was binding upon the Kern Valley Bank, and no doubt would estop, not only the bank and the defendant Price (who as commissioner in effect represented the bank), but also the intervener, the successor in interest of the bank, from denying in this action the status of the plaintiff as trustee under the deed of trust.

[2] Aside from this, plaintiff was entitled to maintain this proceeding for another reason. It is not disputed that he brought this proceeding, not only as trustee, but also as a bondholder, on behalf of himself and numerous other bondholders. As such bondholder he was a creditor of the Buckeye Refining Company, the owner of the property at the time of the foreclosure sale, and accordingly was entitled to a lien upon the property by virtue of the deed of trust as security for the payment of the bonds held by him, and, consequently, was in a position as a lien creditor to redeem the property. Code Civ. Proc. § 701; Frink v. Murphy, 21 Cal. 108, 81 Am. Dec. 149; Jones on Mortgages, § 1055.

[3] With regard to the other finding concerning the notice of redemption, it appears that the intervener had been led by the bank officials to believe that no redemption had been attempted, and had exercised due diligence to learn from the records of the county if any notice of redemption had been filed, but through some error or oversight in the recorder's office he obtained no actual knowledge of the filing for record of such notice. But it is undisputed that the plaintiff gave a sufficient notice in writing to the commissoner, and forthwith filed a duplicate thereof with the recorder of the county where the property is situated, which was all that he was required under the law to do in order to effect a redemption and to impart constructive notice thereof to subsequent purchasers.

Notwithstanding the attack made by the appellant upon the judgment in this case, the respondent has not seen fit to give to the court the benefit of his familiarity with the case nor his investigation of the law bearing upon it, preferring, perhaps, to reserve his energy for the preparation of a petition for rehearing.

The judgment is reversed, with directions to the trial court to enter judgment in favor of the plaintiff upon the findings in the cause.

We concur: WASTE, P. J.; RICHARDS, J.

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51 Cal. App. 114

MOSHER v. JOHNSON. (Civ. 3740.)

(District Court of Appeal, First District, Division 1, California. Jan. 20, 1921.)

Appeal and error ⚷755—Duty of respondent to assist court on appeal.

It is the duty of a respondent who has secured a meritorious judgment to assist the court on appeal by pointing out the reasons why the action of the lower court should be sustained.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by George T. Mosher against Gertrude B. Johnson. From a judgment for plaintiff, defendant appeals. Affirmed.

Taylor & Forgy, of Los Angeles, for appellant.

L. D. Colling, of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this action for damages alleged to have been suffered by reason of the refusal and failure of the defendant to purchase certain personal property, the furniture of an apartment house, according to the terms of a written agreement, which provided that the price therefor should be determined by arbitration. Judgment was accorded to plaintiff, and the defendant has appealed.

It was alleged in the complaint, and the court found, that it was the agreement of the parties relating to the purchase and sale of the furniture that, if the parties could not agree upon the price, said price should be determined by "arbitration in the usual mode," each of said parties selecting one arbitrator, and these two securing a third, the decision of any two to be decisive as to the price to be paid, which was to be the reasonable value of the furniture at the time of the sale. The contract also provided that should the defendant not exercise her option to purchase the furniture the plaintiff might require her to do so, and if they could not agree upon the value at that time, it should be "forthwith determined by arbitration as aforesaid," referring back to the former provision. After the original contract was entered into, the parties modified it by a supplemental agreement extending the time for the purchase of the furniture by the defendant, and again stipulated that, in the event of a failure to agree upon the price, the amount "was to be settled upon the same terms as in the original agreement, viz. each party to elect one person, in case of disagreement these two parties to select another, other conditions being the same." When the plaintiff demanded that defendant purchase the furniture, the parties being unable to agree, plaintiff selected Victor E. Stedman and the defendant designated Thomas B. Clark, as appraisers, who appraised the furniture at $5,666.54. This finding was reduced to writing, signed by each of the appraisers, and served upon each of the parties.

The court further found the amount arrived at by the appraisers to be the fair and reasonable value of the furniture on the date of the appraisement, and that the defendant acquiesced and agreed to all the acts of the arbitrators, or appraisers, and accepted and ratified their findings. It accordingly gave judgment in plaintiff's favor for the sum of $5,666.54 and costs.

Appellant contends that these findings have no support in the evidence, resting her contention, we think, more upon an interpretation of the contract than upon the insufficiency of the evidence. The respondent has not been sufficiently interested in the matter to enter an appearance in this court, no respondent's brief having been filed. We have no way of reaching parties who thus shirk the responsibility cast upon them by the appeal, and who, having secured a meritorious judgment, do not recognize the duty incumbent upon them of pointing out to the appellate tribunal the reasons why the action of the lower court should be sustained. It is as much the duty of the respondent to assist the court upon the appeal as it is to properly present a case, in the first instance, in the court below.

Notwithstanding respondent's neglect, we have examined the record, at the expense of our own time, and are satisfied that the judgment should be sustained. The lower court found, in effect, that the action of the parties, in arriving at the price the defendant was to pay plaintiff for the furniture, was a substantial compliance with their agreement, and that the finding of the arbitrators, or "appraisers," if the appellant likes that term better, was acquiesced in and agreed to by the defendant. There is evidence which, if believed by the trial judge, was amply sufficient to warrant the findings.

The judgment is affirmed.

We concur; KERRIGAN, J.; RICHARDS, J.

51 Cal. App. 89

HOLTMAN v. BUTTERFIELD et al.

(Civ. 3676.)

(District Court of Appeal, First District, Division 1, California. Jan. 17, 1921.)

1. Bills and notes 🔑28—Letter held not note.

Letter stating that "Herewith you will find my note for fifteen thousand dollars ($15,000.-00) payable in three years from date with interest at six per cent. Now dear Mrs. H., you will remember I have often told you that I owed my present health and happiness to your totally unselfish and loving care of me while in the mountains two years ago, and elsewhere. I hand you this token that you may know how much out of my abundance I appreciate the kind regard have always shown to me during the last few years. * * * Accept the inclosed with my love"—*held* not a promissory note, but merely a letter intended by the writer to accompany a note.

2. Trial 🔑136(3)—Meaning of unambiguous letter is a question for the court.

The meaning of an unambiguous letter, claimed to constitute a promissory note, is a question of law for the court and not a question of fact for the jury.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Mattie Berkley Holtman against Charlotte M. Butterfield and another, executors of the estate of F. D. Butterfield, deceased. Judgment of dismissal, and plaintiff appeals. Affirmed.

Clark & Law, of Los Angeles, for appellant.
Anderson & Anderson, of Los Angeles, for respondents.

WASTE, P. J. Plaintiff brought this action against the executors of the estate of F. D. Butterfield deceased, basing her claim upon a written instrument alleged to be a promissory note. The defendants denied the existence of any such note or other promise to pay to the plaintiff, on the part of the decedent. When the case came on for trial, a jury having been selected, plaintiff produced a witness who was sworn. Thereupon defendants objected to any evidence being offered or received in the case, upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. The court sustained the objection. The jury was discharged and a judgment of dismissal was entered, from which plaintiff has appealed on the judgment roll alone.

It is alleged in the complaint that on January 4, 1916, F. D. Butterfield, the decedent, made and delivered to plaintiff his promissory note in the sum of $15,000, payable three years after date, and bearing interest at 6 per cent. per annum, no part of which note had been paid except the sum of $1,200. After the death of Butterfield a claim, based upon and containing a copy of the alleged note, was duly presented to his executors and was by them rejected. Thereupon the plaintiff brought this action. A copy of the instrument upon which plaintiff seeks to recover, and which was set forth in the claim, is as follows:

"Los Angeles, Jan. 4, 1916.

"Mrs. Mattie Berkley Holtman—My dear Mattie: Herewith you will find my note for fifteen thousand dollars ($15,000.00) payable in three years from date with interest at six per cent. Now dear Mrs. Holtman, you will remember I have often told you that I owed my present health and happiness to your totally unselfish and loving care of me while in the mountains two years ago, and elsewhere.

"I hand you this token that you may know how much out of my abundance I appreciate the kind regard have always shown to me during the last few years. When I see again I will endeavor to explain to you personally how

much I have always appreciated your totally unselfish kindness. In the meantime accept the inclosed with my love and best wishes for your future health and happiness.
"Sincerely, F. D. Butterfield."

It is not claimed that a promissory note for $15,000, or for any other amount, was inclosed in or with the above instrument, or that there was any other writing delivered to or received by plaintiff other than said letter. Appellant contends, nevertheless, that the document is a promissory note; that it was recognized by the decedent during his lifetime as a valid obligation, evidence of which recognition, she asserts, is to be found in the fact that during his lifetime he paid her interest amounting to some $1,200, as alleged in her complaint. Her argument, in substance, is that this payment and alleged recognition of the obligation amounted to a construction put upon the document by the parties, that is binding upon the court if it appear that the instrument in question is ambiguous or indefinite. We are not impressed with this argument.

[1] It requires only a casual reading of this instrument to demonstrate that the trial court was correct in holding that no cause of action against the decedent's estate could be predicated thereon. It in no way rises to the dignity of a promise to pay $15,000, or any amount, to the plaintiff. It is very apparent that this particular instrument is nothing but a letter intended by the writer to accompany a promissory note, which he may have fully intended to execute and deliver to the plaintiff, and which by reason of the context of the writing, we may assume, he believed he was inclosing with it.

[2] We see nothing ambiguous or uncertain in the words contained in the letter sent by the decedent to the plaintiff. Their meaning was properly a question of law for the court, and not a question of fact to be determined by the jury. Swain v. Grangers' Union, 69 Cal. 186, 187, 10 Pac. 404; Harrison v. McCormick, 89 Cal. 327, 330, 26 Pac. 830, 23 Am. St. Rep. 469; Heffner v. Gross, 179 Cal. 738, 742, 178 Pac. 860.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

51 Cal. App. 128

CANDEIAS v. SUPERIOR COURT IN AND FOR MERCED COUNTY.

(Civ. 2287.)

(District Court of Appeal, Third District, California. Jan. 21, 1921.)

Certiorari 🔑5(2)—Will not issue where there is right of appeal.

Under Code Civ. Proc. § 1068, authorizing a writ of review when an inferior tribunal exercising judicial functions has exceeded its jurisdiction and there is no appeal, or any speedy and adequate remedy at law, the writ will not be issued to review a judgment alleged to have been without jurisdiction, from which an appeal would lie and in fact was taken, though the court refused to fix the amount of the appeal bond.

Petition by A. S. Candeias against the Superior Court of the State of California in and for the County of Merced for a writ of review to annul a judgment in an action of unlawful detainer. Writ discharged and proceedings dismissed.

See, also, 193 Pac. 957.

L. C. Pistolesi, of San Francisco, and O. F. Meldon, of Sacramento, for petitioner.

F. W. Henderson, of Merced, for respondent.

BURROUGHS, Presiding Justice pro tem. This is a proceeding by A. S. Candeias to obtain a writ of review to annul a judgment of the superior court of the state of California, in and for the county of Merced, in an action wherein William Pfitzer and Emily Pfitzer are plaintiffs and petitioner herein is the defendant.

A writ of review was issued out of this court December 15, 1920, commanding the respondent to certify to this court a transcript of the record and proceedings in said action. Respondent has appeared by a demurrer to the petition and a motion to dismiss the proceeding.

From the petition it appears that petitioner was a tenant of Pfitzer of an 80-acre dairy farm under a five-year lease, expiring December 31, 1922. At the time of the execution of the lease there were about 45 acres of the land planted to alfalfa, and among other conditions of said lease, the petitioner agreed to "keep all stock off of the alfalfa when the same is wet; * * * and in the event that any of the alfalfa is trampled out by stock, said party of the second part (petitioner) agrees to reseed the same at his own cost and expense."

The petitioner conducted said premises as a dairy farm and had about 80 head of dairy cows thereon.

April 21, 1920, the lessors commenced an action against the petitioner, in unlawful detainer, basing their cause of action upon an alleged violation of the foregoing provision of the lease, and in support of said action further alleged service of notice to surrender possession of said property and vacate the same within three days of service thereof, and that more than three days had elapsed since such service, and that the defendant (petitioner) refused to vacate and still continued in possession of the demanded premises. A copy of the demand is annexed to the complaint and made a part thereof. The demand is not in the alternative, requiring a performance of the covenants of the lease, or to deliver possession, but is a demand that the premises be surrendered, for failure to comply with the terms of the lease in "that you have pastured the land in alfalfa with your stock and allowed them to run thereon while the land was wet." Defendant answered denying the averments of the complaint as to his failure to comply with the terms of the lease. After a trial of the issues, the court made findings favorable to plaintiff and entered its judgment in accordance therewith. In due time defendant perfected his appeal to this court and made application to the trial judge, under the provisions of section 945 of the Code of Civil Procedure, to fix the amount of a bond on appeal and for an order to stay the execution of the judgment upon the filing of the bond pursuant to section 1176 of the Code of Civil Procedure; but said judge refused and still refuses to fix the amount of said bond. It is further alleged in the petition that, if said judgment be not annulled in this proceeding, the same will be carried into execution before the cause can be heard on the appeal, and that there is no other plain, speedy, or adequate remedy.

It is the contention of petitioner that, in an action in unlawful detainer, the jurisdiction of the court is special and limited, and the jurisdictional facts must clearly appear upon the face of the complaint, and unless they so appear the court acts in excess of its jurisdiction in trying the issues or rendering judgment thereon. He claims that the notice to deliver possession, not being in the alternative, as provided in subdivision 3, § 1161, Code of Civil Procedure, is insufficient to confer jurisdiction upon the court, and therefore this court should annul the judgment.

Under the view we take of this proceeding it is unnecessary to pass upon the questions raised by petitioner as to the sufficiency of the demand or the question of jurisdiction as those matters will be properly before the court on appeal. In actions of this character a right of appeal is given by section 963, Code of Civil Procedure, and of this provision of the law defendant has availed himself. Section 1068 of the Code of Civil Procedure provides when a writ of review may issue as follows:

> "A writ of review may be granted by any court, except a police or justices' court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."

In Noble v. Superior Court, 109 Cal. 523, 42 Pac. 155, after citing 1068, Code of Civil Procedure, it is said:

> "From this provision it is made manifest that three concurring requisites are essential to the issuance of the writ of review, viz.: (1) An excess of jurisdiction by the inferior tribunal, etc., exercising judicial functions; (2) that there is no appeal; (3) that there is no other plain, speedy, and adequate remedy."

It thus clearly appears that one of the prerequisites to the granting of the writ of review is that there is no appeal. The defendant, having a right of appeal in the action sought to be reviewed, is therefore not entitled to the writ. The demurrer to the petition is sustained, the writ of review discharged, and the proceedings dismissed.

We concur: BURNETT, J.; HART, J.

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51 Cal. App. 79

BREZZO v. BRANGERO. (Civ. 3523.)

(District Court of Appeal, First District, Division 1, California. Jan. 15, 1921. Hearing Denied by Supreme Court March 14, 1921.)

1. Executors and administrators ⟹3(2)—Husband held entitled to withdraw from bank funds of deceased wife for necessities without administration.

Under Code Civ. Proc. § 1454, authorizing a surviving husband or wife without administration to collect from any bank deposits of deceased, not exceeding $1,000 on making affidavit, a husband after his wife's death, having made the proper affidavit, *held* entitled to withdraw a fund amounting to $320.70 from a bank, but such withdrawal did not give the husband title thereto; the intent of the statute being to provide a temporary fund for immediate necessities.

2. Husband and wife ⟹151(7)—Husband financially able to pay wife's funeral expenses cannot recover them from wife's estate.

Where a surviving husband is financially able to pay his wife's funeral expenses out of his own property without recourse to the money of the wife, he cannot maintain a cross-complaint to recover such expenses in an action by the wife's executor to recover the wife's bank deposits withdrawn by him.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Isabella Brezzo, as executrix of the last will and testament of Margherita Brangero, also called Margherita Oldano, against Pietro Brangero. Judgment for plaintiff, and defendant appeals. Affirmed.

John J. Mazza, of San Francisco, and Geo. T. Kerr, of Watsonville, for appellant.

John L. McVey and M. Martino, both of Oakland, for respondent.

WASTE, P. J. Plaintiff, as executrix of the last will of Margherita Brangero, deceased, brought this action to recover the sum of $320.70, which the appellant, the surviving husband of the deceased, withdrew from the Bank of Italy, after his wife's death, upon filing the affidavit provided for in section 1454 of the Code of Civil Procedure, and without procuring letters of administration. In such affidavit the defendant stated that he was the surviving husband of the deceased and that the total amount left by her on deposit in all the banks of the state of California at the time of her death did not exceed $1,000. It was stipulated at the trial that all of the money so withdrawn by the defendant was used by him in payment of the hospital expenses, doctor's bills, and funeral expenses of the deceased wife. The lower court decided adversely to Brangero, and gave judgment against him for the fund withdrawn from the bank. From that judgment he appeals.

Section 1454 of the Code of Civil Procedure, in so far as pertinent to this appeal, reads as follows:

> "The surviving husband or wife [or other heirs, as the case may be] may, without procuring letters of administration, collect of any bank any sum which said deceased may have left on deposit in such bank at the time of his or her death; provided, such deposits shall not exceed the sum of one thousand dollars. Any bank, upon receiving an affidavit" stating the requisite facts, "may pay to said affiant or affiants any deposit of said decedent, if the same does not exceed the sum of one thousand dollars, and the receipt of such affiant or affiants, is a sufficient acquittance therefor."

[1] On the former hearing of this appeal, in an opinion written by Mr. Justice (pro tem.) Beasly, this court said:

> "It seems to be conceded by respondent that under the provisions of section 1454 the person or persons therein authorized—denominated by the appellant as the next to kin—may collect from the bank deposits when the aggregate amount thereof does not exceed $1,000, but it is contended that the right to so collect does not affect the title to the fund as against legatees of the decedent to whom such fund is bequeathed; that the party entitled to collect the money from the bank may do so, but must keep the fund intact, subject to the order of the executor or administrator subsequently to be appointed.
>
> "The purpose of the Legislature in enacting the section is, we think, quite clear. It was to provide the family of the deceased with temporary funds for such immediate necessities as funeral expenses, and perhaps to provide ready money for their support pending the probate of their estate. This being so, the husband, having made the proper affidavit, was entitled to withdraw the fund from the bank, but this did not give the husband title to the fund, that is to say, it was not intended by the provisions of the section that the fund should become the property of the husband."

We are satisfied with, and adhere to, the conclusion thus announced, on the first question presented by the appeal.

In addition to claiming the fund as his own, the appellant filed a cross-complaint in the action, in which he sought a set-off amounting to $163.50, based on the fact that that sum was paid by him for the funeral expenses of his deceased wife. He had previously filed a claim against the estate for this amount, which not being acted upon, he elected to treat it as rejected, and based his cross-complaint thereon. The trial court disallowed the prayer of the cross-complaint. This court held its action improper and reversed the judgment in that respect. A petition for a rehearing was granted upon the single question as to the right of the appellant to recover upon his cross-complaint, and the matter was ordered placed upon the calendar for further hearing and determination of that question alone.

[2] Upon a further consideration of the question, and an examination of additional authorities bearing on the matter, we have reached the conclusion that the lower court was right in denying the defendant any set-off against the estate for the amount expended by him in payment of the funeral expenses of his deceased wife. If, as was the case in Re Estate of Mathewson (Sup.) 184 Pac. 867, the husband does not have sufficient income to pay the funeral expenses of the deceased wife, it may be proper under some circumstances, as indicated in that decision, to make an allowance to the husband for such purpose. But here the court found that the defendant, the surviving husband of Margherita Brangero, deceased, was financially able to pay the funeral expenses out of his own property and estate, without the necessity of any recourse to the moneys of the deceased wife. Consequently, he was bound to bury the deceased wife in a suitable manner, and to defray the necessary funeral expenses. In re Weringer, 100 Cal. 345, 346, 34 Pac. 825.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

51 Cal. App. 120

PALMER v. PALMER. (Civ. 3744.)

(District Court of Appeal, First District, Division 1. California. Jan. 20, 1921.)

Divorce 🔑130—Evidence held to show extreme cruelty rendering denial of divorce error.

In an action for divorce, evidence *held* to show extreme cruelty, rendering it error for the court to deny plaintiff a divorce, where plaintiff's evidence showed that defendant had on several occasions brutally maltreated her physically, and some of such acts were sufficiently corroborated, and that defendant's conduct with other women inflicted great mental suffering upon plaintiff; defendant offering no rebutting evidence.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Ora Clark Palmer against William G. Palmer. Judgment for defendant, and plaintiff appeals. Reversed.

S. J. Parsons, of Los Angeles, for appellant.

Ernest E. Noon, of Los Angeles, for respondent.

KERRIGAN, J. This is an appeal by the plaintiff in an action for divorce instituted by her against the defendant, her husband, alleging acts of cruelty and adultery upon his part. At the conclusion of the evidence for plaintiff the court directed that judgment be entered in favor of the defendant, from which judgment the plaintiff prosecutes this appeal.

It seems quite clear from the course pursued by the trial judge during the introduction of plaintiff's evidence, and particularly from his remarks at the conclusion thereof, that he was of the opinion that the plaintiff was seeking a divorce on the single ground of the defendant's adultery, and that the evidence was insufficient to sustain a decree in her favor upon that ground; whereas in truth her action was also based upon the ground of physical and mental cruelty, which the evidence abundantly established and in the absence of evidence on the part of the defendant in contradiction thereof, left the cause in such guise that the action of the trial court in dismissing the suit was erroneous.

The plaintiff and defendant were married in February, 1894, and at the time of the trial there were living as the issue of this marriage four children—Ethel, aged 16; Chester, aged 13; Oran, aged 12 years; and Paul, aged 5 years. The plaintiff testified to various incidents occurring between herself and the defendant, some of which we will refer to: The defendant is a member of a so-called religious sect known as "Holy Rollers" and a preacher and expounder of its doctrine. On one occasion (we will hope when he was off duty) he tore off all the plaintiff's clothes. Upon another he dragged her out of bed, and threw her across the room, and then drew her out onto an adjoining sleeping porch, took off her gown, and then beat her with his clenched fist, striking her upon the breast. As a result of this struggle she was sore all over for several days, and later the pain in her side and breast became so serious as to necessitate a surgical operation by removing the breast. At another time the defendant went to plaintiff's bedroom in company with a woman (named as the corespondent in this case), a Mrs. Walker, and awakened the plaintiff. Learning that the defendant desired to make some sort of confession to her the plaintiff objected to the presence of Mrs. Walker, who thereupon withdrew, and the defendant then got down upon his knees at the bedside of his wife, and informed her that Mrs. Walker had refused to become a member of their church, which she contemplated doing upon the following day, unless he had confessed to the wrongs he had done his wife, whereupon he stated that he had trifled with and been intimate with four women. Later that morning the defendant communicated to the plaintiff that Mrs. Walker was going to stay with them at their home. The plaintiff protested. Her objection was met by the defendant telling her that she had nothing to say about the matter; that "the Lord says Mrs. Walker is going to stay here, and she will stay." After this introduction to the plaintiff's home the defendant and said corespondent the next morning left for their church, the defendant telling the plaintiff that Mrs. Walker would be home for dinner. Notwithstanding the plaintiff's protest, Mrs. Walker returned with the defendant, and a place was arranged for her at the family table by one of the children. Subsequently, during Mrs. Walker's stay of three weeks at the Palmer home, and on one Saturday night after the plaintiff had cleaned her house and "put it in order for Sunday," and while she was getting the baby ready for bed, the defendant surprised his wife by transporting her bed and bedding from the upper to the lower floor of the house, saying that she should sleep downstairs, against which she unavailingly protested. While upon this point (as upon others) the record is not clear, apparently from December 2 to 28, 1917, when the plaintiff left her home she, her daughter, and the baby slept downstairs, while the two other children, their pastor father, and his newly found convert slept upstairs.

On this subject of the curious intimacy existing between this "Holy Roller" preacher and his coadjutor, the plaintiff also testified that "they had a bed in the study, where they spent a good many hours alone with the door locked"; that she objected to the defendant complying with Mrs. Walker's request to rub and hold her hand to relieve her fingers of numbness, and to his serving this intruder with breakfast in bed. On the morning before the plaintiff left the defendant and their home, she ordered Mrs. Walker to leave the house. On the following day, the 28th of December, it appears that a Mrs. Susie Barnell, a sister of the defendant, called to talk with him about his conduct towards the plaintiff. This lady was a witness at the trial, and testified that she at that time said to the defendant: "I am going to order Mrs. Walker out of the house. I am not going to have her tormenting Ora (plaintiff)." For this purpose she went upstairs, followed by the defendant, who warned Mrs. Walker, saying: "Lock the door. Susie is coming." A quarrel ensued in the upper hall between the two women, Mrs. Walker pushing Mrs. Barnell through the hall and down onto the landing, the while tearing her underclothes to pieces. On her part Mrs. Barnell struck Mrs. Walker with an empty revolver at which the defendant became violent, so that the plaintiff directed two of the children, the girl and the baby, to leave the house, saying to the girl, "Papa may kill you." Mrs. Barnell having thrown the pistol downstairs, the defendant went after it, and, meeting his wife at the bottom of the stairs, struck her on the back of the head, knocking her to the floor and stunning her, and also pushed his sister Susie out of the house. It was this scene of violence which culminated in the plaintiff leaving defendant's home and not returning. Its details were given in testimony both by the plaintiff and Mrs. Barnell, and parts of it were corroborated by Oran Palmer, one of the children of the parties, 12 years of age. Ethel Palmer, their daughter and eldest child, testified that upon an occasion about 3 years prior to the trial, the defendant struck the plaintiff with his hand and took her into another room, where she heard her mother crying. Other witnesses testified that the defendant was with Mrs. Walker on two occasions at least alone at the church with the doors locked.

From this reference to the evidence, it is too clear to require argument that in the absence of rebutting testimony the plaintiff was entitled to a decree of divorce from the defendant upon the ground of extreme cruelty. Her own evidence showed that the defendant had on several occasions brutally maltreated her physically, and some of these acts of cruelty were sufficiently corroborated, and the defendant's open association with Mrs. Walker, and insisting upon her retention in the home of the parties against the protest of the plaintiff, and his conduct there with and demeanor toward this woman on the one hand and the plaintiff on the other, constitute a plain instance of conduct on the part of a married person calculated to inflict great mental suffering upon his spouse, which the law regards as ground for dissolving the bonds of matrimony under which such a course of conduct is possible. MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; Avery v. Avery, 148 Cal. 239, 82 Pac. 967.

Counsel for the defendant in the trial court cross-examined none of the witnesses who testified for the plaintiff, nor did he call any witnesses on behalf of the defendant. He rendered no better, although less efficacious, service to his client in this court, where he has filed no brief nor presented any argument on his behalf. Thus unassisted, we think it follows from what we have above set forth that the judgment should be reversed.

It is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

51 Cal. App. 52

GEARY v. DE ESPINOSA et al. (Civ. 3639.)

(District Court of Appeal, First District, Division 1, California. Jan. 7, 1921. Hearing Denied by Supreme Court March 7, 1921.)

1. Statutes 🔑181(1)—Construed to effect legislative intent.

Statutes must be read and considered in conjunction with the legislative intent, and must be liberally construed to effect such intent.

2. Partition 🔑19—Authorized by remainderman out of possession.

Under the amendment to Code Civ. Proc. § 752, by St. 1919, p. 319, which omitted from the section the original provision that plaintiff in partition must hold and be in possession of real property, a remainderman out of possession can maintain partition, though he could not do so under the section before amendment.

3. Partition 🔑12(5)—Remainder may be divided or sold subject to life estate.

In a suit for partition by a remainderman out of possession, where the property was all in possession of one life tenant, the interests of the several remaindermen may be partitioned by division or sale subject to the life estate, without interfering with the possession of a life tenant.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action of partition by J. L. Geary against Josefa Boronda De Espinosa and others. From a judgment sustaining a demurrer to the petition, and dismissing it, plaintiff and defendants Manuel D. Espinosa and others appeal. Reversed.

L. T. Jacks, W. G. Banta, and J. L. Geary, all of San Francisco, for appellant Geary.

R. C. McComish, of San Jose, for other appellants.

Russell Scott and C. F. Lacey, of Salinas, for respondent Spreckels Sugar Company.

Z. B. Stuart, C. W. Byrer, and J. W. Hocker, all of Los Angeles, for other respondents.

WASTE, P. J. Plaintiff brought this action seeking to partition three parcels of real property. The lower court entered a judgment of dismissal upon the ground that the action could not be maintained under the provisions of section 752 of the Code of Civil Procedure by the plaintiff, a remainderman out of possession, while the holder of the life estate was in possession. Plaintiff appeals upon the judgment roll.

The action is one for the partition of three parcels of real property in Monterey county, containing more than 10,000 acres of land, possession of all of which, as alleged in the complaint, is held by the defendant Josefa Boronda De Espinosa as life tenant. The entire remainder in fee is held by the plaintiff and 15 of the defendants, as tenants in common, subject to certain leases and mortgages of individual interests of certain of the remaindermen in the property.

A general and special demurrer to the complaint was interposed by one of the defendants and overruled. Thereupon the life tenant and all of the defendant remaindermen answered. The answer of the holder of the life estate, Mrs. Espinosa, alleges her ownership in fee simple of 30 acres of the property, but otherwise admits all the material allegations of the complaint, and prays for a partition. All of the defendant remaindermen, except 2, in their answers also consent to partition. One of them, Z. B. Stuart, in his answer as first filed, averred that the entire property could be readily and beneficially divided without a sale, and joined in the prayer of the other defendants for the partition. Subsequently, by an amendment to his answer, Stuart denied that a partition could be had without great damage to him, and further alleged that litigation over their respective interests in the property was pending between himself and certain other defendants. Defendant B. A. Soberanes, as trustee for Salvador Espinosa, denies that partition can be made at all, for the reason that the defendant life tenant Josefa Boronda De Espinosa holds, and will hold, possession of the entire property, subject to the leases above mentioned, during her life.

The action was brought on for trial, and at the outset, upon the hearing, objection was made to the introduction of any evidence in support of plaintiff's case. After argument the court refused to admit the introduction of such testimony, reversed its former ruling, and sustained the demurrer to the complaint, theretofore interposed, without leave to amend. The plaintiff elected to stand upon his complaint. A judgment of dismissal of the action was thereupon entered.

The sole subject of investigation before the court on this appeal is whether or not the complaint states facts sufficient to constitute a cause of action. More specifically stated, the question to be determined is whether or not a remainderman out of possession, and not entitled to the present right of possession, may compel partition of the remainder while the life tenant is in possession of the entire property. It is the general rule, prevailing in England and in many jurisdictions in the United States, that no person has the right to demand a court to enforce a compulsory partition, unless he has an estate in possession—one by virtue of which he is entitled to enjoy the present rents, or the possession of the property as one of the cotenants thereof. Freeman on Cotenancy and Partition, § 446; Mills v. Stump, 20 Cal. App. 84, 89, 128 Pac. 349. Section 752 of our own Code of Civil Procedure, under the provisions of which this action may be maintained, if at all, as it stood before the amendment adopted in 1919, was as follows:

> "When several cotenants *hold* and *are in possession of* real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners." (The italics are ours.)

While recognizing that in some of the states the statutes are broad enough to include the holders of nearly every estate that can exist in lands as proper parties plaintiff in this kind of an action, the Supreme Court held that in this state under the section as it then stood, it was only the cotenants mentioned therein who held and were in possession of real estate, who could bring an action for partition, and that it was only that real property which was thus held by them that could be partitioned. Jameson v. Hayward, 106 Cal. 682, 686, 39 Pac. 1078, 46 Am. St. Rep. 268.

In 1919, however, and before this action was brought, the section was amended to read as follows:

> "When several cotenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof," etc. Stats. 1919, p. 319.

[1] Appellant argues that by this amendment the bar of the common law and of the former statute in this state has been re-

moved, and that he is now entitled to maintain the action, although not now in, or entitled to, possession of the property sought to be divided. His contention appears to be based upon a reasonable construction of the section as it now stands. Statutes must be read and considered in conjunction with the legislative intent, and then be liberally construed with the object in view to effect such intent. Odell v. Rihn, 19 Cal. App. 713, 719, 127 Pac. 802.

[2] When adopting the amendment of 1919 to the section, the Legislature had before it the bar of the common law and of its own enactment as it then stood. It was then, as now, the law in a number of states that a remainderman, although not in possession, might bring a partition suit. Crowley v. Sutton (Mo.) 209 S. W. 902, 903; Doerner v. Doerner, 161 Mo. 407, 61 S. W. 802; Deadman v. Yantis, 230 Ill. 243, 250, 82 N. E. 592, 120 Am. St. Rep. 291; Stahl v. Buffalo R. & P. Ry. Co., 262 Pa. 493, 106 Atl. 65, 67; Hanson v. Ingwaldson, 77 Minn. 533, 538, 80 N. W. 702, 77 Am. St. Rep. 692. These decisions appear to be based upon statutes reading so like ours as to be practically the same in effect.

Consequently we think it but fair to assume that, when the Legislature so amended section 752 of the Code of Civil Procedure as to strike from it the provision that in order for a cotenant to maintain an action in partition he must *hold* and be *in possession of* real property, and permitted the action to be brought by one who may merely *own* real property, as such tenant in common, it must have intended to remove the restriction of the common law and of its own prior enactment. To so hold does no violence to settled rules of law, for while it may be true, as pointed out by the respondent, that more jurisdictions interpose the common-law bar of a right of possession, as a prerequisite to maintaining an action in partition, than hold to the contrary, it was well within the province of our own Legislature to adopt either rule, as it deemed best. It therefore becomes unnecessary for us to enter into a minute discussion of the cases cited by the respondent, which support the rule in force in this state before the amendment to this section.

We are of the opinion that it is now the rule in this state that actual possession, or a right of actual or immediate possession, is no longer necessary in order to enable a cotenant to maintain an action in partition, if he otherwise falls within the provisions of section 752 of the Code of Civil Procedure, as it now reads. Fitts v. Craddock, 144 Ala. 437, 439, 39 South. 506, 113 Am. St. Rep. 53; Easly v. Easly, 78 Wash. 505, 510, 139 Pac. 200. Clearly under the decisions above noted the plaintiff is entitled to maintain this action against all the other holders of remainder interests in the real property. It is unnecessary for us to further consider the question whether or not the action will lie against the defendant Josefa Boronda De Espinosa, owner of the life estate, which is raised by some of the authorities (Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352), for she joined in the prayer of the plaintiff and certain of the other defendants that the real property be partitioned in conformity with the interests of the respective parties. It is certain, of course, that the decree in the partition suit can in no wise affect her rights.

[3] Furthermore, there is no necessity for disturbing the interest of Mrs. Espinosa, for there can be an actual partition, as between the reversioners, by each taking his share in severalty, subject to her life estate, or the whole may be sold subject to her interest. Hanson v. Ingwaldson, supra.

The judgment is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

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49 Cal. App. 551

HARDY v. FREY et al. (Civ. 3340.)

(District Court of Appeal, Second District, Division 1, California. Oct. 11, 1920.)

1. Mortgages ⟹151(3)—Mechanic's lien superior to subsequently delivered mortgage.

Where, after plaintiff, pursuant to contract, entered upon a lot and commenced construction work, a mortgage executed by the owner was delivered, plaintiff's mechanic's lien is superior under Code Civ. Proc. § 1186, declaring that liens provided for are preferred to any mortgage which attached subsequent to the time when building was commenced; there being nothing to show that plaintiff was estopped from asserting the superiority of his lien over the mortgage because of its deposit in escrow before the commencement of building.

2. Appeal and error ⟹907(3), 931(1)—Findings must be construed most favorably in support of the judgment.

Findings must, where possible, be construed most favorably in support of the judgment, and, in the absence of the bill of exceptions, they are presumed to be true for the purpose of the appeal.

3. Appeal and error ⟹907(3) — Presumption that there was no evidence offered on issue on which there was no finding.

Where there was no finding on the issue of estoppel raised by defendant's answer and the appeal was on the judgment roll alone, judgment for defendant cannot be sustained on the theory that the affirmative answer which is deemed to be denied should be taken as true, for since there was no finding the appellate court will presume no evidence was introduced in support of that allegation of the answer.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action to foreclose a mechanic's lien by H. M. Hardy against Mrs. Elizabeth C. Frey and others and John F. Tanner. From a judgment for defendant John F. Tanner, plaintiff appeals. Reversed.

G. C. De Garmo, of Los Angeles, for appellant.

E. L. Brady and J. L. Brady, both of Los Angeles, for respondent.

SHAW, J. Action to foreclose a mechanic's lien. Judgment went against plaintiff, from which he appeals upon the judgment roll alone.

It appears from the findings that on October 9, 1914, defendant Elizabeth C. Frey acquired by purchase a lot, title to which prior to said date had been vested in the Los Angeles Trust & Savings Bank. In anticipation of the purchase and while negotiations therefor were pending, she, on September 17, 1914, entered into a contract with plaintiff whereby he undertook and agreed to erect a dwelling house upon the lot for her. In pursuance of the contract he, on October 5, 1914, entered upon the lot and commenced the work of constructing the house. Four days later, to wit, on October 9th, the property was conveyed to Mrs. Frey, at which time a mortgage thereon, which, known to plaintiff, she had theretofore signed and acknowledged, was, by the party in whose hands it, with other papers, had been deposited in escrow, delivered to defendant John F. Tanner and filed for record. Upon these facts the trial court as a conclusion of law found the mortgage so given to Tanner was superior to plaintiff's lien for constructing the house.

[1] In so doing the court, in our opinion, erred. An indispensable requisite to the validity and operation of a mortgage is delivery thereof. While, as found by the trial court, plaintiff knew that Mrs. Frey had signed and acknowledged the mortgage in question, and that Tanner had agreed to loan her $1,200 upon the same, this cannot be construed as equivalent to a finding that the mortgage was delivered; and especially is this true since the court further found the mortgage was not delivered until October 9, 1914. Hence the lien of the mortgage did not attach to the lot until a date subsequent to that upon which the plaintiff commenced the work of constructing the house, and therefore, as provided in section 1186, Code of Civil Procedure, plaintiff's lien must be deemed superior to the mortgage.

While it appears that the mortgage and other papers relating to the transaction were, at the time plaintiff commenced the erection of the house, deposited in escrow, the nature of the agreement under which the deposit was made is not shown; nor, conceding the agreement to have been of such character that the deposit of the mortgage in pursuance of its terms could be said to constitute delivery thereof to Tanner, nevertheless it is not made to appear that plaintiff had knowledge or notice of the fact that such deposit in escrow was made. No facts are found upon which to insist that plaintiff was estopped from asserting his claim of lien. The argument of respondent's counsel and theory upon which the trial court apparently based its conclusion appears to rest upon the fact alone that, since plaintiff knew Mrs. Frey had signed and acknowledged the mortgage, the subsequent consummation of the loan and delivery of the mortgage rendered it superior to plaintiff's lien. To so hold would be contrary to the express provision of section 1186, Code of Civil Procedure, which provides that—

> "The liens provided for in this chapter are preferred to any * * * mortgage * * * which may have attached subsequent to the time when the building * * * was commenced; * * * also to any * * * mortgage * * * of which the lien-holder had no notice, and which was unrecorded at the time the building * * * was commenced."

[2, 3] In his answer and by way of estoppel, defendant alleged:

> "That the said Hardy agreed to and with this defendant on or about August 22, 1914, that the said lien of defendant's said mortgage was and is superior and paramount in time and right over any alleged lien or claim of lien upon the part of the plaintiff Hardy or of any one or all of the plaintiffs hereinbefore mentioned or of any other person, firm or corporation whatever"—which affirmative allegation is deemed to be denied.

Notwithstanding such denial, the court made no finding in response to the issue. Nevertheless, since the evidence is not brought up, respondent insists that we must accept the allegation of the answer as being true. We do not so understand the law. Findings must, where possible, be construed most favorably in support of the judgment (Ballou v. Sunflower, etc., Co., 165 Cal. 559, 132 Pac. 1036), and in the absence of a bill of exceptions, they are presumed to be true for the purposes of the appeal (Freman v. Marshall, 137 Cal. 161, 69 Pac. 986). Nevertheless a judgment cannot be upheld unless it is supported by the findings. Appellant is not complaining of any error due to the failure of the court to find upon defendant's affirmative allegation. He is not prejudiced by reason thereof, and hence, since there is no finding that the allegation is true, we must presume no evidence was introduced in support thereof. Engebritsen et al. v. Latin-American Pub. Co., 38 Cal. App. 141, 175 Pac. 652.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

51 Cal. App. 117

BERRY v. MIAMI CYCLE & MFG. CO.

(Civ. 3742.)

(District Court of Appeal, First District, Division 1, California. Jan. 20, 1921.)

1. Sales ⚷441(3)—Evidence held to prove nonexistence of alleged defects in motorcycles.

In action by buyer of motorcycles for breach of warranty, evidence *held* to sustain finding that alleged defects did not exist.

2. Costs ⚷260(4)—Appeal solely on ground of insufficiency of evidence is frivolous, where evidence is amply sufficient.

Where the evidence is amply sufficient to sustain findings, appellant, who based appeal solely on the ground of insufficiency of evidence to sustain findings, should be penalized for prosecuting a frivolous appeal.

3. Costs ⚷260(7)—Appellant who prosecuted frivolous appeal will not be penalized, where respondent failed to present brief.

Appellant who prosecuted frivolous appeal will not be penalized, where respondent, to whose benefit such penalty would redound, is also at fault in not having filed or presented brief.

Appeal from Superior Court, Los Angeles County; F. G. Finlayson, Judge.

Action by T. E. Berry against the Miami Cycle & Manufacturing Company, in which defendant cross-complained. Judgment for defendant on cross-complaint, and plaintiff appeals. Affirmed.

Lewis Sherman Jones and Edward E. Gray, both of Los Angeles, for appellant.

Cates Robinson, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal by the plaintiff from a judgment in favor of the defendant in an action wherein the plaintiff sought to recover damages from the defendant for an alleged breach of the warranties of an agreement entered into between the parties, by the terms of which the plaintiff and one F. M. Hodge were made the sole and exclusive agents of the defendant for the sale of a certain type of motorcycle, known as Flying Merkle motorcycle, throughout certain portions of Southern California, and by which said agreement, according to the plaintiff's contention, the defendant warranted said motorcycles to be free from imperfections in the nature of latent defects arising from the process of manufacture, but that a large number of said motorcycles were defective in these respects, and for that reason unmerchantable, to the damage of the plaintiff and said Hodge in a certain sum. Hodge is alleged to have conveyed his right of recovery to the plaintiff prior to the inception of the action. The defendant in its answer denied the averments of the plaintiff's complaint as to any breach of warranty on its part and as to any damage resulting therefrom, and by way of cross-complaint sought to recover from the plaintiff the sum of $723.71 upon a book account for motorcycles and motorcycle parts sold to plaintiff, and for which he had failed and refused to pay.

Upon the trial of the action evidence pro and con was presented by the respective parties, which covers 710 pages of the reporter's transcript on appeal. The trial court from this evidence found against the plaintiff's claim as to the defendant's breach of its warranties in the respects indicated, and expressly found that the motorcycles delivered to the plaintiff were in every particular free from imperfections in material and workmanship, and were in serviceable working order at the time of their said delivery, and that, with the exception of four of said motorcycles, they were free from the specific latent defects specified by the plaintiff as existing in them, and as to these defective machines their depreciation in value by reason of the existence of said latent defects amounted altogether to the sum of $18.50. The court further found that the defendant was entitled to recover from the plaintiff upon its cross-complaint in the sum of $723.71. It accordingly rendered judgment against the plaintiff for the difference in these two sums, namely, the sum of $705.21. It is from this judgment that the plaintiff has prosecuted the present appeal.

[1] The sole contention which the appellant makes upon this appeal is that the evidence is insufficient to justify the findings of the trial court. He has failed to file in support of this contention or present any supplement to the typewritten transcript, or any adequate statement of the evidence embraced within its 710 pages, and the sole reference to the evidence in the case is contained in a scant seven pages of his brief. A cursory examination of the transcript shows that practically the whole thereof is occupied with testimony upon the main issue in the case, and that upon that issue the defendant presented many pages of testimony, consisting, for example, in the evidence of its agents in charge of the manufacture of these motorcycles, who testified as to the careful tests to which every machine issuing from its factories was subjected before leaving the same, both in the factory and on the road, which strongly tended to show the practical impossibility of the existence to any considerable degree of the defects which the plaintiff claimed to exist in these motorcycles. There was also evidence presented on the part of its sales agents, who came in contact with the plaintiff and his associate Hodge during the several years when they were acting as the defendant's representatives in the sale of these motorcycles, and whose testimony showed

that no complaint had ever been made by either of them as to the existence of the particular defects to which they testified at the trial. The defendant also offered numerous letters written by the plaintiff in ordering parts for replacement in motorcycles already delivered and in use, in none of which did it appear, either that complaint was made of these claimed defects, or parts ordered for their replacement. Evidence of this character is scattered all through this voluminous transcript, and is such in volume and amount as to amply sustain the finding of the trial court that the particular defects to which the plaintiff testified on the trial of the cause had no existence in fact or to any greater extent than that found to exist in four of these machines. The evidence as to the plaintiff's indebtedness to the defendant in the sum set forth in its cross-complaint also amply sustains the finding of the trial court in that regard.

[2, 3] The appellant's contentions herein are utterly without merit, and he should be penalized for taking and prosecuting a frivolous appeal. This court would have no hesitation in affixing this penalty were it not for the fact that to impose it would redound to to the benefit of the respondent herein, who on its part is grossly at fault in this case for failing to present or file in this court a respondent's brief, and for which, did the statute permit, it should also be penalized.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

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51 Cal. App. 148

PHŒNIX v. GIBSON. (Civ. 3683.)

(District Court of Appeal, First District, Division 1, California. Jan. 24, 1921.)

1. Appeal and error 🔑1010(1)—Conclusions of fact not disturbed where supported by evidence.

Trial court's conclusions of fact will not be disturbed on appeal where supported by sufficient evidence.

2. Quieting title 🔑44(3)—Evidence held to prove agreement to sell land and reimburse defendant's intestate for improvements made.

In action to quiet title, evidence *held* to sustain defendant's claim that her intestate had made improvements on the land under agreement with plaintiff's intestate that, on completion of the improvements, the property should be sold and defendant's intestate reimbursed for making improvements.

3. Quieting title 🔑49—Court might order property sold pursuant to owner's agreement to sell and compensate another for improvements.

Where plaintiff's intestate owning land made agreement with defendant's intestate whereby the land was to be sold after defendant's intestate had made improvements thereon and that defendant's intestate was to be compensated for such improvements out of proceeds of sale, equity had jurisdiction, in the absence of any intervening rights of other parties, to order that the property be sold and that defendant be compensated out of proceeds for improvements made by intestate.

4. Appeal and error 🔑301—Contention urged for first time on appeal not considered.

The contention that the judgment is excessive, not urged in motion for new trial but made for the first time on appeal, not considered.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Josie Phœnix, as administratrix of the estate of Hilario Lopez, deceased, substituted for Hilario Lopez, against Dorothy Gibson, as administratrix of the estate of William Gibson, deceased. From judgment for defendant on her cross-complaint, plaintiff appeals. Affirmed.

M. R. Van Wormer, Dist. Atty., of San Luis Obispo, for appellant.

Webster & Ryan, of San Luis Obispo, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant upon her cross-complaint in an action to quiet title to certain real estate. The action was one originally begun by one Hilario or "Joe" Lopez, who died during its pendency, and the present plaintiff, as the administratrix of his estate, was substituted in his place. Lopez was during his lifetime the owner of the property in question, but it is averred by the defendant in her cross-complaint that an agreement had been entered into between said Lopez and one William Gibson, of whose estate she is administratrix, that said William Gibson would improve and rebuild a dwelling house upon said premises, and that after the same had been completed the property should be sold, and from the proceeds of such sale said William Gibson should be reimbursed for the moneys expended by him in making said improvements, and that said Gibson had performed his part of said agreement at an expenditure of the sum of $1,200, no part of which had been paid. The plaintiff denied these allegations, and upon the issues thus raised the cause went to trial, at the conclusion of which the trial court made its findings in favor of the defendant upon her said cross-complaint, and thereupon entered judgment directing that the property in question be sold, and that from the proceeds of such sale the defendant be paid the sum of $1,200, together with her costs. It is from this judgment that the present appeal has been taken.

The first point urged by the appellant is that the evidence is insufficient to justify the finding of the trial court as to the existence of the agreement upon which the defendant predicates her right of recovery. The proof of the agreement in question principally consisted in certain letters claimed by the defendant to have been written by said Lopez to William Gibson, the most important of which was a letter couched in the following terms:

> "Taft, Cal., Jan. 16, 1917.
>
> "Mr. Gibson: In reply to your note in regards to the property, you go ahead and fix things up and pay the taxes and when I come over we will try and sell it and you can get your money out. I haven't seen or heard from the girls for some time.
>
> "Yours respectfully, Mr. Lopez."

This letter appears upon its face to be an answer to a note or letter written by Gibson to Lopez, with the contents of which we are not made acquainted, and both of these were preceded by another letter from Lopez which read as follows:

> "Taft, Cal., Oct. 9, 1915.
>
> "Mr. Gibson: In regards to note about that property you go ahead and build you a house on 25 feet of it, and you can have it. You keep the taxes paid up in full. I went to Bakersfield to see Lola, but she was away, so if you want to pay the taxes and take twenty-five feet of that lot you can. As ever and respectfully—if you pay the taxes let me know.
>
> "Joe Lopez."

[1] This letter also appears to be an answer to a communication of some sort from Gibson the purport of which can only be inferred from the reply of Lopez. The authorship of these letters from Lopez was denied by him while a witness during the trial, and the proof of their authenticity rests upon a comparison of the signatures of Lopez with his admitted signature in other documents. The trial court had the original of each of these signatures before it, and had also before it the witness Lopez, whose testimony in relation to his ability to write and to his having made the agreement with Gibson was quite materially impeached upon cross-examination. From our own examination of these signatures we are of the opinion that the conclusions of the trial court as to the genuineness of the letters of Lopez is sufficiently supported by the evidence in the case, and will not therefore be disturbed upon appeal.

[2] The next question before us is as to whether or not these letters of Lopez afford sufficient proof of the agreement upon which the respondent relies to justify the court's findings as to the nature and effect of said agreement. It must be conceded that these letters, and especially the one under date of January 16, 1917, upon which the respondent chiefly depends, are indefinite as to the nature and extent of the work of improvement which Gibson was to do in relation to the building already upon the premises. This uncertainty would probably have been removed had the note to Gibson to which this particular letter was a reply been produced. It, however, was in the possession of Lopez, if in existence, which Lopez denied, and of which he also failed or refused to disclose the contents. His subsequent acts and conduct, however, in relation to the work which Gibson actually did in the way of improving the property, shed a strong light upon the understanding between the parties as to what the proposed improvements were to be at the time Gibson was directed to "Go ahead and fix things up," in the words of the letter of January 16, 1917. We are of the opinion that taking all these things into consideration the trial court was justified in making its finding to the effect that such an agreement as the defendant pleaded in her cross-complaint was made.

[3] This brings us to the appellant's concluding contention, which is that the evidence is insufficient to show that it was the intention of the parties to the said agreement to create a lien in Gibson's favor for the value of the work which he was to do in improving the building upon the premises in question. The trial court, however, does not so find, nor do we think such a finding was necessary to sustain that portion of its judgment which directs a sale of the premises and the payment from the proceeds of such sale of the amount due the estate of Gibson. All that the trial court did was to find that there was an agreement between the parties that after the improvement of the premises had been made the property was to be sold, and that out of the proceeds of such sale the costs of such improvements were to be paid. The letter of Lopez dated January 16, 1917, justifies the making of this latter finding, and all that the trial court undertook to do in this equitable proceeding was to carry this portion of the agreement between the parties into effect. We are pointed to no authority which denies this power to a court of equity, and have no doubt that it existed in the particular case before us in the absence of any intervening rights of other parties.

[4] The claim of the appellant that the judgment was excessive was not made to the lower court upon her motion for a new trial, and is urged for the first time upon appeal. It therefore comes too late; but, even if it were otherwise, our inspection of the record satisfies us that said claim is devoid of merit.

Judgment affirmed.

We concur: **WASTE, P. J.; KERRIGAN, J.**

51 Cal. App. 74

HARPER & REYNOLDS CO. et al. v. HAMMOND LUMBER CO. et al.

(Civ. 3183.)

(District Court of Appeal, Second District, Division 2, California. June 14, 1920. On Rehearing Jan. 14, 1921. Hearing Denied by Supreme Court March 14, 1921.)

1. Mortgages ⟹151(3)—Deed of trust given by owner to materialmen is prior to mechanics' liens.

Where an owner, to enable the contractor to obtain material, gives a deed of trust to a materialman, such deed of trust takes priority over the claims of subcontractors and other materialmen; consequently, where the deed of trust was given to the contractor to enable him to procure materials, and he assigned it to a lumber company, it still takes priority.

2. Mortgages ⟹151(3)—Deed of trust given contractor by owner takes priority over claims of mechanics, not being fraudulent.

Where a contract for the improvement of a building provided for payment of a sum to be raised by mortgage, and further provided that the owner should give the contractor a note secured by a second deed of trust, and in event that the expense of the work exceeded the two amounts the owner should pay the same, and it appeared from the fact that the work was being done on a cost plus basis that the deed of trust was to enable the contractor to obtain material, such deed of trust, having been assigned to a lumber company, takes priority over claims of materialmen in subcontractors or mechanics' liens; it not being open to attack as a constructive fraud upon them.

On Rehearing.

3. Mortgages ⟹151(3)—Trust deed given contractor held prior to mechanics' liens.

Where a contract for the alteration of a building provided that the owner should pay an amount realized by mortgage, and should give his note secured by second deed of trust to the contractor, who was working on a cost plus basis, and further required the contractor to submit all contracts to the owner, the contractor cannot be deemed an original contractor, so that the execution and acceptance of the trust deed was an attempt to assign a portion of the contract price, but the second trust deed stands on the same footing as the first mortgage, which was executed to obtain funds for the work, and having been assigned to a lumber company for materials, takes priority over the claims of subcontractors and materialmen.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Harper & Reynolds Company and others against the Hammond Lumber Company and others to foreclose mechanics' liens, the several actions being consolidated. From a judgment for plaintiffs foreclosing the lien, defendants appeal. Reversed.

R. L. Horton, of Los Angeles, for appellants.

Richard J. O. Culver, Behymer & Craig, and Wheeler & Sweet, all of Los Angeles (Henry O. Wackerbarth, of Los Angeles, of counsel), for respondents.

WELLER, J. This appeal is from a judgment for plaintiff for the foreclosure of certain mechanics' liens. The only question in controversy is as to priority of the mechanics' liens over the lien of a trust deed on the property, executed by the owner to the general contractor as part payment, or as security for part payment, of the contract price. This trust deed was executed and recorded prior to the time when the building improvement was commenced, and before the commencement of the work or furnishing of materials which gave rise to the mechanics' liens. The appeal is taken on the judgment roll.

The findings material to the issue here are as follows:

"That on said April 29, 1915, the defendant Lawrence Holmes, as owner, entered into a contract with Fred W. Siegel, as contractor, wherein and whereby it was agreed that said Fred W. Siegel should furnish the necessary labor and materials to alter and repair said building, and to construct an addition thereto, of two stories of brick and of four floors and basement of brick in the rear of said building. That in and by said agreement it was agreed that said Holmes would pay to said Siegel the sum $11,500, which he would procure by way of a loan from Fidelity Savings & Loan Association, and would give to said Siegel his promissory note in the sum of $12,500, and secure the same by a trust deed upon the real property hereinbefore described, upon which said building was to be erected, in payment for work performed and materials furnished in the alteration and repair and addition to said building, as aforesaid. * * * That said trust deed referred to in paragraph 8 of these findings, to secure a note for $12,500, was executed on the 8th day of May, 1915, at Los Angeles, Cal., by the defendant Lawrence Holmes as party of the first part, the defendant Title Guarantee & Trust Company as party of the second part, and the defendant Fred W. Siegel as party of the third part, and duly recorded on the 17th day of May, 1915, in Book 5987, page 252, records of said Los Angeles county. * * * That said Fred W. Siegel did on or about the 8th day of May, 1915, for valuable consideration, sell and assign said note and duly indorsed the same, together with said trust deed, to the defendant W. H. Elliot, and the said defendant W. H. Elliot was acting as agent for and in behalf of the defendant Hammond Lumber Company, a corporation; that said defendant W. H. Elliot, as such agent of Hammond Lumber Company and on its behalf, agreed to pay to said Siegel for said note and said trust deed, the sum of $12,500, in credits and materials, which credits and materials have been extended and furnished to said Fred W. Siegel, by the defendant Hammond Lumber Company.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

> * * * That the execution of the trust deed referred to in paragraph 8 of these findings, by Lawrence Holmes, as owner of the real property and building upon which it was proposed to construct said alterations, repairs, and additions, as hereinbefore found, for the benefit of the defendant Fred W. Siegel as contractor for the construction of said alterations, repairs, and additions, prior to the construction of said alterations, repairs, and additions, upon said real property, was a constructive fraud upon the persons, firms, and corporations who are found herein to be entitled to enforce mechanics' liens upon said real property and the building situate thereon, under or through said Fred W. Siegel, as herein found. That in accepting said trust deed and the note which it secured, and in assigning the same as herein found, said contractor, Fred W. Siegel, attempted to assign a portion of the contract price for the construction of said alterations, repairs, and additions."

Thereafter the various claims of subcontractors and materialmen which form the basis of this action accrued. Ultimately, under a trustee's sale on default in payments on the note secured by the trust deed, the property in question was conveyed by the trustee to the appellant Elliot, as agent of the appellant Hammond Lumber Company, assignee of the promissory note secured by the trust deed.

There is no question raised as to the validity of the trust deed and subsequent sale and conveyance of the property by the trustee, except that it is claimed by respondents that it was in fraud of their rights as lien claimants and subject to their liens; and no dispute exists as to the validity of the lien claims other than the contention of appellants that they are subordinate to the trust deed.

The trial court found that the execution of this trust deed was a constructive fraud upon the persons, firms, and corporations entitled to mechanics' liens, and that the same was transferred by the contractor to the agent of the appellant Hammond Lumber Company in an attempted assignment of a portion of the contract price for the construction of the alterations, repairs, and additions to the building on the premises in question.

The theory upon which it is sought to subordinate this trust deed to the claims of the respondents is that the indebtedness evidenced by the promissory note to the original contractor and the trust deed securing the same was, and still continued to be, merely another form of security for the payments that would from time to time fall due under the contract for the building, and that the assignment to the appellant Hammond Lumber Company is subject to all the equities that respondents could claim, if the original contractor had continued as the direct beneficiary of the trust deed, and was himself claiming, as against subcontractors and materialmen, a preferential right in the money still owing under the contract from the owner.

As we understand respondents' contention, it is that the contractor obtained no new or superior claim on the funds that should become due and payable under his contract by virtue of the special promise to pay under the promissory note, and no higher security therefor by reason of the trust deed, than he would have had under the mechanic's lien law; and that the contractor or his assignee is limited to such recovery as is prescribed by section 1193 of the Code of Civil Procedure, namely:

> "Only such amount as may be due him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished."

It must be conceded that if the purpose of the note and trust deed was merely to prevent the materialmen and subcontractors from exercising their preferential claim on all moneys remaining due and unpaid from the owner to the contractor, the transaction could not be upheld against a claim of fraud.

To the finding that the transaction in question is constructively fraudulent as against the respondents, objection is interposed that there is nothing in the pleadings raising an issue of fraud, and that in any event the finding is but a conclusion of law deduced from the terms of the contract. The contract is found by the court as set out in hæc verba in the pleadings; and it is claimed that its nature and effect must be determined as a question of law from its undisputed terms.

It is contended by appellants that the note and trust deed were made and accepted as an advance payment on the contract price, and not merely to secure payments in the future as they became due. The contract itself is susceptible of that construction, and the court in its findings expressly so construes it. As recited in the contract:

> "It is further understood and agreed between the parties hereto that in case the money supplied for the construction of said building by the Fidelity Savings & Loan Association, amounting to $11,500, together with the second trust deed made to Fred W. Siegel, amounting to $12,500, should not be sufficient to pay the total cost of the construction of said building as herein provided, then and in such event the party of the second part agrees to immediately supply such amount of money as may be necessary for the completion of the aforesaid building," etc.

Under paragraph VIII of the findings it is declared:

> "That in and by said agreement it was agreed that said Holmes would pay to Siegel the sum of $11,500, which he would procure by way of loan from Fidelity Savings & Loan Association, and would give to said Siegel his promissory

note in the sum of $12,500, and secure the same by a trust deed upon the real property hereinbefore described, upon which said building was to be erected, in payment for work performed and materials furnished in the alteration and repair and addition to said building as aforesaid."

Respondents appear to have placed the same construction on the contract providing for this note and trust deed. In the complaint in the action filed by the respondent Harper & Reynolds Company, in an averment setting up the substance of this contract, it is stated that in said agreement it was agreed that—

> The said Holmes "would give to said Siegel his promissory note in the sum of $12,500, and secure the same by a trust deed upon the real property hereinbefore described in paragraph 6 of this complaint, in payment for work performed and materials furnished."

Substantially the same allegation is contained in the complaint filed by respondent H. T. Miles & Son. In the cross-complaint of Emil Brown, another of the respondents, it is alleged that—

> "Said promissory note and said trust deed were given by said Lawrence Holmes as part of the contract price for the alteration and repair of and the addition to a building on the real property described."

On the day of the execution of this note and deed of trust, the contractor, Siegel, assigned them to the agent of the Hammond Lumber Company, one of the appellants, in consideration, as found by the trial court, of the sum of $12,500 in credits and materials, which were then agreed to be and were thereafter extended and furnished to Siegel by the Hammond Lumber Company. There is no finding that the credits and materials so obtained were for or entered into the building under contract, neither is there anything in the findings or the record to the contrary; but we think the conclusion cannot be escaped that the purpose of the note and trust deed was to furnish collateral to enable the contractor to purchase material for this building.

As bearing upon this point, attention should be called to the nature of Siegel's employment. His contract was to supply the material and the labor for this building for its actual cost, plus 10 per cent. thereon for his own remuneration. The $11,500 which the owner borrowed from the Fidelity Savings & Loan Association, and the $12,500 evidenced by this note and security, made up the principal sum to cover the transaction, with the further agreement that if it was not enough to meet all the demands the owner was to supply the additional amount, and if it provided a surplus it was to be applied on the debt evidenced by the promissory note.

[1, 2] Had the owner, Holmes, executed the note and trust deed directly to the Hammond Lumber Company, there could be no doubt as to the validity of the transaction, or as to the priority of the lien over the claims of subcontractors and materialmen. Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 Pac. 58; Rose v. Munie, 4 Cal. 173; Williams v. Santa Clara Min. Ass'n, 66 Cal. 193, 5 Pac. 85; Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288. We can see no legal or equitable distinction where precisely the same end was reached through the contractor as an intermediary. If the owner had raised this $12,500 by mortgage of the property to some third person, and paid the money to his contractor, who, in turn, had paid it out to the Hammond Lumber Company for credits and materials, there would be no question as to the first lien of the mortgage or the application of the money. Under the mechanics' lien law, since the amendment of 1911, there has been no requirement for partial and reserve payment. The owner is privileged to pay the entire contract price in advance, and he is empowered to create, by mortgage, preferred liens on the property to raise the money for that purpose, which take precedence to subsequent mechanics' lien claims. So far as the record discloses, no more than that was done in this case. Subsequently the materialmen and subcontractors dealt with the contractor with notice of the pre-existing liens on the property. They may have relied upon the personal responsibility of the parties, or upon the statutory bond which it appears was executed in this transaction. Their equities would seem to be no greater in their character, and not so good in point of time, as those of the Hammond Lumber Company, which gave full consideration for the note and security assigned to it.

There is no allegation of fraud in any of the pleadings, and nothing in the contract or assignment to suggest fraudulent intent. No facts are set forth in the findings from which corrupt motives on the part of any of the contracting parties could reasonably be inferred. Nowhere does it appear that subsequent to the recordation of the trust deed the proceeds were diverted from the purpose for which they were intended, with the intent to deprive the lien claimants of their priority. The finding, therefore, that the execution of the trust deed was a constructive fraud on the lien claimants is not within the issues as framed, hence, not justified.

As this finding constitutes the basis of that portion of the decree which is attacked by appellants, it follows that the judgment should be reversed; and it is so ordered.

We concur: FINLAYSON, P. J.; THOMAS, J.

On Rehearing.

WORKS, J. This is an appeal from a judgment for the foreclosure of certain mechanics' liens, and is prosecuted upon the judgment roll. There is but one question presented by the appeal. The appellant Hammond Lumber Company claims a priority over the liens of the respondents under a certain trust deed through a breach of the conditions of which it holds a grant deed to the property which is subject to the decree of foreclosure rendered by the trial court.

On April 29, 1915, Fred W. Siegel, as the party of the first part, and Lawrence Holmes, as the party of the second part, entered into an agreement, the entire text of which, after its introductory parts, follows:

"That the said party of the first part in consideration of the covenants on the part of the said party of the second part, hereinafter contained, hereby covenants with the said party of the second part, that the said party of the first part will order and have furnished all labor and material necessary for the erection and completion of the additions and alterations to 702 West Third street, the additions to consist of adding two stories of brick to the present structure and building an addition of four floors and basement of brick in the rear; the alterations to consist of converting part of the existing stores into a hotel lobby and altering positions of partitions, plumbing, etc., on the second floor, said building being in the city of Los Angeles, county of Los Angeles, state of California, on the northerly thirty-one (31) feet of the easterly forty-five (45) feet of lot nine (9), block S, and the easterly forty-five (45) feet of lot ten (10), block S, of the Mott Tract, as per book 14, page 7, of miscellaneous records of said county, according to the plans and specifications hereto attached and made a part hereof.

"It is further understood and agreed by the parties hereto that all labor, material and subcontracts, employed in the construction of said building shall be approved by the party of the second part before any purchase or contract is consummated. All material to be purchased as cheaply as possible and all subcontracts to be let on competitive bids.

"It is further understood and agreed between parties hereto that in case the money supplied for the construction of said building by the Fidelity Savings & Loan Association, amounting to eleven thousand and five hundred ($11,500) dollars, together with second trust deed made to Fred W. Siegel, amounting to twelve thousand and five hundred ($12,500) dollars, should not be sufficient to pay the total cost of the construction of said building as herein provided, then and in such event, the party of the second part agrees to immediately supply such amount of money as may be necessary for the completion of aforesaid building as herein provided, and in case there shall be more money than required same shall be applied on trust deed.

"And the said party of the second part in consideration of said covenants on the part of the said party of the first part hereinbefore contained, agrees to and with the said party of the first part that the said party of the second part will on demand and as bills are presented, checked off and approved, pay all bills for material and labor as same are used and furnished in the construction of the said building.

"The party of the first part agrees to superintend the construction of said building, to order all material and labor, and to generally look after the erection and economical construction of said building, and the party of the second part agrees to pay to the party of the first part for said services a sum equal to ten per cent. of the total cost of the construction of said building, including all labor and material, laid on the ground, including everything of every nature up to the time of the completion of said building; payment to be made to said first party by said second party as the bills are paid by said second party, this ten per cent. being an additional payment to the cost of construction aforesaid.

"It is also agreed and understood by and between the parties hereto that said party of the second part will insure the said building when the rough lumber is delivered on the ground.

"Time is the essence of this contract, hence all work shall be rushed as much as possible. The said party of the first part shall not in any event exceed one hundred and fifty working days from date hereof; but the time during which the party of the first part is delayed in said work by the acts or neglects of the owner or his employees or those under him by contract or otherwise, or by the acts of God which the party of the first part could not have reasonably foreseen and provided for, or by stormy and inclement weather which delays the work, or by any strikes, boycotts or like obstructive action by employees or labor organizations, shall be added to the aforesaid time for completion, by a fair and reasonable allowance; also any additional time required for additional or extra work ordered by the owner."

The second trust deed mentioned in the agreement was executed by Holmes on May 8, 1915, Siegel being the beneficiary under it, and Holmes then also made and delivered the promissory note for $12,500, for the payment of which the trust deed was security. On the same day Siegel transferred the note and the trust deed to the appellant Hammond Lumber Company, the consideration for the transfer being the agreement of the latter to pay to Siegel the sum of $12,500 in "credits and materials." This payment was later made.

The trust deed was placed of record on May 17, 1915. The various agreements of the respondents to furnish labor and materials for the job mentioned in the contract were of date, respectively, August 12, September 3, and September 21, 1915, and March 10, 1916. The power of sale in the trust deed was exercised, on account of a breach of conditions named in the deed, and pursuant to the sale the grant deed was executed to the appellant Hammond Lumber Company November 4, 1916, and it was recorded January 13, 1917.

The trial court found that the execution of the trust deed for the benefit of Siegel was a constructive fraud upon the respondents, and that, in accepting the note and trust deed, Siegel attempted to assign a portion of the contract price for the performance of the work contemplated by the agreement. Upon these findings it was decreed that the lien claims of the respondents are superior to the rights of appellant Hammond Lumber Company accruing to it pursuant to the provisions of the trust deed.

Our first and practically our only labor must be to place a construction upon the agreement entered into between Siegel and Holmes. The respondents contend that the instrument made Siegel an original contractor for the performance of the work mentioned in it, and the findings of the trial court constantly so term him. It is apparent from the nature of the particular findings above specifically noted that the trial court so considered him. On the other hand, appellants view the contract as one consummating an employment of Siegel as a mere representative or agent of Holmes, so constituted for the purpose of raising funds for the carrying on of the work as well as to purchase material and to superintend construction.

[3] The terms of the contract, loosely drawn as it is, furnish some basis for these warring claims as to its meaning; but probably the strongest argument to be made in support of the contention that under it Siegel was an original contractor is to be found in the fact that he executed a bond to secure laborers and materialmen in the performance of labor and the furnishing of materials for the job. We are far from satisfied, however, that Siegel was an original contractor. The fact that, according to the terms of the agreement, he was to "order and have furnished all labor and material necessary" for the work; that "all labor, material and subcontracts employed in the construction" of the improvement were to be "approved" by Holmes "before any purchase or contract is consummated"; that the money to the extent of $11,500 supplied by the Fidelity Savings & Loan Association, "together with the second trust deed made to Fred W. Siegel, amounting to" $12,500, was supposed, in the first instance, at least, to "be sufficient to pay the total cost of the construction of said building as herein provided"; that Holmes would, "on demand and as bills are presented, checked off and approved, pay all bills for material and labor as same are used and furnished" in construction; that Siegel "agrees to superintend the construction of said building, to order all material and labor, and to generally look after the erection and economical construction of said building"; that Holmes "agrees to pay to" Siegel "for said services a sum equal to ten per cent of the total cost of the construction of said building"—these circumstances, we say, convince us that the construction of the agreement which is contended for by appellants is the correct one. That being so, the Siegel trust deed, in so far as the rights of the beneficiary under it are concerned, stands exactly in the same position as the trust deed which, pursuant to the terms of the agreement, was executed in favor of the Fidelity Savings & Loan Association. As the latter instrument was plainly superior to the lien claims of the respondents (W. P. Fuller & Co. v. McClure, 191 Pac. 1027), so was the trust deed to Siegel. The findings of the trial court to the effect that the execution of the Siegel trust deed was a constructive fraud upon respondents, and that Siegel, by accepting the trust deed, attempted to assign a portion of the contract price, are not supported by the evidence.

The judgment is reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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51 Cal. App. 124

WILLEY v. WILLEY. (Civ. 3745.)

(District Court of Appeal, First District, Division 1, California. Jan. 20, 1921.)

Divorce 🔑203—Court not limited by inartificially drawn prayer as to power to require defendant husband to pay wife alimony.

In a wife's action for divorce, the complaint being founded on a charge of desertion and willful failure to provide, the court was not limited, by the inartificially drawn prayer of the complaint for order that defendant pay plaintiff $75 a month as temporary alimony pending the trial of the action, as to its power to require defendant to pay plaintiff alimony in the action based on charges of desertion and failure to provide sustained by showing of plaintiff's necessities and of defendant's financial ability to relieve them; the court possessing such power under Civ. Code, § 137, and power to modify its orders in such respect from time to time under the express reservation of its first order and also under section 139.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action for divorce by Eleanor H. Willey against Harry E. Willey. From judgment awarding alimony, defendant appeals. Affirmed.

Collamer A. Bridge, of Los Angeles, for appellant.

Newton M. Todd, of Long Beach, for respondent.

RICHARDS, J. This is an appeal upon the judgment roll from a portion of an interlocutory decree in an action for divorce. The complaint in said action is in two counts, one founded upon the charge of desertion, and the other upon the defendant's willful failure to provide for plaintiff the common necessaries of life. In this latter count of her complaint the plaintiff alleges that the defendant has for a long time been employed in various positions in which he has been receiving salaries amounting to $200 or more a month; that the plaintiff has no means whatever and is in such physical condition as to render it impossible for her to accept employment of any kind so as to properly support herself or prosecute this action; that the sum of $75 a month is a reasonable sum for temporary alimony, and certain other sums are reasonable for attorney's fees and costs. The prayer of her complaint is for divorce, and it embraces the further prayer for an order of court that the defendant "pay to the plaintiff the sum of $75 per month as temporary alimony pending the trial of this action," and certain other sums for attorney's fees and costs.

The defendant's answer by specific denials puts in issue the foregoing averments of the plaintiff's complaint, and he also presents a cross-complaint containing specifications of alleged cruelty on the part of the plaintiff, and praying for a divorce on his part. To this the plaintiff answered with specific denials, and in her said answer prayed for general equitable relief.

A trial ensued, at the conclusion of which the court made its findings in plaintiff's favor on both counts of her complaint, and thereupon entered its interlocutory decree in the following form:

> "Wherefore, it is ordered, adjudged and decreed that the said plaintiff is entitled to a divorce from defendant; that when one year shall have expired after the entry of this interlocutory judgment a final judgment and decree shall be entered granting a divorce herein, wherein and whereby the bonds of matrimony heretofore existing between said plaintiff and said defendant shall be dissolved, and at that time the court shall grant such other and further relief as may be necessary to complete disposition of this action.
>
> "And it is further ordered, adjudged and decreed that the defendant pay to the plaintiff as alimony the sum of thirty ($30) dollars per month, said sum to be paid on or before the 10th day of each and every calendar month, commencing with the first day of August, 1918."

The appellant has taken this appeal from that portion of the above interlocutory decree which awards alimony to the plaintiff, and his contention upon this appeal is that the trial court was not entitled upon the pleadings and issues in the case to award the plaintiff alimony in its said interlocutory decree. This contention on the appellant's part is based upon his claim that the plaintiff in her prayer in her complaint limited her demand for alimony to "temporary alimony pending the trial of this action," and by so doing limited not only the issues in the case, but the power of the court to deal with the subject of alimony in making its interlocutory decree.

This contention is utterly without merit, and finds no support in the authorities which the appellant refers to as sustaining it. The issues in cases of this character are made by the pleadings taken as a whole, and these show the plaintiff to be entitled to alimony from the defendant if the averments of her complaint were supported by the proofs in the case. The findings of the court show them to have been thus supported. It is true that the plaintiff in the prayer of her complaint referred only to "temporary alimony," but this did not limit the power of the court to grant her the relief to which she was entitled and which she was awarded by the court's interlocutory decree, since by that decree the court expressly retained the power to grant in its final decree "such other and further relief as may be necessary to a complete disposition of this action." It will thus be seen that the alimony which the court awarded the plaintiff in its interlocutory decree did not purport to be other than temporary alimony, which it would have been entitled to allow under the most rigid interpretation of the prayer of the plaintiff's complaint. We hold, however, that the court was not limited by the somewhat inartificially drawn prayer of the complaint as to its power to require the defendant to pay plaintiff alimony in the action based upon charges of desertion and failure to provide sustained by a showing of the plaintiff's necessities and of the defendant's financial ability to relieve them. It possessed that power under section 137 of the Civil Code, and it also possesses the power to modify its orders made in that respect from time to time under its express reservation of that power, and also under section 139 of the Civil Code. Soule v. Soule, 4 Cal. App. 97, 87 Pac. 205; Mathews v. Mathews, 193 Pac. 586; Gaston v. Gaston, 114 Cal. 545, 46 Pac. 609, 55 Am. St. Rep. 86.

The case of Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70, in no way militates against this conclusion, since in that case there was nothing in either the complaint or judgment touching the subject of alimony, nor was that subject presented or litigated in the action until long after the judgment in the case had become final, when the plaintiff moved the court for an order modifying the judgment so as to award her alimony. The Supreme Court rightly determined that there was nothing to modify in such a judgment. There is no parity between that case and the case at bar, since in the instant case the issue of the right and need of the plaintiff to alimony of some sort was raised by her pleadings, established by her proof, and found by the trial court to exist; whereupon said court by its interlocutory decree awarded her alimony, but in so doing expressly reserved the power to modify its judgment in that regard in its final decree.

The respondent has filed no brief on this appeal. Had she done so, this court would be disposed to fix a penalty upon the defendant for having taken and prosecuted a frivolous appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(51 Cal. App. 142)

THOMSON v. LANGTON et al. (Civ. 3617.)

(District Court of Appeal, First District, Division 1, California. Jan. 22, 1921.)

1. Partnership ⟹328(3)—Evidence held to show partner guilty of misconduct.

In an action to dissolve a partnership, evidence *held* to show that the defendant was guilty of excluding plaintiff from any participation in the business and of making a secret profit from firm transactions, so as to authorize a dissolution before the time fixed for termination.

2. Partnership ⟹267—Where assets destroyed and business could not continue firm will be dissolved at suit of partner.

Where the assets of a partnership had been so reduced by destruction by fire that the firm could not continue business without raising additional capital from the partners or by borrowing, the partnership will be dissolved at the suit of one partner, since a partner cannot be compelled without his consent to make contributions to the capital in addition to those which he agreed to make.

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by James S. Thomson against John M. Langton and others. From a judgment for plaintiff, the named defendant and certain others appeal. Affirmed.

E. B. Coil, of Los Angeles, for appellants.

Samuel H. French, of Los Angeles, for respondent.

KERRIGAN, J. This is a suit for dissolution of a copartnership. Judgment went for plaintiff, and certain of the defendants appeal.

The only questions presented for determination are whether or not the evidence warrants a judgment of dissolution, and whether or not certain moneys paid upon a policy of insurance on copartnership property belong to plaintiff individually or to the copartnership.

Eleanor Jane Langton and John M. Langton, Jr., are mother and son, and they are the sister and nephew, respectively, of Matilda Thomson, the wife of the plaintiff. Langton, Jr., and his father had been conducting a sash and door business for some time in Los Angeles, but prior to the formation of the copartnership sought by this suit to be dissolved, Langton, Sr., had transferred his interest to his wife and son. Langton, Jr., and his mother, being in need of more capital in the business, the former approached his aunt, Mrs. Matilda Thomson, in January, 1916, with a request that she advance the necessary funds. Instead of consenting to make a loan, she agreed to take a one-third interest in the said business in the name of her husband and to pay the Langtons therefor the sum of $3,000. Thereupon articles of copartnership were entered into by Langton, Jr., Mrs. Langton, and James S. Thomson, wherein it was agreed in part that they should each hold an undivided one-third interest in and to the property of the Langton Door & Sash Company. Langton, Jr., and Langton, Sr., were each to receive a salary of $100 per month, and Thomson was to receive a salary of $50 per month, which was to be increased at the expiration of six months to such sum, not to exceed $100, as could be paid out of the business. As a consideration for such salaries the partners agreed to give their entire time and attention to said business. The enterprise was to continue for two years from and after January 19, 1916.

Plaintiff's contention in support of the judgment of dissolution is that, notwithstanding that the duration of the partnership was fixed by agreement at a definite time, he had the right under the law (Civ. Code, §§ 2451, 2452) to dissolve it sooner without being liable in damages because of the serious misconduct of his copartners and because the business could only be further conducted at a loss.

As the result of a trial, at which much evidence was presented, the court found that Langton, Jr., claimed that the firm was indebted to Langton, Sr., for services in the sum of $654, when he well knew that this amount was at least $200 in excess of the sum actually due; that said Langton, Jr., at divers and sundry times refused to admit plaintiff to the office of said firm and locked him out therefrom, and refused to allow him to examine the books and accounts of said firm, and also at numerous times refused to consult with him in the affairs or management of said business; that Langton, Jr., in the manner aforesaid and in other ways, exercised such arbitrary and despotic control over the affairs of the copartnership that it made impossible any relation of trust and confidence between him and the plaintiff. The court further found that on or about the 30th day of January, 1917, said Langton, Jr., pretended to sell to said copartnership a certain lot of doors, 1,408 in number; that said pretended sale and purchase was without the knowledge or consent of plaintiff; that said defendant Langton, Jr., represented that he purchased said doors and turned the same in to said partnership at and for the cost price to him, to wit, $1,600, but the court finds that all of said transaction was carried out with the funds of said firm, and that the cost price of said doors to said Langton was several hundred dollars less than $1,600, and that in said transaction said Langton, Jr., made a secret profit for himself of several hundred dollars, and concealed the fact from said plaintiff, and plaintiff did not know until after said pretended sale of said secret profit so made by said Langton, nor that said defendant was not the sole owner of said doors. The court also found that a certain loss by fire which took place February 4, 1917, was in excess of one-half of the total assets of the business of the copartnership; that there was available for the resumption of business less than $5,000 in assets; and that a resumption of the business would require a substantial contribution by the partners. On this subject it further found:

> "That said copartnership could not incur indebtedness for said amount without impairing its credit and standing; that said outlay would involve an expenditure not contemplated in the articles of copartnership, and could not be provided for out of the present assets, and would involve the assumption by the parties of a liability in addition to the amount contributed or agreed to be contributed to the capital of said firm; * * * that on account of said loss by fire and the necessity aforesaid for the expenditure of money in procuring machinery and replacing the mill building and merchandise, and the necessary expenses of the business, it will not be possible to carry on the business of the partnership further except at a permanent loss; that said business cannot be rehabilitated and restored to a prosperous and active business under said copartnership agreement."

Coming now to the proposition of the insurance, the court found substantially as alleged by plaintiff, as follows: That defendants had failed and refused, notwithstanding the requests of plaintiff, to procure insurance against loss by fire on said property of said firm or any part thereof, and there was no insurance on said property so destroyed by said fire except the sum of $2,000, which has been paid for and carried by plaintiff under an agreement with said Langton, Jr., and said Eleanor Jane Langton that in case of loss no part of the moneys on account thereof should be claimed by either of the defendants or regarded as partnership property, but that the same should stand as indemnity and reimbursement for any loss on plaintiff's share in the partnership property; that plaintiff should pay for said insurance and carry the same for and on his own account.

The evidence supports the findings. One of the causes of difference between the partners was the conduct of Langton, Sr., who, principally on account of his convivial excesses, was often absent from business, and when present his conduct was offensive and his work unsatisfactory, occasionally amounting to drunken violence. The conduct of Langton, Jr., was even more flagrantly in violation of his duties to the plaintiff as a partner. The evidence shows that he declined to treat the plaintiff as a partner in the conduct of the business, refused to disclose to him or to give access to information as to process necessary for the proper conduct of the enterprise, resulting in loss of customers; that he locked the door of their place of business and refused plaintiff access thereto; and, finally, as found by the court, that he used the funds of the firm to make a secret personal profit.

With respect to the trial court's finding that as a result of the fire, which destroyed a large proportion of the plant and property of the copartnership, the business could not be rehabilitated and restored to a prosperous and active business under the copartnership agreement, it appears that as a result of said conflagration the assets of the firm were reduced from $16,144 to $4,294; that Langton, Jr., was unable to pay his debts and was without credit; and it was stipulated that the only way in which the firm could have obtained money to resume business, if at all, was by borrowing it.

As to the question of the ownership of the money derived from the payment of the policy of fire insurance already referred to, the plaintiff testified that, following a conversation between his wife and Mrs. Langton, the latter said that neither she, her husband, nor her son cared to carry any insurance on the business; that they would not do so, but that if Mrs. Thomson cared to have insurance to have it, and that Langton, Jr., and she, if the policy were taken in the name of the partnership, would assign their interest therein to plaintiff in the event of the occurrence of a loss. This witness also said that he was present at a conversation between an agent of an insurance company soliciting insurance from the firm, at which time Langton, Jr., told the agent positively that "he would not take out insurance." Other testimony in the record is to the effect that a policy of insurance was to be taken out to the credit of the firm; that the premium thereon was to be paid by the firm and charged to plaintiff's account, and in the event of loss by fire said policy was to be regarded as having covered plaintiff's one-third interest in the firm.

[1, 2] The foregoing brief reference to the testimony abundantly shows that Langton, Jr., was guilty of serious misconduct entitling the plaintiff to a dissolution of the partnership. In addition to this, it appears clear from the evidence that after the loss by fire the business of the concern could be conducted only at a permanent loss unless sufficient money could be borrowed by the firm or obtained by means of a further contribution to

its capital by the copartners. But it is settled law that where there has been a substantial impairment of the original capital a partner is not required to furnish money or to engage his personal credit in order to rehabilitate or restore the partnership business. In Van Ness v. Fisher, 5 Lans. (N. Y.) 236, 241, it is said:

> "The partnership was not formed on any other idea or understanding by either party than that of doing the business contemplated upon the capital stipulated to be furnished, to wit, $2,000, or as much more as the parties might voluntarily furnish. Nothing appears in the articles from which it can be inferred that a resort to the credit of the concern was contemplated as a means of carrying on its business. * * * Upon the loss of the $2,000 neither party could call upon the other to furnish more; consequently, upon the loss of the capital, no more business could be done, unless by mutual consent; for, if either could use the credit of the firm to procure the means of going on with the business, he could compel his copartner to furnish more capital than he agreed to furnish."

In 1 Bates on Partnership, § 251, it is stated:

> "Where four persons agreed to (and did) buy oil lands for resale, each contributing in specified proportions to be repaid from sales, and the lands had greatly depreciated, and one filed a bill calling upon the others to make up the difference between the amounts contributed by him and them, those contributions are capital and not advances, and hence there was no right to compel contribution."

From the authorities it is apparent that a partner cannot be forced to make a contribution of additional capital, and it necessarily follows that he could not be compelled to join in raising money by borrowing it, for this would be nothing more in effect than an enforced contribution.

It follows from the foregoing that the plaintiff was entitled to the judgment which he recovered dissolving the partnership and awarding him the money collected upon the policy of insurance.

The judgment is affirmed.

We concur: SEAWELL, Presiding Justice pro tem.; RICHARDS, J.

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50 Cal. App. 768

MELROSE v. COOLEY et al. (Civ. 2141.)

(District Court of Appeal, Third District, California. Dec. 31, 1920.)

1. Husband and wife ⚷47(4)—After conveyance, the grantor cannot convey to third person right of land.

After husband had conveyed a mining claim to his wife he could not convey right of way to a third person.

2. Mines and minerals ⚷34—Pipe line held not "appurtenant" to placer claim at which point waters were diverted.

Where a pipe line was placed on a mining claim merely because it was at that point that the diversion of the water of a ravine with which it was connected was accomplished, and the waters were carried for use in a mine elsewhere, the pipe line cannot be deemed appurtenant within Civ. Code, §§ 661, 662, to the claim on which the diversion occurred, so as to pass by conveyance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appurtenance—Appurtenant.]

3. Fixtures ⚷21—Pipe line held not a "fixture."

Where a pipe line was used to carry water from a point of diversion on one mining claim to another mining claim, it was not a "fixture" within Civ. Code, § 1013, with respect to the mining claim on which the line originated where the diversion occurred.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fixture.]

4. Mines and minerals ⚷34—Pipe line not appurtenant to land over which it was laid.

A pipe line, carrying water from a point of diversion on one mining claim to another mining claim, is not appurtenant to an intervening mining claim over which it was let run.

5. Husband and wife ⚷47(4)—Presumption of license over land conveyed by husband to wife.

Where a husband conveyed a mining claim to his wife, but after the conveyance executed a deed for right of way for a pipe line over the claim, and the line thereafter was maintained without objection, it will be presumed that the pipe line was laid under license.

6. Mines and minerals ⚷34—Option contract held not to provide for forfeiture of pipe line.

Where the owner of a mining claim who had granted a license to run a pipe line thereover gave the mining company using the pipe line an option to purchase the claim, provisions for forfeiture in case of failure to exercise the option should not be deemed to extend to the pipe line.

7. Property ⚷9—Plaintiff held to have only half interest in pipe line for mining purposes.

In an action in trespass and conversion by plaintiff, the wife of a judgment debtor, who asserted that the water pipe line, built for mining purposes, sold under execution against the husband, belonged to her, evidence *held* to show that plaintiff by mesne conveyances had acquired only a half interest therein.

8. Appeal and error ⚷994(1)—Credibility of witnesses not for appellate court.

The question of the credibility of witnesses is not for the appellate court.

9. Appeal and error ⚷930(4)—Presumed that jury based verdict on injury to whole pipe line, where case was tried on erroneous theory that plaintiff was sole owner.

Where an action of trespass and conversion was tried on the theory that plaintiff was the sole owner of a pipe line when plaintiff was in fact the owner of only a half interest, the judgment for damages in plaintiff's favor should be reversed, for the jury will be assumed to have considered in reaching their determination the damage done to the entire pipe line.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by F. A. Melrose against Lucy W. Cooley and others. From a judgment for plaintiff, defendants Columbia Consolidated Mines Company and E. C. Klinker appeal. Reversed and remanded.

Nilon & Nilon, of Nevada City, for appellants.

J. M. Walling, of Nevada City, James Snell, of Hollister, and Searls & Searls, of Nevada City, for respondent.

HART, J. The appeal in this action is from a judgment for plaintiff in the superior court of Nevada county for $750, based on a complaint which sets forth two causes of action—the first for trespass, in tearing out a certain pipe line, and the second for conversion by the defendants of the pipe line so removed. The amount sued for was $14,800, being double the amount of actual damages claimed to have been suffered, the complaint alleging that the trespass was malicious and one with an evil intent to vex, annoy, and injure the plaintiff. The cause was tried before a jury.

This action grows out of a sale of a pipe line under an execution issued on a judgment entered on the 20th day of April, 1916, in an action wherein one J. H. Hunt sued the plaintiff's husband, N. M. Melrose, to recover the sum of $494.23, alleged to be due said Hunt from said Melrose.

The complaint in the present action alleges that the plaintiff was the owner of a water right on Missouri ravine, in Nevada county, and was also the owner of a pipe line leading from Missouri ravine to Iowa ravine and thence to a reservoir, and that the defendants had knowledge of this ownership; that within one year preceding the commencement of the action (the action was commenced April 18, 1918), but at a date unknown to the plaintiff, the defendants tore out the pipe line and flume mentioned and removed pipes comprising a part of said line, and converted 1,300 feet thereof to their own use.

The controversy is as to the ownership of the pipe line and flume seized and sold under the execution issued in the action of Hunt v. N. M. Melrose, above referred to, the plaintiff claiming that she acquired ownership thereof through a conveyance from her husband and also from one Fontz prior to the issuance and levy of said execution, and the defendants contending that the conveyance by her husband did not carry with it the pipe line, etc., and the conveyance of Fontz, if it passed any title at all to plaintiff, vested her only with a one-half interest in the property sold as indicated.

The evidence shows that N. M. Melrose, on or about January 1, 1914, purchased a mining claim known as the "Missouri Placer"; that the Missouri placer embraced the ground on which the diversion of the waters of a stream named and known as Missouri ravine was effected; that after said Melrose became the owner of the Missouri placer, he constructed the pipe line and the flume, which are involved in this action, and which pipe line led from Missouri ravine, he testifying that he built the pipe line for the purpose of using the waters of Missouri ravine in working the Ocean Star mine for the Ocean Star Mining Company, of which he was then president and manager. All the pipe line and the flume, which are referred to in the complaint, with the possible exception of about 96 feet of the pipe line, were placed by Melrose, and were at all times maintained on and across lands owned by one Lucy W. Cooley. At the time that the pipe line, etc., was built, the Cooley properties, which embraced the Ocean Star mine, and which had previously been acquired by Lucy W. Cooley from her husband, were under option for the sale thereof to the Ocean Star Mining Company. Subsequently to the construction of the pipe line by Melrose, the latter, by deed dated April 15, 1915, conveyed the Missouri placer mine, together with the improvements thereon, to his wife, the plaintiff herein. In said deed of conveyance the pipe line was not specifically mentioned. N. M. Melrose continued to operate and manage the Ocean Star Mining Company's business until the month of October, 1915. At this particular time the option held by said mining company on the Cooley property had expired and was forfeited. On August 1, 1915, however, the Ocean Star Mining Company sold all its right, title, and interest in and to the said pipe line to Kohler and Olson for the stated consideration of $1,868. On May 1, 1916, Kohler and Olson sold and transferred the pipe line to Fontz, who, on October 7, 1916, sold an undivided one-half interest in the pipe line to the plaintiff, F. A. Melrose. The instrument conveying said property to Kohler and Olson was signed as follows: "Ocean Star Mining Co., pr. N. M. Melrose, Pres. and Gen'l Manager. A. Perry, Secty & Treasurer, Vic. Pres. [Seal.]"

J. H. Hunt, plaintiff in the action against N. M. Melrose, in which the former obtained a judgment against the latter in the sum of $484.23, bought the pipe line at the sale under the execution issued on said judgment, and, there having been no redemption, a sheriff's deed including said pipe line, was executed to Hunt, who had previously granted his interest in the pipe line to defendant Klinker.

In the month of March, 1916, the defendant Klinker took possession of the Cooley properties which, as seen, had been under option to the Ocean Star Mining Company. Klinker, when taking such possession, was the representative of the defendant Columbia Consolidated Mines Company. This company had become the owner of several mines, including the Ocean Star. Possession of the Cooley properties was taken by the Columbia under an option from Lucy W. Cooley.

[1] The plaintiff, over the objection by defendants, was allowed to introduce in evidence a deed, dated March 16, 1914, from M. D. Cooley, purporting to convey to the Ocean Star Mining Company a right of way for a pipe line across what was known as the German quartz claim. There was, however, introduced by defendant a deed from M. D. Cooley to his wife, Lucy W. Cooley, dated October 25, 1913, granting to her said German quartz claim. There was no evidence showing that Lucy W. Cooley was not the owner of the German quartz claim by virtue of the latter deed at the time of the purported granting by her husband of a right of way for a pipe line over said mine. It follows, therefore, that M. D. Cooley, when attempting to grant said right of way to the Ocean Star Mining Company, had no interest in the German quartz claim which he could convey.

[2, 3] The question of the ownership of the pipe line in dispute would seem from a mere superficial examination of this record to be enveloped in more or less obscurity or, at least, confusion; but a careful analysis of the evidence, considered in the light of the law respecting appurtenances to real property, has made it clear to our minds that the plaintiff acquired no interest in the pipe line by virtue of the conveyance to her by her husband of the Missouri placer mine. There was no mention of the pipe line in said instrument of conveyance, and the said pipe line was neither appurtenant to nor a fixture of said mine, for it was not used or even intended to be used with that mine for its benefit (Civ. Code, § 662), or in working or developing said mine (Civ. Code, § 661). Nor, in our opinion, was it a fixture to the Missouri placer within the meaning of section 1013 of the Civil Code, for it was placed on the property of said mine merely because it was at that point that the diversion of the waters of Missouri ravine, with which the line was connected, was accomplished, and, moreover, did not become an integral part of the property of said mine, and could be removed at any time without injury to the premises to which it was affixed. Civ. Code, § 1019.

[4-6] Nor do we think the pipe line was appurtenant to or a fixture of the Cooley properties. It is to be conceded that the grant of the right of way for the pipe line by M. D. Cooley over and across the Cooley properties, having been made subsequent to the time that M. D. Cooley conveyed all his right, title, and interest in and to said properties to his wife, was apparently without legal force; it not appearing that in making the grant he was acting under due authority from his wife. But it may be assumed, from the fact that the pipe line was allowed to be laid across Mrs. Cooley's properties and was so maintained until the pipe line was sold by the Ocean Star Company to Kohler and Olson, that the grant of the right of way over her properties for the pipe line by her husband was acquiesced in by her, and that therefore the same was so constructed and maintained under a license from both Mrs. Cooley and her husband. Nor does the provision in the option agreement that failure by the Ocean Star Mining Company to pay the stipulated sum for the Ocean Star mine at or within the specified time shall operate to forfeit said option "and all rights thereunder," etc., give Mrs. Cooley title to the pipe line of which there is no specific mention in the option. There could be no forfeiture of the title to property which she did not own. That provision obviously meant and was intended to work a forfeiture only of the option to purchase the quartz mine at the price specified in the option.

[7] But, obviously, the ownership is somewhere or in some person or persons, and it is our conclusion, after a painstaking examination of the evidence in the record before us, that, originally, the pipe line was the property of the Ocean Star Mining Company, and that the plaintiff in this action was the owner, by virtue of the conveyance from Fontz to her, above mentioned, at the time of the seizure and sale of the pipe line under the execution issued in the case of Hunt v. N. M. Melrose, only of an undivided one-half interest in said property, so taken and sold.

N. M. Melrose testified that he constructed the pipe line solely for the purpose of installing power for the Ocean Star mine, which was being operated by the Ocean Star Mining Company, and that the pipe line was used exclusively for that purpose. The pipe line, therefore, if appurtenant to or a fixture of any property at all, it was to or of the Ocean Star mine. But, as before suggested, it is reasonably clear that the pipe line was established and maintained either by N. M. Melrose or the Ocean Star Mining Company over and across the Cooley properties, which, as seen, included the Ocean Star mine (sometimes known as the German mine) under a license from the Cooleys, and that the pipe line was the property of, and so regarded by all the parties, either N. M. Melrose or the Ocean Star Mining Company. And now we come to consider evidence of singular significance upon the proposition of the original ownership of the pipe line. N. M. Melrose testified, it is true, that he constructed the pipe line at his own expense, and that the line belonged to him; but he further testified that the pipe and the other materials used in installing the pipe line were ordered in the name of the Ocean Star Mining Company, and that it was by the latter's checks that all bills incurred in the construction of the pipe line were paid. As above shown, the pipe line and the water rights with which it was connected were conveyed to Kohler and Olson by the Ocean Star Mining Company, "per N. M. Melrose, Pres. & Gen'l Mngr.—A. Perry, Sect. & Treasurer, Vice Pres." Kohler and Olson sold to Fontz, who, as seen, conveyed an undivided one-half interest to the plaintiff. N. M. Melrose testified, it is also true, that he caused the Ocean Star Mining Company to order the materials for the pipe line, and to pay therefor with its checks as a matter of convenience and upon the assumption that the order would be the more readily filled by ordering through that channel, but that he reimbursed out of his own private funds the company for the money paid by it for the materials.

[8] It is not, of course, within the province of this court to determine the credibility of the witnesses, and, indeed, it is not requisite for us to essay that task here to show that the title acquired by Kohler and Olson to the pipe line through the conveyance by the Ocean Star Mining Company and consequently the title of Fontz to the pipe line were legally impregnable. It may first be observed that if it be true that N. M. Melrose and the plaintiff honestly believed that the ownership of the pipe line was in him and that he conveyed it to his wife, the plaintiff herein, by virtue of his conveyance of the Missouri placer properties to the latter, it is a singularly strange circumstance that the plaintiff should have conceived it to be necessary to take a conveyance of one-half of the property from Fontz. We may assume that N. M. Melrose knew of the Fontz conveyance, since it was to his own wife. Mrs. Melrose, the plaintiff, was not a witness in the case, and N. M. Melrose did not attempt to explain the reason for the Fontz conveyance, so we are in the dark as to the purpose of that transaction, except in so far as we may be furnished light upon the circumstance by N. M. Melrose's testimony to which we have referred and inferences which may reasonably be educed therefrom. It is also worthy of note that the record does not show that Mrs. Cooley ever made any objection to the transfer of the pipe line by the Ocean Star Mining Company to Kohler and Olson. But, be that as it may, we are justified in concluding that the conveyance of the pipe line to Kohler and Olson by N. M. Melrose, as the manager of the Ocean Star Mining Company, acting for and in behalf of said company, had the effect of vesting in the said grantees a perfect title to the pipe line, even though said Melrose, and not the said company, was then the actual owner of the property, since it is unquestionably true that Melrose, having taken part in the making of said conveyance and thereby impliedly at least assured the company's title to the pipe line, is forever estopped from setting up his own ownership of the property so conveyed. No one would be found to say that, had N. M. Melrose undertaken to have the Ocean Star's conveyance to Kohler and Olson set aside solely on the ground that he was the real owner of the property so conveyed, his complaint would not, under the circumstances, have fallen under a plea of estoppel.

It follows from the foregoing views that the present record shows that the plaintiff is the owner of an undivided interest only in the pipe line in controversy.

[9] The trial was had upon the theory that plaintiff was the sole owner of the entire pipe line system and the pipe, flume, etc. This is shown by the refusal of the court to give a certain instruction, preferred by the defendants. The jury, we may therefore assume, in reaching their conclusion as to the amount of damages sustained by the plaintiff, considered the damage done to all the pipe and other essential concomitant property. The judgment will consequently have to be reversed.

We are not required herein to say who is or may be the owner of the other half of the pipe line. Nor are we prepared to say whether another trial may not develop competent evidence showing that plaintiff was at some time, either by her own act or in some other legal way, divested of her title to her interest in the pipe line prior to its seizure and sale under the execution referred to. It is sufficient for us to be convinced, as we are convinced, that, according to the present record, she is entitled to recover only such damages, both compensatory and punitive, if it be shown that the injury was done maliciously, as may be just for any injury done to her one-half interest, and no more, in the pipe line in dispute.

We do not regard it necessary to review elaborately the objection preliminarily urged by counsel for respondent, that the bill of exceptions was not settled within the time prescribed by law, and is therefore not legally before this court, and as a result there is here no record subject to review. It is sufficient to say that we think that the trial court's order, relieving the defendants from the consequences of their delay in bringing the bill to settlement, represented, on the showing made by them, the exercise only of a sound and just discretion.

The judgment is reversed, and the cause remanded.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

51 Cal. App. 152

COUTS v. O'NEILL. (Civ. 3242.)

(District Court of Appeal, Second District, Division 2, California. Jan. 25, 1921.)

1. Mortgages ⟹38(1)—Finding that deed was not mortgage held justified.

In an action to have deed declared to be a mortgage, finding that deed was not a mortgage *held* amply and substantially justified by the evidence.

2. Costs ⟹260(4)—Claim that appeal is frivolous not considered, where claimant employs hundreds of pages to show appeal not meritorious.

Appellate court is not inclined to seriously consider an assertion that an appeal is frivolous when the maker of the assertion has employed 299 pages in an endeavor to demonstrate that it is not meritorious.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Cave J. Couts against Richard O'Neill. Judgment for defendant, and plaintiff appeals. Affirmed.

T. B. Cosgrove, of Los Angeles, and Sweet, Stearns & Forward, of San Diego, for appellant.

E. S. Torrance, Eugene Daney, and E. Swift Torrance, all of San Diego, for respondent.

WORKS, J. This action was instituted for the purpose of having two deeds, absolute in form, decreed to be mortgages. Judgment went for the defendant, and the plaintiff appeals.

The transactions out of which the controversy arises were between the appellant and Richard O'Neill, who, although of the same name with the respondent, was the respondent's predecessor in interest in the land which is the basic subject of the litigation, and who departed this life in 1910. Whenever, in the course of this opinion, Richard O'Neill, or O'Neill, is mentioned, it will be understood that the reference is to the deceased person of that name, and not to the respondent.

On November 4, 1895, Richard O'Neill promised to lend appellant the sum of $10,000, and, during the succeeding year, redeemed his promise by advancing to appellant various sums aggregating a little more than the amount named. On October 16 and November 12, 1896, appellant and his wife executed to O'Neill, in consideration of the loan, their two promissory notes, and they also, on the first-mentioned date, delivered to him their grant deed to certain lands in San Diego county. This instrument is one of those asked by appellant, in his complaint, to be decreed a mortgage, but the litigation is devoid of all interest as far as it is concerned, for it was beyond all question intended by the parties to be a mortgage, and the trial court found that it was one.

On October 10, 1901, within a week prior to the expiration of five years from the execution of the deed just mentioned, the appellant executed to Richard O'Neill a second deed, conveying the same property as the first, and it is upon the effect to be given to this second instrument that the appeal turns.

The appellant asks for a reversal of the judgment upon but two grounds, each presenting a question as to the sufficiency of the evidence to support the findings of the trial court. He contends, in the first instance, that the evidence fails to justify the finding that the deed of October 10, 1901, was an absolute conveyance and not a mortgage.

The evidence tending to support the finding, if any such there be, is, then, to be marshaled and considered. The appellant having failed to satisfy the obligation secured by the deed of October 16, 1896, O'Neill took up with Wm. J. Hunsaker, an attorney at law, on September 23, 1901, the matter of his relations with appellant. On the next day Hunsaker wrote Couts:

> "Mr. O'Neill came up yesterday for the purpose of talking over his business with you. Inclosed you will please find copy of a letter I have this morning written him, which explains itself. Mr. O'Neill declines to take a new mortgage, but is willing to take a deed to the property and give you an option to purchase it within a year. I hope you will be able to find some way out of your present difficulties."

The letter to O'Neill, copy of which was inclosed in the letter to appellant, contained the following introductory statement:

> "In response to your request for a statement as to the amount due from Mr. Cave J. Couts to you, and of the method by which you can take a deed to the property, and give Mr. Couts an option to purchase it within a year from the date of the deed, I beg to say."

The letter then set forth a statement of figures and proceeded:

> "As I understood you yesterday, you do not feel, under the circumstances, like taking a new mortgage, as your notes have now run nearly five years, and there has been no payment on account of principal or interest; but that you are willing to give Mr. Couts an opportunity to repurchase the property within one year, and that if Mr. Couts is not satisfied with this arrangement that your purpose is to have your mortgage foreclosed. In this connection you might call Mr. Couts' attention to the fact that your mortgage was executed before the amendment to the law of 1897, extending the time for redemption to twelve months, and that the Supreme Court has recently decided that as to mortgages executed before this amendment, the mortgagor has but six months within which to make redemption. If you should agree with Mr Couts for a conveyance

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of the property to you in satisfaction of the amount due you under your mortgage, the transaction will have to be brought about in this way: In consideration of the satisfaction of your indebtedness and a surrender of the notes to Mr. Couts, he will make a deed to you, which will vest in you the absolute title to the property. At the same time you would execute and deliver to Mr. Couts an instrument giving him the option to purchase the property from you within twelve months at a figure to be named in the option—this figure should be such amount as will cover interest on the amount due you and taxes on the property. As you have determined not to accept a new mortgage from Mr. Couts, the only course left open to you for the protection of your interests is to enter into such an arrangement with Mr. Couts as is above suggested, or to commence proceedings to foreclose your mortgage before the 16th of next month."

On October 7, 1901, Hunsaker wrote appellant, "Inclosed you will please find copies of a letter and papers which I have just mailed to Mr. O'Neill." The "letter" to O'Neill refers to the "papers" mentioned in the quotation in the following excerpt from it:

> "Inclosed you will please find carbon copies of the papers which should be executed to consummate the business consisting of a deed from Couts to you for the property described in your mortgage, a release and discharge of Mr. Couts from all indebtedness to you, * * * a quitclaim deed from you to Mr. Couts, and the escrow agreement, under the terms of which the deed is to be deposited with the Farmers' & Merchants' Bank of this City."

The "deed from Couts to you" was the one above mentioned as having been executed on October 10, 1901. The "release and discharge of Mr. Couts from all indebtedness to you" contained this language, among other things:

> "I have remised, released and forever discharged the said Cave J. Couts from all claims of every kind, nature and character soever against him, from the beginning of the world to this day."

The "quitclaim deed from you to Mr. Couts" was in the ordinary form. The "escrow agreement" was in the following language:

> "The within quitclaim deed from Richard O'Neill to Cave J. Couts is herewith deposited in escrow by said Richard O'Neill with the Farmers' & Merchants' Bank of Los Angeles, California, which is to deliver the same to the within named Cave J. Couts, if said Cave J. Couts shall, on or before the 16th day of January, 1902, place to the credit of said Richard O'Neill in said Farmers' & Merchants' Bank, the sum of $18,467.34; or shall, on or before the 16th day of April, 1902, place to the credit of said Richard O'Neill with said bank, the sum of $18,914.99; or shall on or before the 16th day of July, 1902, place to the credit of Richard O'Neill in said bank, the sum of $19,387.86; or shall on or before the 16th day of October, 1902, place to the credit of said Richard O'Neill in said bank, the sum of $19,860.73, and shall also place to the credit of said O'Neill in said bank such amount or amounts of money as said O'Neill may hereafter expend in the payment of taxes on the property mentioned in said deed, or in effecting redemptions from sales thereof made for delinquent taxes, which amounts shall be evidenced by delivery by said O'Neill to said Farmers' & Merchants' Bank of the tax receipts or certificates of redemption therefor. Time is hereby expressly declared to be of the essence of this agreement; and if said Couts shall fail to so place to the credit of said O'Neill the amount of money above specified on or before the 16th day of October, 1902, said deed shall thereupon be returned by said bank to said O'Neill for cancellation and destruction."

Hunsaker testified that he, O'Neill, and appellant met in San Diego on October 10th, or the day before, and he continues:

> "My recollection is * * * that Mr. Couts, Mr. O'Neill and I had a talk * * * before the papers were executed. That Mr. O'Neill asked Mr. Couts if the papers which he had received, copies of which he had from me, were all right. Mr. Couts said they were if Mr. O'Neill would not consent to taking a new mortgage. Mr. O'Neill said to Mr. Couts that he would not take a new mortgage, that Mr Couts had not paid the interest for years, and that he, Mr. O'Neill, had had to pay the taxes, and that unless this arrangement which was set forth in these papers was satisfactory to Mr. Couts that he would foreclose the mortgage. Mr. Couts then said it was all right."

The various papers were then executed, and, according to Hunsaker, "the original notes were delivered by me to Mr. Couts."

The appellant himself testified that he received the notes from Hunsaker, but he was not sure whether they were delivered at the time of the execution of the papers or a few days later. At any rate, he kept them until his deposition was taken in the case, and they were offered in evidence at the trial. They then had certain memoranda upon them, and the appellant testified that these were in his handwriting and were placed upon the notes at the time he received them from Hunsaker. On one of the obligations the memorandum was as follows:

> "Paid by deed to Richard O'Neill of all the property securing this, computing interest in full at 10% net on whole amount compounded semiannually, and to be reconveyed to me within one year from Oct. 16, 1901, if I can pay the amount with 10% interest net payable quarterly. Couts."

On the other note the appellant wrote:

> "This note paid the same as that of Octr. 16, 1896, for $10,000. Couts."

When the various instruments were executed at San Diego on October 10, 1901, Hunsaker kept the release and discharge mentioned in his letter to O'Neill of the 7th. On October 21, 1901, he forwarded that document to appellant under cover with a letter in which he said:

> "Inclosed you will please find the satisfaction of the O'Neill mortgage and general release executed by Mr. O'Neill at the time of the settlement between yourself and Mr. O'Neill. This satisfaction and release as you will observe by the indorsement on it, has been recorded."

This instrument was retained by appellant until his deposition was taken and was produced at the trial.

In the meanwhile, the grant deed from appellant to O'Neill, the quitclaim deed from O'Neill to appellant, and the escrow instructions, all signed in San Diego on October 10, 1901, had been deposited by Hunsaker with the Farmers' & Merchants' Bank of Los Angeles. This was done immediately after the meeting of the three men in San Diego. The papers remained with the bank for more than a year, or until after the last day upon which payment could be made by the appellant under the escrow instructions and a purchase of the property by him result. The payment was not made, although Hunsaker reminded the appellant by letter that his option was about to expire, the letter being dated eight days before the time fixed for that event, and Hunsaker procured a return of the instruments from the holder of the escrow. O'Neill took possession of the land on November 18, 1902.

Richard O'Neill died on May 7, 1910, and he had, nearly five months, at least, before that time, made a will in which he left to his son, the respondent, the real property conveyed by the appellant's deed of October 10, 1901. Hunsaker testified that he had a conversation with the appellant on or about December 13, 1909, during which he informed appellant that O'Neill had disposed of the land "in a way I am not prepared to tell you, but it is not to you." This was in response to a question addressed by the appellant to Hunsaker, by which appellant asked whether O'Neill had disposed of the property. The appellant himself testified:

> "I had heard from others before Mr. O'Neill's death that he had disposed of his property, I understood by deeds and not by will,"

—and he gives his recollection of Hunsaker's answer to his question, above mentioned, as follows:

> "Mr. O'Neill disposed of his interest" in the property covered by the deed of October 10, 1901, "the same as he did of all the rest of his property, but I am not at liberty to tell what that was."

The estate of O'Neill passed through the due course of administration and the land devised to the respondent by the will was distributed to him on January 6, 1911. The appellant did not commence this action until September 10, 1915.

[1] We would not have it understood, from the foregoing statement of the evidence supporting the finding of the trial court, that there was no conflict in the evidence introduced under the issue from which the finding arose. Upon that issue there was a serious conflict, as there is much evidence in the record which is not in harmony with the matters which we have been at such pains, on account of the importance of the litigation, to state. We are not, however, concerned with the conflict in the evidence. That was for the trial court, and we are satisfied, from a careful examination of the record, that the trial judge was justified in resolving the conflicting evidence as he did. The finding that the deed of October 10, 1901, was not a mortgage is amply and substantially justified by the evidence.

The appellant's second point is that the evidence fails to support a finding of the trial court to the effect that the cause of action stated in the complaint was barred by the laches of the appellant in instituting the action. This point we need not consider. Having reached the conclusion already stated as to the effect of the deed, it becomes immaterial whether or not the commencement of the action was unreasonably deferred.

[2] Before concluding this opinion there is, however, a matter which we must notice. The appellant's opening brief covers 90 pages. The respondent felt it necessary to reply in a far from laconic "brief" of 282 pages. The appellant's reply brief is 38 pages in length, and the respondent, notwithstanding his earlier broadside, interposes a final brief of 18 pages. The last page of this brief is devoted to an attempt to show that the appeal is frivolous. Surely, after all we have suffered from respondent, we might have been spared that 1 page! We are not inclined to seriously consider an assertion that an appeal is frivolous when the maker of the assertion has employed 299 pages (it will be noted that we exclude the 1 page) in an endeavor to demonstrate that it is not meritorious.

It is unjust and improper to afflict the courts with briefs as voluminous as the first brief filed by the respondent on this appeal. The courts of this state are heavily burdened with work, and their labors are made more onerous by the presentation of such briefs as the one now before us. We have a right to expect that the profession will aid and not hamper us in our endeavor to keep pace with a flood of litigation, and we embrace this opportunity to remind them of their duty in that regard. In order that our comment may not be improperly applied, we should state that, although the names of all counsel listed as attorneys for respondent at the head of this opinion are on the transcript on appeal, only the first name on the list is signed to the two briefs of the respondent.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

51 Cal. App. 99

FIRST NAT. BANK OF ANTIOCH v. FICKERT.

COMMONWEALTH NAT. BANK OF KANSAS CITY, MO., v. SAME.

(Civ. 3619, 3620.)

(District Court of Appeal, First District, Division 1, California. Jan. 18, 1921. Hearing Denied by Supreme Court March 17, 1921.)

1. Estoppel 🔑72—Maker held estopped to set up nonnegotiability of notes assigned before maturity.

In action upon notes given for the purchase price of jennets, defendant *held* estopped to set up the nonnegotiability of the notes which were assigned before maturity and for valuable consideration without notice of pretended existing equities against them, since, where one of two innocent persons must suffer by act of a third, he by whose negligence it happened must be the sufferer in view of Civ. Code, § 3543.

2. Evidence 🔑442(6)—Parol agreement inadmissible in action for purchase price of stock under complete written contract.

In an action on a note given for the purchase price of certain jennets, where defendant set up breach of an oral contract by plaintiff's assignor, from whom the jennets were purchased, to repurchase the jennets and their colts, evidence of such parol agreement *held* improperly admitted; the written agreement of sale being full and complete, in view of Code Civ. Proc. § 1856, and of Civ. Code, § 1625.

3. Evidence 🔑420(5)—Written contract for absolute sale of stock cannot be varied by parol agreement making sale conditional.

In an action on notes given for the purchase price of certain jennets pursuant to a written contract of sale, evidence of parol agreement whereby the seller was to repurchase the jennets and their offspring *held* inadmissible as varying the terms of the written contract by changing it from an absolute to a conditional or contingent sale.

Appeals from Superior Court, Kern County; H. A. Peairs, Judge.

Separate actions by the First National Bank of Antioch and by the Commonwealth National Bank of Kansas City, Mo., against Phillip Fickert. Judgments for defendant in each case, and plaintiffs appeal. Judgments reversed, with directions.

Edward F. Brittan, of Bakersfield, and Devlin & Devlin, of Sacramento, for appellants.

Anderson & Borton, of Bakersfield, for respondent.

SEAWELL, Presiding Justice pro tem. These are appeals from judgments made and entered in favor of defendant in two separate actions brought by plaintiffs herein to recover upon two certain promissory notes.

Agreeable to stipulation of the parties, an order of this court was heretofore made that both appeals be submitted upon the same briefs. The notes in each action are alike in amounts, identical in form and substance, except as to the time of payments, and arise out of the same transaction and contract. Both were indorsed and sold to the respective assignees, plaintiffs herein, before maturity and for a valuable consideration, in due course of business. Plaintiffs' assignor entered into the following agreement of sale with defendant:

> "Tehachapi, Cal., June 1, 1914. This agreement made and entered into this day by and between H. B. Thornberry, of Los Angeles, Cal., hereinafter mentioned as party of the first part, and Phillip Fickert, of Tehachapi, Cal., hereinafter mentioned as party of the second part, witness as follows: The party of the first part agrées to sell and does sell to the party of the second part twenty head of jennets for the consideration of thirteen thousand dollars, all of said jennets to be registered stock and to be imported from Missouri, and the party of the second part agrees to accept such jennets as may be selected by the party of the first part as satisfactory stock, and pay for same as follows: Giving on this date one note for thirty-two hundred fifty dollars due seven months after date, said note to be given as deposit on said stock, said payment to be forfeited for failure to accept such stock as delivered, or to furnish the following payments as hereinafter mentioned; second note for thirty-two hundred fifty dollars at seven per cent., due one year; third note for thirty-two hundred fifty dollars at seven per cent. due in two years; fourth note for thirty-two hundred fifty dollars at seven per cent. due in three years. From delivery of said stock at Tehachapi, Cal. It being also agreed and understood that all of the said jennets shall be in foal or said party of the first part shall forfeit one hundred dollars for each jennet which shall prove to fail to be in foal. Said delivery to be made on or before November 1, 1914. [Signed] H. B. Thornberry, Party of the First Part.
>
> "Accepted by Phillip Fickert, party of the second part."

The above is the only written instrument evidencing the agreement of sale and purchase of the animals therein described.

The four notes provided for in said agreement were accordingly made, executed, and delivered by Phillip Fickert to H. B. Thornberry, plaintiffs' assignor. The first and second notes were paid some time after they fell due. Payment of the third and fourth having been refused, these actions were brought September 28, 1917, to enforce said payments. Said notes, being for like amounts, were in the following form:

"$3,250.00. Bakersfield, Cal., Oct. 14, 1914.
"Thirty-two months after date, I promise to pay to the order of H. B. Thornberry thirty-two hundred fifty and no/100 dollars, for value received, with interest at the rate of 7 per cent. per annum from date, and if the interest be not paid annually, to become as principal, and bear the same rate of interest. This note is negotiable and payable without defalcation or discount and without any relief or benefit whatever from stay, valuation, appraisement, or homestead exemption laws.
"Phillip Fickert."

The complaints are in the usual form of actions to recover on promissory notes.

By way of answer and as a separate and special defense, defendant alleged that on the 14th day of October, 1914, a certain transaction and agreement was made between defendant and H. B. Thornberry, plaintiffs' assignor, by the terms of which said Thornberry sold defendant 20 head of jennets for the price of $13,000, of which sum the promissory notes set out in plaintiffs' complaint, respectively, evidenced only a portion of the consideration therefor, that it was the agreement of said parties thereto that any male colts born to any of said jennets would, upon demand of defendant, be purchased by Thornberry from defendant at the time when such male colts were ready to be weaned, for the sum of $1,000 each, and that at any time during the pendency of said contract, and before the final payment of any of the promissory notes given as the purchase price of said jennets, said Thornberry would upon demand of defendant receive back the said jennets or such of them as then survived, and all the progeny thereof, and would in addition thereto cancel and release him from all obligations then subsisting on account of said purchase of said jennets and repay all sums of money paid by defendant to said Thornberry. It was further alleged that there had been born to said jennets while in defendant's possession eight male colts, all of which had been weaned, and that a demand had been made upon said Thornberry to purchase the same at the agreed price of $1,000 each, but he had at all times refused to purchase the same, that on November 30, 1915, defendant notified said Thornberry of his election to rescind in accordance with said agreement by offering to return the survivors of said jennets, numbering eighteen, and the progeny thereof, numbering, on November 30, 1915, eight (four jack colts and four jennet colts), upon condition that said Thornberry return to defendant the promissory notes then outstanding against him, including the notes set forth in plaintiffs' complaints, together with the amounts which he had theretofore paid, but that said Thornberry refused to accept said offer.

Defendant further alleges that the consideration for said promissory notes had wholly failed, in that said Thornberry had repudiated it and refused to perform the foregoing contract which constituted a material portion of the consideration for said promissory notes.

The answer concludes with an allegation that defendant had at all times been willing to deliver over and sell said eight male colts to said Thornberry for the sum of $1,000 each, and closes with an offer to sell said colts to said Thornberry at said price of $1,000 each.

The foregoing constitutes all the material matters set out in defendant's answers.

The court found that the said promissory notes were made, executed, and delivered as alleged in the complaints respectively; that before said notes became due and payable, and for a valuable consideration, said Thornberry assigned and sold said notes and the indebtedness evidenced thereby to said respective party plaintiffs, and that said plaintiffs are the legal owners and holders thereof; that no part of the principal or interest has been paid on said third note except the sum of $227.50, paid October 14, 1915, being the installment of interest due on that day, and $545 paid on the same day on account of principal. The court then proceeded to find that every material allegation of the answer was true, but that it was not true that there was due to the First National Bank of Antioch, on January 18, 1919, the sum of $3,089.55 on account of principal and unpaid interest, or any sum whatsoever. A similar finding was made against the fourth assigned promissory note, owned by plaintiff Commonwealth National Bank of Kansas City, Mo., as to any amount being due or owing from the defendant, although a large amount remained unpaid on account of the note it held against said defendant.

It is further expressly found that plaintiffs had no knowledge of any representations made by said Thornberry to said defendant at the time, to wit, October 14, 1914, said contract and agreement, which was in parol, was made, as to the progeny of said jennets or as to any representations or statements made by said Thornberry as to the subject-matter of said contract or agreement.

As a conclusion of law from its finding of fact the court determined that the promissory notes set out in said complaints are not negotiable in form and were purchased and received by plaintiffs subject to all equities and defenses existing in favor of and against plaintiffs' assignor, Thornberry, and defendant was declared, therefore, to be entitled to judgment for his costs.

We are of the opinion that the trial court's conclusion is erroneous.

Every material fact essential to entitle plaintiffs to judgment is either found by the court or admitted to be true, except that the notes in question were in form nonnegotiable, and that the evidence received to establish the parol agreement over the objection of plaintiffs was properly admitted and was sufficient to defeat the actions.

[1] It would serve no practical purpose to follow counsel through learned disquisitions as to what impedimenta commercial paper may carry and still retain its negotiable character. The instant case appears to fall wholly within the rule of stare decisis. The identical language, even as to the arrangement of words and sentences, relied upon by defendant to outlaw said notes from the negotiable instrument class, was passed upon in Flood v. Petry, 165 Cal. 309, 132 Pac. 256, 46 L. R. A. (N. S.) 861. The instant cases, upon the facts, places plaintiffs in a more favorable position than was plaintiff in Flood v. Petry, supra. There plaintiff had knowledge of an existent contract between Flood and defendant Petry's assignor. Here it is found that plaintiffs had no knowledge of any contract or condition of any kind that did or could affect the notes upon which the present actions were brought. Defendant here, as in the case last above cited, must be held to be estopped from setting up the defense of nonnegotiability of said notes, which were assigned before maturity and for a valuable consideration and without notice of any pretended existing equities against them. "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civ. Code, § 3543; Flood v. Petry, supra; Spotton v. Dyer, 184 Pac. 23.

[2] We further think that the evidence tending to establish the parol agreement was improperly admitted. The written agreement of contract, dated June 1, 1914, seems to be full and complete and is presumed to contain all of the engagements of the parties thereto. Section 1856, Code Civ. Proc.; section 1625, Civ. Code; Langan v. Langan, 89 Cal. 194, 26 Pac. 764.

There is nothing ambiguous or uncertain about the terms of the contract, nor does it appear to be oppressive or inequitable. It is not attacked upon the ground of fraud, mistake, or accident. Section 1640, Civ. Code. No attempt was made to reform it.

[3] It is the claim of defendant that the evidence received to establish the parol contract was admissible to show the true nature of the consideration and not to vary the terms of the contract. The alleged subsequent parol contract does, however, substantially change the terms of the written contract, and reduces it from an absolute to a conditional or contingent sale. It makes for the parties another and different agreement. This may not be done. Lompoc Valley Bank v. Stephenson, 156 Cal. 350, 104 Pac. 449; Carver v. San Joaquin Cigar Co., 16 Cal. App. 761, 118 Pac. 92; Hardin v. Robinson, 175 Cal. 534, 166 Pac. 808; Germain Fruit Co. v. Armsby, 153 Cal. 585, 96 Pac. 319; Langan v. Langan, 89 Cal. 194, 26 Pac. 764; Bledsoe v. Stuckey, 190 Pac. 217; Peterson v. Chaix, 5 Cal. App. 525, 90 Pac. 948.

Defendant and his wife gave testimony in support of the alleged parol agreement, while Thornberry denied that any such agreement had been made. Letters written by defendant's wife, at his dictation, in answer to repeated demands made by Thornberry for payment of the notes in accordance with the written contract, tend strongly to support the claim that the contract of sale was absolute, and not conditional. One of the excerpts from a letter written at defendant's direction to Thornberry, and others to the same effect are in the record, is as follows:

> "I don't want you to think I am trying to get out of the deal. I know the money is due you, and should be paid, and will be, as soon as I can make the required arrangements."

If the oral agreement had been made as contended for, defendant voluntarily placed himself in an embarrassing situation by not reminding Thornberry of that fact at the times when he was being harassed by demands to pay in accordance with the written agreement. From the view we take of the law of the two cases presented there seems to be no avenue by which defendant may escape from plaintiffs' demands. A retrial would be unavailing to defendant.

The judgments appealed from are therefore reversed with directions to the court below to enter judgments in favor of plaintiffs as their respective interests are shown by the record.

We concur: RICHARDS, J.; KERRIGAN, J.

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51 Cal. App. 65

BROWN v. TITLE INS. & TRUST CO.

(Civ. 3657.)

(District Court of Appeal, First District, Division 1, California. Jan. 13, 1921. Hearing Denied by Supreme Court March 14, 1921.)

1. Abstracts of title 🔑3—Acknowledgment 🔑6(2)—Obvious mistake as to date of acknowledgment does not prevent recording.

Where the certificate of acknowledgment was dated two years before the date of the conveyance obviously by a mistake in inserting the day of the month for the number of the year in the blank, and the deed referred to in the certificate of acknowledgment showed by exception of taxes for that year from the warranty that the acknowledgment certificate was a mistake, the defect does not prevent the deed from being entitled to recordation, notwithstanding Civ. Code, § 1202, prescribing proceedings to correct a defective certificate, and such mistake does not make false a certificate that the title appeared of record in the name of the grantee in the deed.

2. Acknowledgment 🔑31 — Acknowledgment obviously dated wrong presumed to have been taken on date of deed.

Where the date stated in the certificate of acknowledgment was obviously wrong on its face, the certificate is to be treated as undated and is presumed to have been made on the date of the execution of the deed.

3. Abstracts of title 🔑3—Statute regulating evidence of defectively acknowledged deeds held inapplicable in action against title examiners.

In an action against a title company which had given a certificate that the title appeared of record in the grantee named in a deed the acknowledgment certificate to which was obviously incorrectly dated, Civ. Code, § 1202, providing for validation of instruments notwithstanding defects in acknowledgment in admitting them in evidence with like effect as copies of an instrument duly acknowledged, provided it is shown the original instrument was genuine when the copying in the record book occurred within 15 years prior to the trial, has no application.

4. Abstracts of title 🔑3—Defective acknowledgment certificate does not render abstractor liable for forgery through grantee's negligence.

The fact that the deed to grantee in the chain of title which a title company certified appeared of record in the grantee had an erroneous date in the certificate of acknowledgment does not render the title company liable for damages caused by the fact that grantor, using a fictitious name by which he was recognized in the deal by plaintiff, the trust company, and the notary, had forged a conveyance to himself from the true owner, since the loss was sustained by the grantor's negligence, and not by the error in the certificate, which at most would have subjected the owner only to the costs of a suit to correct it.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by George W. Brown against the Title Insurance & Trust Company for damages occasioned by the fraud of a third person in a real estate transaction. From a judgment dismissing the action after demurrer to plaintiff's third amended complaint was sustained without leave to amend, plaintiff appeals. Affirmed.

Goodwin & Morgrage, of Los Angeles, for appellant.

O'Melveny, Millikin & Tuller, of Los Angeles, for respondent.

SEAWELL, Presiding Justice pro tem. This is an appeal from a judgment of dismissal of the action entered after order made sustaining a demurrer to plaintiff's third amended complaint without leave to amend.

The facts are quite fully stated in the complaint. The defendant at the times therein mentioned was a corporation duly organized and, as alleged, "engaged in the business of examining the record titles to real property in Los Angeles county, issuing its written guaranty as to the true condition of such titles, as shown by the records in the recorder's office of said county, and holding money and papers in accordance with instructions given it by the respective parties creating such escrows."

The action was brought against defendant Title Insurance & Trust Company to recover the sum of $4,750 as damages sustained by reason of a fraud imposed upon plaintiff by a third party in a real estate transaction by the alleged fault of defendant.

The facts relied upon to maintain this action are identical with those related in Brown v. Rives, 184 Pac. 32. There the action was brought by this plaintiff against the notary public, E. E. Rives, and his surety for damages in the sum of $4,750, alleged to have resulted from the negligence of said notary in taking the acknowledgment of a person who represented himself to be Helmer E. Rabild and the owner of the property described by the conveyance in which plaintiff, Brown, was named as grantee, without personal knowledge or proof of said Rabild's identity.

Judgment for defendant was affirmed on appeal on the sole ground that any negligence on the part of the notary, Rives, was not the proximate cause of plaintiff's injury. Brown v. Rives, supra.

By the instant action plaintiff seeks to recover from defendant a like amount as damages alleged to have resulted from the issuance to him of a false certificate as to the condition of the record title of the same lots or property described in said former action and also in having disregarded plaintiff's instructions in the payment of said sum to impostor Rabild.

The complaint sets out two causes of action. No argument is made to support the second cause of action. The view taken by the court as to the law of the case makes the second cause of action unimportant.

For many years prior to May 26, 1914, Martin L. Kelsey and Anna B. Kelsey, his wife, had been and then were owners of lots 15, 16, and 17, block 9, Van Ness Avenue square, city of Los Angeles, as shown by the records of Los Angeles county.

On May 26, 1914, one Leonard C. Canfield laid a general plan to defraud by forging the names of said Kelsey and wife and a notarial certificate of their acknowledgments to a deed purporting to convey their title to said three lots to a fictitious person, to wit, Rabild, and caused the same to be placed of record. Canfield in the preparation and furtherance of his plan to cheat and defraud had, prior to the making of said forgery, assumed the name Helmer E. Rabild, and retained said name throughout his transactions with both plaintiff and defendant.

On or about June 10, 1914, said Canfield, now Rabild, called plaintiff on the telephone, and, after introducing himself as Helmer E. Rabild, stated that he was the owner of said three lots actually owned by the Kelseys, and offered the same to plaintiff for the sum of $4,750. He also in this conversation agreed to furnish plaintiff with three certificates of title, one for each lot, to be issued by defendant Title Insurance & Trust Company free from all incumbrances except the taxes for the year 1914–15, and also certain building restrictions and easements. Plaintiff stated to Canfield, whom he accepted as Rabild, that he would place $4,750 with defendant trust company with instructions to pay the same to him whenever said trust company issued its certificate in usual form that title to said property was vested in plaintiff. Subsequent to said conversation and on the same day plaintiff deposited with said trust company said sum of $4,750, with written instructions to said trust company to "pay said sum to Helmer E. Rabild when it could issue its certificate of title in usual form that title to said property *appeared from the records* of Los Angeles county as vested in plaintiff." (Italics are ours.)

Plaintiff had no personal acquaintance with Canfield as Rabild or at all. They did not meet at any time pending the transaction. Neither did Canfield present himself as such or as Rabild at the trust company's offices, nor does it appear that he was known to any of its officers. He made no physical manifestations to either plaintiff or defendant, but employed the telephone and United States mail as exclusive methods of obtaining and imparting information necessary for the accomplishment of his purposes. On June 24, 1914, he sent to defendant trust company through the mail an instrument in the form of a deed, in which Helmer E. Rabild was the named grantor and George W. Brown, plaintiff, was named as grantee, describing the same three lots described by the forged Kelsey deed. Defendant on the same day filed said deed for record, executed three separate written guaranties that title to said lots, as such appeared from the records of said county of Los Angeles, were on said date vested in George W. Brown, and, without further communicating with plaintiff, mailed said check or money order addressed to Helmer E. Rabild, Monrovia, Los Angeles county, which was received and appropriated by the person in whose name it was sent. The witnessing clause of the deed was in the followings words and figures:

> "Witness my hand this 12th day of June 1914.
> "Helmer E. Rabild."

The notarial certificate was in words and figures as follows:

> "State of California, County of Los Angeles–ss.:
>
> "On this 12th day of June, 1912, before me, E. E. Rives, a notary public in and for said county, personally appeared Helmer E. Rabild, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.
>
> "Witness my hand and official seal.
> "[Notarial Seal] E. E. Rives,
> "Notary Public, Los Angeles County, California."

E. E. Rives was in fact a duly appointed, qualified, and acting notary, and had, so far as he knew, actually taken the acknowledgment of Rabild. In form the certificate of acknowledgment complies with the requirements of section 1189, Civil Code.

No other questions affecting title from other sources were presented in either case.

Upon the foregoing statement of facts it is argued by counsel for plaintiff that the "defective certificate of acknowledgment" showed upon its face that Rabild had appeared before the notary as grantor in said deed two years before title could have passed to him and at a time when it was incontrovertibly in the Kelseys, and that this constitutes actionable negligence on the part of defendant. It is insisted that the defect above pointed out was sufficient to have put defendant as the agent of plaintiff upon inquiry, and defendant should have refused to file said deed for record, as it was not entitled to recordation.

It is apparent from an inspection of the instrument itself that said defect was a clerical error. No fraudulent design is charged against the notary who committed the error. The figures intended to correctly state the day of the month were repeated in the blank space provided for the insertion of the current year, not an uncommon slip of the mind.

The argument made by plaintiff's counsel to the effect that the deed was absolutely void under our Code sections, and not, therefore, entitled to be placed on the public records by reason of its defective certificate of acknowledgment, is reduced to secondary importance by the conclusion we have reached that said defect is not the proximate cause of plaintiff's loss.

[1] However, reverting for the moment to the subject of recordation of instruments, it is significant that section 1202, Civil Code, contemplates defective certificates and provides that, when "an instrument is properly made, but defectively certified, any party interested may have an action in the superior court to obtain a judgment correcting the certificate."

The fact that a notarial certificate is dated earlier than the deed, when it is clearly shown by a reference to the deed that such date is erroneous, does not alone invalidate the certificate.

It has been held no error to admit a deed in evidence, although the certificate of acknowledgment bears date prior to the acknowledgment of the deed if from the instrument it appears that it was actually made at the time of its acknowledgment, and that the conflict in dates arises from a mere clerical error. Mosier v. Momsen, 13 Okl. 41, 74 Pac. 905; Fisher v. Butcher, 19 Ohio, 406, 53 Am. Dec. 436; In re Dahlem's Estate, 175 Pa. 455, 34 Atl. 807, 52 Am. St. Rep. 848; 1 C. J. 828; 1 R. C. L. 286.

States having statutes requiring that the true date of the making of an acknowledgment of an instrument shall be stated in the certificate thereof have held the rule to be that it is sufficient if the date appears by evidence within the instrument itself. In re Dahlem's Estate, 175 Pa. 455, 34 Atl. 807, 52 Am. St. Rep. 848; Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661; Kelly v. Rosenstock, 45 Md. 389.

If the rule recognized by other jurisdictions may be applied to the situation here presented, plaintiff's contention that the deed of June 12, 1914, was not entitled to be recorded and imparted notice to no one is not sustainable.

The notarial certificate makes direct reference to the deed dated June 12, 1914. The certificate declares that Helmer E. Rabild, known to the notary to be the person whose name was subscribed to the within instrument, personally appeared before him and acknowledged that he executed the same. The deed further contains the following provision which would have been a very significant circumstance to any one that the acknowledgment was not made prior to a time when taxes for the current year, to wit, 1914, became a lien upon the property:

> "Subject to the 1914 and 1915 taxes, also subject to restrictions, reservations and conditions as recorded in Book 4192, page 201, of Deeds."

[2] This was notice to the world that at least the taxes assessed against the property for the year 1914 had not been paid and the title was subject to other conditions. The instrument itself contained the evidence that the acknowledgment had not been taken prior to a time when taxes became payable. The claim that the acknowledgment was taken on the day named in the certificate being shown to be erroneous removes it from all consideration, and the presumption that it was taken on the day the deed bears date must be indulged. Where no date appears in the certificate or if it is rendered by evidence within itself so doubtful as to destroy its force, the certificate will be presumed to be made, under all the authorities, at the date of the instrument.

[3] Section 1207, Civil Code, which provides, upon conditions therein stated, for the validation of instruments affecting title to real property, notwithstanding any defect, omission, or informality in their execution or in the certificate of acknowledgment or the absence of any such certificate, is relied upon by plaintiff as being conclusive against any avenue of escape from liability. The closing lines of said section provide that certified copies of any instrument described in said section "may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded, provided, when such copying in the proper book of record occurred within fifteen years prior to the trial of the action it is shown first that the original instrument was genuine."

The above section is not applicable to the facts of the instant case. There are no facts in the instant case upon which the rule of evidence as stated may operate. It is not necessary, therefore, to proceed further with a discussion of this subject for reasons above stated.

[4] Plaintiff contends that the deed in question was false, inasmuch as Rabild had but mythical existence. But the truth of the matter is, plaintiff, Brown, by his written instructions to defendant gave to Helmer E. Rabild corporeal existence and fitted him to his newly chosen name. Defendant had no part in bringing plaintiff, Brown, and impostor Rabild together.

Defendant was instructed by plaintiff to deal with one Helmer E. Rabild as the owner of said lots. The identical person whom plaintiff had bargained with, using the same name given to defendant, was the person received by and dealt with by defendant. So far as this transaction is concerned, Rabild cannot be regarded as a fictitious person in his business dealing with defendant. Plaintiff was the author of his own misfortune.

The main facts of the instant case in plan and purpose are quite similar to those set out in Bank of Savings v. Murfey, 68 Cal. 455, 9 Pac. 843. The impostor in the instant case seems to have employed the same methods that were practiced by the impostor in the former case. Defendant Murfey was a notary public. Wright Leroy was an impostor and swindler. Leroy introduced himself to Murfey as M. B. West and requested Murfey to draw a deed from him to Henry Harmon for a lot in Oakland. Murfey prepared the deed as directed. Leroy signed the name of M. B. West, and in that name acknowledged its execution. Murfey affixed his certificate to the deed in the usual form. Later Leroy presented himself at the banking house of plaintiff, introducing himself as Henry Harmon to E. C. Sessions, its president, and stated that he desired to borrow $4,000 on the property described in the West deed. After some preliminary arrangements the examination of the title was referred to a searcher, who reported the record title in M. B. West. Later Leroy presented himself at the bank and handed Mr. Sessions the forged deed. A note and mortgage in the agreed amount of $4,000 were prepared, the mortgage duly executed and acknowledged before one of the bank's officers, who was a notary, and the money paid to Leroy. None of the officers of the bank had ever seen Leroy until he presented himself to the bank in this transaction. An action for damages was brought against the notary, Murfey, for negligence in certifying Leroy to be West, the owner of the property. The court held that, while the notary was negligent and careless in taking and certifying the acknowledgment to said deed without knowing or requiring proof that the person subscribing the name M. B. West to said deed was in fact West, nevertheless plaintiff's damage was not proximately caused by Murfey's negligence, but the result of plaintiff's negligence in failing to inquire as to the identity of the person to whom it was making a loan and taking a note and mortgage therefor and accepting a person who was not personally known or proven to its president or some of its officers to be the person whose name was subscribed to said instrument.

The question of proximate cause as it pertinently applies to the facts of the instant case is exhaustively discussed in the Murfey Case, supra. Plaintiff in the instant case gave defendant no instructions to take the acknowledgment of Rabild. Impliedly plaintiff made Rabild his agent to select any qualified notary he might choose. Rabild selected Rives.

Plaintiff prepared the way for the commission of the fraud perpetrated upon him by giving verity to Rabild's identity. Rives, the notary, had certified that Rabild, personally known to him to be the person whose name was subscribed to the deed had executed the instrument. The deed from Kelsey and wife to Helmer E. Rabild was already of record.

If the notarial certificate had been faultless as to date, plaintiff, admittedly, would have received all that he had bargained for, to wit, a deed formally executed by Rabild in accordance with instructions and which would have been sufficient to have justified defendant in issuing its certificate "that title to said property appeared from the records of said Los Angeles county as vested in him." But such a deed would have conveyed to him nothing. A specious deed yet stood between him and actual title. Plaintiff's only chance of circumventing an unsuspected forgery is now urged in an action against defendant as a ground for damages for the commission of an error in the consummation of a transaction that would have resulted in certain loss to plaintiff except for the intervention of said error.

To sustain the right to maintain an action for damages on a mere naked error, where no substantial benefit could possibly come to the person urging such as a basis of damage, would be repugnant to every principle of equity as well as the sound policy of the law. It is not pretended that defendant was an insurer of plaintiff's title.

If the deed in question had been genuine, in the absence of intervening rights, the only damages plaintiff could have suffered would have been the costs of maintaining an action to correct the error in the manner provided for by statute. Nothing could have been done, under the circumstances of the situation, to have made plaintiff whole. An action to correct the defect would have been an idle thing.

Plaintiff having stated his cause as broadly and as favorably to himself as the facts would permit, and it appearing that there is no theory upon which the action may be maintained against defendant, the judgment of the trial court is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

51 Cal. App. 82

HYDE et al. v. WILDE et al. (Civ. 3369.)

(District Court of Appeal, Second District, Division 1, California. Jan. 15, 1921. Rehearing Denied Feb. 11, 1921. Hearing Denied by Supreme Court March 14, 1921.)

1. Mandamus 🔑10—Writ cannot be invoked to compel performance of ineffective act by city council.

If a proposed city ordinance relative to the matter of material to be used in street construction and surface work does not fall within the purview of the initiative reservation, petitioners for writ of mandate against the mayor and common council of the city to compel them either to pass the ordinance or submit it at a special election have no right to insist that the city council pass the ordinance or call election and submit it to vote, as nothing would be thereby accomplished, while a writ of mandate is never to be invoked to compel the performance of act without effect in law.

2. Municipal corporations 🔑79—City can include within charter requirements as to procedure for street improvements which will prevail over general law.

Under the grant of municipal power a city has the right to include within her charter provisions requirements as to the manner and procedure to be adopted for the guidance of her officers in improvements of the streets, and such provisions will prevail over general law.

3. Municipal corporations 🔑78—State law controls matter classed as municipal affair, in absence of charter provisions.

Where no particular provisions are made in a city charter covering a matter falling within the classification of a municipal affair, the state law controls.

4. Municipal corporations 🔑282(4)—Vrooman Act confers on council discretion in determining character of pavement, exercise being administrative act not within initiative and referendum.

The Vrooman Act, the general law of the state under which street improvement work is prosecuted, confers a discretion on the city council to determine the kind of material to be used in the improvement of a street, which discretion is not intended to be exercised by a blanket declaration or ordinance, but with respect to the particular work, as it becomes necessary, and in the exercise of such discretion the council performs an administrative act not legislative in character within the meaning of the constitutional provision reserving to the people the right to initiate and refer legislation.

5. Municipal corporations 🔑282(4)—Neither city council nor electors can modify or restrict power given council by Vrooman Act to determine paving material.

The Vrooman Act, the general law of the state under which street improvement work is prosecuted, defines the powers of city councils and boards of trustees in respect of determining with what material paving work shall be done, and neither the city council itself nor the electors, by approving at an election an ordinance constituting a blanket determination by the council of the kind of paving material to be used, have the right to change, modify, or restrict the power given the council under the statute.

6. Municipal corporations 🔑78 — State law controls where no special procedure outlined touching municipal subject.

Under Const. art. 11, § 6, where no special procedure is outlined touching a municipal subject, the state law always controls.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Petition for writ of mandate by C. L. Hyde and others against Louis J. Wilde and others. From judgment directing issuance of the writ, defendants appeal. Judgment reversed, and superior court ordered to enter order dismissing the proceeding.

S. J. Higgins, City Atty., F. McCleneghan, Deputy City Atty., and M. R. Thorp, all of San Diego, and Paul S. Honberger, of Los Angeles, for appellants.

Charles C. Crouch, of San Diego, for respondents.

JAMES, J. Plaintiffs, alleging themselves to be duly qualified and registered voters within the municipal limits of the city of San Diego, brought this proceeding against the mayor and common council of said city to compel the council to either pass or submit at a special election a certain ordinance desired to be put into effect by the petitioners. A judgment for the issuance of a peremptory writ was made after hearing had, and defendants have appealed.

The proposed ordinance had to do with the matter of material to be used in street construction and surface work, and the material clause thereof is as follows:

"Section 1. That from and after the adoption of this ordinance, it shall be unlawful to construct, or for any person or official of the city to order the construction of, any patented pavement, or patent process pavement, upon any of the public streets, alleys, or rights of way in the city of San Diego, until the owner of such patent shall have transferred to the city all right to the use of the same therein, with the privilege of any person to manufacture and lay the same upon the streets under any contract that may be awarded to him, or entered into by him with the city of San Diego, or the superintendent of streets of the said city."

[1] Numerous grounds of objection to the claim of the petitioners were raised by the answers made to the petition, and it is insisted here that, upon either of the grounds alleged, the petition should have been denied. It will not be necessary to give particular attention to each of the grounds urged by appellants. A determination of the one main question argued in the briefs is all that is essential to a consideration of this appeal. This contention is, briefly, that the city of San Diego is governed by the general law of the state in the matter of the improvement of her streets; that under the state law the appropriate authorities of the city are given the right to determine the kind of material to be used in street improvement work, and that the provisions of the proposed ordinance, if valid, would effect a modification and repeal of the state law; that only the state Legislature, or the electors of the state as a body acting under the initiative, may change the state law. The last proposition is extended by the argument that the proposed ordinance would likewise operate to amend the freeholders' charter, authority for which, in the manner proposed, does not exist in law. The basis for the latter argument will more fully appear in the statement hereinafter made. It is admitted that the petition presented by the plaintiffs was sufficient in form and substance. The question is, Was the subject-matter of the proposed ordinance a matter of legislative nature such as is intended to be covered by the right reserved in the people to initiate or prevent legislation? If the proposed ordinance does not fall within the purview of the initiative reservation, then petitioners would have no right to insist that the city council pass the ordinance or call an election and submit it to a vote, for nothing would be thereby accomplished, and mandate is never permitted to be invoked to compel the performance of acts which will have no effect in law. Navajo, etc., Mining Co. v. Curry, 147 Cal. 582, 82 Pac. 247, 109 Am. St. Rep. 176; Wiedwald v.

Dodson, 95 Cal. 450, 30 Pac. 580. In State ex rel. Davies v. White et al., 36 Nev. 334, 136 Pac. 110, 50 L. R. A. (N. S.) 195, it is said:

> "The proposition that a writ of mandate will not issue to compel respondents to submit to the electors of the city a proposed ordinance that would be void even if approved by a majority of the electors is too clear for discussion or the citation of authorities. It remains only to consider whether the proposed ordinance would be valid if enacted."

Our Supreme Court, in the case of Hopping v. Council of the City of Richmond, 170 Cal. 605, 150 Pac. 977, has said:

> "Executive powers are frequently committed to the city council, and they are sometimes exercised by declarations in the form of an ordinance or resolution. The fact that executive action is taken by ordinance or resolution would not make it subject to the power of the referendum. With respect to such action, no matter how effected, the people, under the constitutional reservation, would not have the power of invoking the referendum to reject or approve them by popular vote. * * * We think the provisions of the referendum should be held applicable to all ordinances and resolutions which constitute an exercise of legislative power. * * * To allow it to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of a city. In many cases it would entirely prevent the exercise of the executive power necessary to carry out the acts determined upon by the legislative department. In the absence of a very clear declaration to the contrary, it must be presumed that the power of referendum was intended to apply solely to the legislative powers of the city. * * * If the council should, either by resolution or ordinance, do something purely executive in character, unmixed with any exercise of legislative power, the provisions of this section should be held inapplicable thereto."

We cite this case more particularly to the point that electors, by the mere filing of a petition otherwise sufficient proposing an ordinance for adoption, have not the right to compel either the adoption of the ordinance or the submission of the same to a vote of the electors, regardless of the subject-matter contained therein. The freeholders' charter of the city of San Diego contains this provision:

> "The mode and manner for the improvement of streets, lanes, alleys, places or courts in this city, where an assessment is levied for the payment of any part or portion of the expense thereof, shall be as prescribed by the general law of the state of California, relative to the improvement of streets, lanes, alleys, places or courts in municipalities, in force at the time proceedings were taken for the improvement of the same."

[2] No other provision is contained in the charter referring to the matter of the improvement of streets, etc. Under the grant of municipal power a city has the right to include within her charter provisions requirements as to the manner and procedure to be adopted for the guidance of her officers in improvement of the streets, and such provisions will prevail over the general law. Cole v. City of Los Angeles, 180 Cal. 617, 182 Pac. 436; Hayes v. Handley et al. (Sup.) 187 Pac. 952.

[3] Where no particular provisions are made covering a matter falling within the classification as a "municipal affair," the state law controls. Hence the condition with respect to the San Diego charter is the same as though no reference had been contained in the charter affecting the matter of public streets at all, for the provision quoted is merely declarative of the law which would control in the absence of such declaration. Clouse et al. v. City of San Diego et al., 159 Cal. 434, 114 Pac. 573. The Vrooman Act (Deering's Gen. Laws 1915, p. 1715), which is the general law of the state under which street improvement work is prosecuted, provides that when the public interest requires the city council may order streets or ways to be graded, planked, paved or repaved. The act further provides as follows:

> "The words 'paved' or 'repaved,' as used in this act, shall be held to mean and include pavement of stone, whether paving blocks or macadamizing, or of bituminous rock or asphalt, or of iron, wood or other material, whether patented or not, which the city council shall by ordinance adopt."

By this provision two things seem clear: First, that a discretion is conferred by the state law upon the city council to determine as to the kind of material to be used in the improvement of a street; second, that the discretion confided is not intended to be exercised by a "blanket" declaration or ordinance, but is to be exercised with respect to the particular work to be done as the same becomes necessary. If discretion is given to the city council by statute to make the selection of material, then the ordinance proposed, as appellants argue, would have the effect, if valid, of repealing in part the state law.

[4] We are of the opinion that the statute of the state does confer a discretion upon the city council; that in the exercise of that discretion the council performs an administrative act, not legislative in character, within the meaning of the constitutional provision reserving to the people the right to initiate and refer legislation. To make the position clearer, we may here inquire, Could the city council, under the authority of the law, pass and adopt an ordinance providing that in the future all streets of the city should be paved or repaved with rock and no other substance? Would such an ordinance have any binding effect upon the council or a succeeding council when the matter of determining the work to be done on a particular street might arise?

We think clearly that no such ordinance could be adopted which would have such general effect. It would fall within the class of matters which, as the court said in Thompson v. Board of Trustees, 144 Cal. 281, 77 Pac. 951—

> "it was beyond the powers of the board by ordinance or otherwise to divest itself and succeeding boards, for a longer or a shorter period, of powers vested in it by the general law for the benefit of its constituents. For this would be to repeal pro tanto the general law. Nor, if this objection could be obviated, would it have been competent for the board thus to bind its successors."

In the case of Hopping v. Council of City of Richmond, supra, the court had in mind undoubtedly the question as to whether the power of the initiative and referendum could be made to extend at all to street improvement procedure, when it said:

> "There may be grounds for excluding from the operation of these powers legislative acts which are special and local in their nature and in which the entire body of citizens who shall exercise the power of referendum and initiative is not interested, such as resolutions to make local improvements and the like. This question is not before us, for the matters determined by the resolution are not local to any particular part of Richmond."

In Chase v. Kalber, 28 Cal. App. 561, 153 Pac. 397, wherein was concerned a mandate petition to require the town clerk to act with respect to a referendum petition filed against a certain resolution passed by the board of trustees establishing the grades of streets and avenues, the court declared in denying the writ:

> "However, as before stated, we have been led to the conclusion upon a reconsideration of the case that, notwithstanding that resolutions of intention to establish grades or otherwise improve streets are of a legislative character, none of the steps necessary to be taken in proceedings for street improvement was intended by the people to come within either the power of the initiative or that of the referendum as delegated by the people through their Constitution to the electors of municipal corporations."

As expressive of the same impression as to the law, this court in Starbuck v. City of Fullerton, 34 Cal. App. 683, 168 Pac. 583—that being a referendum case where it was sought to cause to be submitted to a vote of the electors an ordinance of intention to open a street, passed by the local board of trustees—said:

> "In our opinion, the constitutional provision giving and guaranteeing to electors the right to the initiative and referendum was not designed to furnish a means by which street improvements local in character can be either commenced or prevented by the use of the initiative or referendum."

[5] In this case it is not necessary to place the decision upon the ground that no part of street improvement proceedings may be subjected to these rights reserved to the people. We hold simply that the state law defines the powers of city councils and boards of trustees in the matters concerned in the proposed ordinance, and that neither the city council itself nor the electors, in the manner here attempted, have the right to change, modify, or restrict the power given under the statute.

[6] It is said by respondents that, as the city charter contains a provision authorizing the council "to contract bonded indebtedness for any other purpose authorized by this charter or the general law of the state of California," somehow some work might be done by way of improvement of streets which would not come within that class mentioned in the charter provision making the general law applicable "where an assessment is levied for the payment of any part or portion of the expense thereof." Our attention is not called to any provision of the charter defining or limiting the power of the city council to determine what material shall be used in any class of street work, and it is very clear that the power in that respect is all derived from the state law, by which it must be concluded that discretion is made to vest in the municipal board to select material as occasion requires. We have already made it clear that the condition of the charter wherein street improvement work is referred to is of no different effect than had no reference whatsoever been contained therein. Where no special procedure is outlined touching a municipal subject, the state law always controls by force of the Constitution. Section 6, art. 11, Const. Cal.

In our opinion, the petitioners were not entitled to the writ awarded to them by the trial court.

The judgment is reversed; it is further ordered that the superior court enter its order dismissing the proceeding.

We concur: CONREY, P. J.; SHAW, J.

(51 Cal. App. 131)

STOCKTON et al. v. HIND et al.
(Civ. 3640.)

(District Court of Appeal, First District, Division 1, California. January 21, 1921. Hearing Denied by Supreme Court March 21, 1921.)

1. Fraud 🔑11(1)—Opinion ordinarily not actionable.

As a general rule an expression of opinion or belief, if so understood and intended, is not a representation of fact, and, although false, does not amount to actionable fraud.

2. Fraud 🔑64(1) — Whether representation constitutes opinion or statement of fact ordinarily for jury.

Where there is any doubt as to whether a representation was intended and understood as a mere expression of opinion or as a statement of fact, the question is not one of law, but of fact, for the jury or trial court.

3. Vendor and purchaser 🔑37(4)—Representation as to value may be statement of fact.

A statement by the vendor as to the value of the property and the value of the wood which can be cut therefrom may be made, not as a matter of opinion, but as a statement of fact, and, when so made and relied on by the party to whom it is made, it may be a fraudulent misrepresentation, warranting rescission.

4. Vendor and purchaser 🔑37(1)—Inspection by purchasers generally charges them with knowledge.

The fact that purchasers made an inspection of the property before buying, as a general rule, charges them with the knowledge that would ordinarily be acquired by such inspection, and in such a case they cannot rely on misrepresentations by the vendor.

5. Exchange of property 🔑5—Complaint in action to rescind for fraud held to show reliance on representations notwithstanding investigation.

In an action to rescind a contract for the exchange of property on the ground of fraud, a complaint alleging that the plaintiffs investigated the property they were to receive before they signed the contract, but that the husband was too ill at the time to make a careful inspection, and that the wife was unfamiliar with business matters, sufficiently excuses the failure of the plaintiffs to detect the falsity of the misrepresentations as to the value of the property and the timber thereon, so as to be good against demurrer.

6. Fraud 🔑41—Complaint held to state cause of action for fraud in exchange of property.

A complaint alleging that the defendant made false representations of fact concerning the value of property which he transferred to plaintiffs in exchange for their property, which representations the defndant knew to be false, and which were made to induce plaintiffs to convey their property for a grossly inadequate consideration, and that, relying upon the statements, the plaintiffs made the contemplated exchange, contains all the allegations necessary to state a cause of action based on fraud, under Civ. Code, § 1572.

7. Exchange of property 🔑5—Complaint for fraud held to excuse delay.

A complaint to rescind a contract for the exchange of property based on fraud, which alleged that after the contract plaintiffs, who were aged and infirm, did not reside on the property they acquired, but gave to defendants the contract to cut the timber therefrom, and did not learn until two years after the exchange that the representations as to value of the land and the timber thereon were gross exaggerations, alleges facts ample to excuse the delay in bringing the suit to rescind.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by N. S. Stockton and another against John Hind and others for rescission of a contract for exchange of land on the ground of fraud, in which Clara Stockton, as special administratrix of the estate of N. S. Stockton, deceased, was substituted as plaintiff for N. S. Stockton. Judgment for defendants, after demurrer to the second amended complaint was sustained, without leave to amend, and plaintiffs appeal. Reversed, with directions to overrule the demurrer.

Archibald J. Treat, of San Francisco, for appellants.

J. J. Dunne, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by the plaintiffs from a judgment following an order sustaining the defendants' demurrer to the second amended complaint without leave to amend in an action for the rescission of a contract on the ground of fraud.

Stripped of its legal verbiage, and as stated by the plaintiffs in their opening brief, the averments of the second amended complaint may be summarized as follows: The plaintiffs are husband and wife. The defendants are the Hind Ranch Company, the California Pacific Title Insurance Company, the Hind Company, Incorporated, a corporation, Alice R. Hind, George U. Hind, and C. P. Chamberlain. In May, 1916, the plaintiffs were the owners of an 1,180-acre tract of land in Merced county. The defendant John Hind was the owner of 335.02 acres of land in Napa county. The property of the plaintiffs was subject to a first mortgage in the sum of $40,000, accrued interest in the sum of about $3,000, and water rates of about $1,800; said property and other property of the plaintiffs was also subject to two deeds of trust, in about the sum of $26,500, and certain judgments or attachments, not exceeding the sum of $1,000. By the terms of an agreement (Exhibit A, attached to the complaint) the plaintiffs and John Hind were to exchange their properties, the latter to pay the amount due under said deeds of trust, but not to exceed $26,500, and said judgment and attachment liens, not to exceed the sum of $1,000, which sums were to be secured by a two-year deed of trust upon the Napa county property, which the Stocktons were to acquire in exchange for their Merced property. The personal property upon the Napa county land was to go with it, but the plaintiffs were to give a chattel mortgage thereon to Mr. Hind. It was further provided that the net proceeds of timber cut upon said Napa county land were to be applied to the liquidation of the indebtedness of the plaintiffs.

The complaint further alleges that the holders of one of the deeds of trust had advertised the Merced property to be sold on May 22, 1916; that 10 days previous to said advertised date of sale the defendant John Hind had proposed to plaintiffs the exchange of the lands referred to, and had made to them the following express statement of existing facts:

> "That the reasonable market value of his said land and property in Napa county, hereinabove referred to in paragraph V, was at least the sum of $75,000, and that there was timber and cordwood upon his said land of such a value that the same could be marketed at a profit to the plaintiffs of $55,000, and that although plaintiffs would be required to give a mortgage of about $30,000 upon the Napa county lands to effect the exchange contemplated, the sale of the timber and cordwood would bring enough to liquidate this mortgage, and that plaintiffs thereupon would acquire title to the said Napa county lands free and clear of all incumbrances in return for their equity in the said Merced county lands."

The plaintiffs knew nothing concerning the Napa county property. They visited it for the first time two days after the proposition was made them by Mr. Hind, and they were upon it but two hours. Mr. Stockton was ill and unable to inspect it, and the time was too short for Mrs. Stockton to do so. The plaintiffs had implicitly relied upon the statements of Mr. Hind and his reputation for business integrity. At the time of negotiations Mr. Stockton was about 84 years of age and feeble. His wife was inexperienced in business affairs, and was without knowledge or experience as to the value of the Napa county property, or of the cord or timber wood upon it. John Hind, taking advantage of the great age of Mr. Stockton, and knowing that they believed in him and his good reputation, and knowing that the representations made by him as to the value of the Napa county lands were false, and that they were not worth $75,000, in fact not worth to exceed $15,000, and that the timber thereon was not worth $30,000—in fact, not worth to exceed $1,000—fraudulently made the representations referred to for the purpose of inducing the plaintiffs to exchange their Merced county land for a grossly inadequate consideration; that relying upon the truth of the representations of Mr. Hind the agreement (Exhibit A) was signed on May 20, 1916, and on June 1, 1916, the plaintiffs deeded their land to Mr. Hind and executed papers necessary to carry said agreement into effect, and received from him a deed to his Napa county land.

There was no income from the Napa county property, and the Stocktons had no other property. Because of his great age Mr. Stockton was unable to support himself by labor, and his wife had to labor to support him. She was employed in Merced and Stanislaus counties from the date of the exchange to December, 1918. At no time did she reside upon the Napa county property, and only visited it infrequently. In May, 1917, she suffered a fractured skull, which physically incapacitated her; yet even before she had fully recovered from her accident, and for some time thereafter, she unsuccessfully endeavored to let a contract for the cutting of wood upon the Napa valley property. In October, 1917, the plaintiffs gave to certain of the defendants permission to cut, remove, and sell timber and cordwood from the Napa property, the net proceeds to be credited upon plaintiffs' indebtedness; $2,000 was to be advanced by John Hind, Alice R. Hind, and the Hind Company, for cutting, removing, and selling the timber and wood; the latter was to be sold by the Hinds, who, after reimbursing themselves for said advance and interest at 7 per cent., were to credit the indebtedness of the plaintiffs with anything remaining. If the wood could not be sold at a profit, the plaintiffs were nevertheless to repay all sums advanced, with interest. The plaintiffs were denied the right to themselves cut, remove, or sell timber or wood.

Pursuant to this agreement the Hinds cut, removed, and sold a portion of the timber and cordwood, but for a long time—i. e., from October 31, 1917, the date of the agreement, to July, 1918—refused to account to the plaintiffs. In July, 1918, plaintiffs for the first time learned that, if the whole of the timber and cordwood upon the Napa property were cut and sold, the net proceeds therefrom would not exceed $1,000, instead of the sum of $30,000, which they were induced to believe by John Hind would be the net derivable amount. This information as to the timber and cordwood led the plaintiffs to make inquiry as to the truth of the statements of John Hind as to the Napa land, the discovery that they could not pay off the indebtedness to John Hind from the sale of timber and cordwood, and that they parted with their $80,000 equity in the Merced land for lands in Napa county without value over the deed of trust thereon given to Hind. Promptly upon discovery the plaintiffs notified John Hind that they rescinded the agreement of exchange, offered to reconvey the Napa land and to reimburse him for advances and improvements, and to restore him to his original status, which offer Mr. Hind refused. The plaintiffs further offered to do all things which in equity and good conscience they ought to do to restore John Hind and the other defendants to their original status, providing only that the defendants likewise did equity to the plaintiffs. The defendant John Hind parted with his title to the Merced county land in favor of the defendant Hind Ranch Company, Incorporated, and the plaintiffs to secure their obligation to repay John Hind, conveyed their title in the Napa county land to the California Pacific Title Insurance Company as trustee.

The stockholders of the Hind Ranch Company are John Hind, George U. Hind, and C. P. Chamberlain, said three persons also constituting its board of directors, and each of these individuals had knowledge that the representations of John Hind were false and fraudulent, and that they were made with fraudulent purpose and intent. At the time John Hind refused to rescind the agreement of exchange the plaintiffs did not know that he had parted with his title to the Merced county land.

The principal point raised by the demurrer and discussed in the briefs is that the complaint fails to state a cause of action, in that it does not disclose that Hind made any misrepresentation as to a material fact. In support of the ruling of the court upon the demurrer it is argued that the averments that said defendant represented that the reasonable market value of the property to be conveyed to the plaintiffs was $75,000, and that the sale of the timber and cordwood that could be cut therefrom would bring enough to liquidate the mortgage which the plaintiffs as a part of the transaction were to give upon said land, were not statements of fact, but merely expressions of opinion.

[1, 2] It is conceded that the general rule is that an expression of opinion or belief, if nothing more, and if so understood and intended, is not a representation of fact, and, although false, does not amount to actionable fraud. Ordinarily a person has no right to rely upon such statements, and, if he does so rely, he cannot treat them as fraudulent, either for the purpose of maintaining an action in damages for deceit, or for the purpose of rescinding the contract. Where there is any doubt as to whether or not a representation was intended and understood as a mere expression of opinion or a statement of fact, the question is one not of law but of fact for the court or jury. 20 Cyc. 15 et seq.; Spreckels v. Gorrill, 152 Cal. 395, 92 Pac. 1011; 14 Am. & Eng. Ency. of Law, 36.

[3] The defendant Hind is charged in the complaint with making a fraudulent express statement of material existing facts. He is alleged to have stated, not as a matter of opinion, but as a fact, that the reasonable market value of the property was $75,000. and that the cordwood on the premises was worth in effect a certain amount. That such may be regarded as representations of fact is supported by numerous authorities:

"A statement as to the value of property is not always made as a mere expression of opinion, upon which the other party has no right to rely. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such, it is like any other misrepresentation of fact, and may be a fraudulent misrepresentation warranting rescission. The rule in regard to this matter is stated by Mr. Pomeroy as follows: 'Wherever a party states a matter which might otherwise be only a matter of opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation.' 2 Pom. Eq. Jur. § 878. He further says that the statements which most frequently come within this branch of the rule are those concerning value." Crandall v. Parks, 152 Cal. 776, 93 Pac. 1018.

"True, of course, it is that expressions of opinion honestly made are not actionable. Equity has no concern with them. But equally true it is that a false statement of an opinion expressed to one entitled to rely upon it may form the basis of an action for deceit, like any other misrepresentation of fact." Phelps v. Grady, 168 Cal. 77, 141 Pac. 926.

"The rule that mere expressions of opinion cannot constitute actionable fraud is, no doubt, subject to some qualification. A party inducing another to contract in reliance upon estimates or opinions professedly based upon alleged facts known to the party stating them to be nonexistent will not be permitted to escape responsibility by the plea that he was merely declaring his opinion." Henry v. Continental Bldg., etc., Ass'n, 156 Cal. 680, 105 Pac. 960.

[4, 5] Defendants further contend in effect that, even if it be conceded that the representations in question were of matters of fact, still, since the complaint shows that the plaintiffs inspected the property, they are chargeable with such information and knowledge as would ordinarily flow from such inspection. It is true that where material statements of fact are made to a vendee by a vendor, the former is under no obligation to verify and investigate the statements; and if they be false and the vendee suffer from his reliance thereon, he is entitled to relief. But if the vendee make an investigation of the property on his own account he cannot rely upon the representations. Here, however, it is shown by the complaint that while the plaintiffs visited the property and were afforded by the defendants an opportunity to inspect the same, no such inspection was in fact made by

reason of the illness of Mr. Stockton and the inexperience of Mrs. Stockton in business affairs, which may properly be regarded as a sufficient excuse for their not having made such inspection.

[6] The complaint shows that the defendant Hind made certain false representations of fact concerning the Napa county property, which the defendants knew to be false, and that they were made for the purpose of inducing the plaintiffs to enter into an agreement to convey their property for a grossly inadequate consideration; that relying upon these statements they entered into the agreement, and later the contemplated exchange of properties was made. Here are all the allegations necessary to constitute a cause of action based on fraud. Civ. Code, § 1572; Dow v. Swain, 125 Cal. 683, 58 Pac. 271.

[7] Nor can it be held from the allegations of the complaint that the plaintiffs acquiesced in the fraud alleged to have been practised upon them. There can be no doubt that the alleged facts entitle the plaintiffs to the relief demanded; and we are also satisfied that no argument is necessary to show that the plaintiffs were guilty of no laches. While considerable time elapsed between the making of the exchange and the commencement of this action, the facts pleaded show ample excuse for the delay. Upon the discovery of the fraud the action was promptly commenced.

It follows that the court was in error in sustaining the defendants' demurrer to the second amended complaint. The judgment entered thereon is reversed, and the trial court is directed to overrule said demurrer, and permit the defendants to make answer to the said complaint.

We concur: SEAWELL, Presiding Justice pro tem.; RICHARDS, J.

185 Cal. 200

MOORE SHIPBUILDING CORPORATION et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9542.)

(Supreme Court of California. Feb. 25, 1921. Rehearing Denied March 24, 1921.)

1. Master and servant ⚷347—Compensation allowance to dependents valid.

Const. art. 20, § 21, authorizing the Legislature to enact laws to compensate employees for injuries in the course of employment irrespective of the fault of either party, empowers the Legislature to extend compensation to a workman's dependents deprived of support by his death, whether their maintenance has been voluntarily and gratuitously assumed in good faith legally imposed; and the legislative discretion to determine what dependents shall become distributees of the indemnity is not measured by the analogies of the common law or the limitations of compensation acts in force at the time this constitutional provision was adopted.

2. Master and servant ⚷417(7)—Compensation by commission's findings of dependency conclusive.

Under the provisions of the Workmen's Compensation Act, the commission's findings of total dependency, and that the relationship of the dependent child to decedent's household existed in good faith, must be accepted an established.

3. Master and servant ⚷388—Child of undivorced wife, living in adultery with unmarried man, held a "dependent" member of his "family" or "household" within Compensation Act.

Where deceased servant, an unmarried man, was living in adultery with an undivorced wife, whose three year old daughter he was also supporting, the three constituted a family or household, and though the relationship between him and the woman was not in good faith, bad faith could not be imputed to the child, and she was entitled to death benefits as a "dependent" member of his "family" or "household" in good faith within Workmen's Compensation Act, § 9, subd. 11(1) and (2), and section 14, subds. (a), (b), (c).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependent; Family; Household.]

Wilbur and Shaw, JJ., dissenting.

In Bank.

Proceeding by Horace Guitard, as guardian of Ida Miller, a minor, for compensation under the Workmen's Compensation Act for the death of Albert Bauer, opposed by the Moore Shipbuilding Corporation, employer, and the Ætna Life Insurance Company, insurer. The Industrial Accident Commission made an award in favor of said minor, and the employer and insurer petition for certiorari. Petition denied.

E. L. Stockwell and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco (Warren Pillsbury, of San Francisco, of counsel), for respondents.

SLOANE, J. This is a proceeding to review the action of the Industrial Accident Commission in awarding a death benefit of $3,400 to one Ida Miller for total dependency as a dependent of Albert Bauer, an employee accidentally killed in the service of the plaintiff Moore Shipbuilding Corporation.

The only question in dispute is the status of Ida Miller as a dependent member of the "family or household" of the decedent. The admitted facts disclose that for a year or more preceding his death decedent Albert Bauer was living in adulterous cohabitation with Lola Miller, the undivorced wife of one Samuel Miller. Ida Miller, who at the time of Bauer's death was three years of age, is the daughter of Lola and Samuel Miller. Miller deserted his wife just prior to the birth of the child, and has not been heard from since. Bauer, an unmarried man, appeared on the scene as a friend of Mrs. Miller and the child soon after the latter's birth. He contributed to the support of the mother and daughter for a year or more before he and the mother began living together, and frequently sent them by mail remittances of money addressed to the little girl. Later, at Bauer's solicitation, Mrs. Miller, with her little daughter, came to live with him. Thereafter, the couple lived together ostensibly as man and wife with Ida as their putative daughter, and Bauer, until his death, supported both the mother and child, and by his conduct and declarations indicated his purpose to rear and care for Ida as if she was his own daughter. The evidence would justify the conclusion that it was his intention that the relation should be permanent.

The claims of the mother as a dependent of the deceased were disposed of before the Industrial Accident Commission by stipulation between the parties to this proceeding, and the only relevancy on this appeal of the relations between her and Bauer is as to the effect of their unlawful cohabitation upon the status of the child as being a member in good faith of decedent's household.

[1] The first point to be considered in its logical relation to the case is the objections raised to the power of the Legislature under the Constitution of California to enact into the workmen's compensation law (Laws 1917, p. 831) provision for an allowance to dependents of a deceased employee not connected with him by either legal or natural ties. The constitutional authority for the enactment of a workmen's compensation law in this state is provided by section 21 of article 20 of the

Constitution, and so far as pertinent to the matter before us is comprised in the words:

> "The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment, irrespective of the fault of either party."

That this provision must be construed to empower the Legislature to extend compensation in the event of death of such employee to certain dependents is not questioned by petitioners, but they contend that such allowance must be limited to dependents having a legal or moral claim to support from the employee in his lifetime.

The basis for a construction upholding allowances to surviving dependents is that in authorizing a workmen's compensation act the constitutional provision is presumed to have been adopted to cover the whole scope and purpose of the workmen's compensation laws as commonly enacted and in force at the time of its adoption. That under the general scheme of such laws death benefits to dependents are commonly recognized is conceded.

This construction of section 21 of article 20 of the California Constitution is fully upheld in Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390. In the carefully considered opinion in that case by Mr. Justice Sloss, concurred in by a majority of the court and with concurring opinions by Chief Justice Angellotti and Mr. Justice Shaw, it is declared that—

> "The constitutional amendment, as is perfectly apparent from its terms, was designed to establish the authority of the Legislature to pass laws making the relation of employer and employee subject to a system of rights and liabilities different from those prevailing at common law. That system was one which had already been adopted in many jurisdictions. The statutes putting it into force were commonly known as workmen's compensation laws. In every one of those laws, provision was made not only for compensation or indemnity to an employee who survived his injury, but for payment to the heirs or dependents of an employee who had received a fatal injury. * * * The two kinds of payment have always been regarded as component parts of a single scheme of rights and liabilities arising out of a given relation."

The power of the Legislature to provide for dependents being established, the question that follows is as to the legislative discretion in determining what classes of dependents shall come within the law.

If we are to be governed in this respect by the common-law rules of kinship, inheritance, and liability for maintenance and support, it will at once appear that the claimant here is outside the pale of legislative recognition, but, as is said in Western Metal Supply Co. v. Pillsbury, supra, the workmen's compensation system "was designed to establish the authority of the Legislature to pass laws making the relation of employer and employee subject to a system of rights and liabilities different from those prevailing at common law"; and again that "the analogies of the common law cannot be applied too closely to this new scheme which undertakes to supersede the common law altogether and to create a different standard of rights and obligations." The Supreme Court of Connecticut, in holding an illegitimate child entitled to the benefits of the act, thus defines the scope and purposes of the new system of relation between employer and employee:

> "Compensation is not awarded either as the price of fault or as a measure of duty owed to the injured employee. * * * The underlying principle of this kind of legislation is that the ends of justice and equity will best be subserved, and the general good promoted, by lifting from the shoulders of the unfortunate victims of industrial mishaps and of their dependents some measure of the resulting burden, and casting it upon the industry which occasioned it, and through that industry upon society at large. * * * In its final distribution society bears it. These children and all other children similarly circumstanced, * * * must be supported. If their means of support is withdrawn, society is compelled to supply it. Why may it not as well and fairly supply it in the method provided by the workmen's compensation legislation as in any other." Piccinim v. Connecticut L. & P. Co., 93 Conn. 423, 106 Atl. 330.

In Temescal Rock Co. v. Industrial Acc. Comn., 180 Cal. 637, 182 Pac. 447, this court has upheld an award under the precise provisions of the Workmen's Compensation Act that is involved here, to a woman who was living with the decedent as his wife, without having been married to him. It is true that they thought they were married and had sustained this relation in good faith. But their honest intentions in the matter did not remove the fact that their relations were illegal and wholly without the sanction of the law. The decision holds that the claimant could not take as the wife of the deceased employee, but that she was entitled to an allowance as a member in good faith of his family and household. The court says:

> "If the applicant is a member of the family or household of such employee in good faith, compensation may be awarded, although he or she may not bear any relation by adoption, blood, or marriage to the employee."

In Maryland Casualty Co. v. Industrial Acc. Comn. (S. F. No. 9218), no opinion involving liability under a state of facts substantially like those existing in this case, this court denied a petition for writ of review, which circumstance is, of course, not conclusive as to the point under discussion because, as suggested by counsel for petitioners here, we have consented to review the proceedings in this matter. We see no reason, however, for arriving at a different conclusion from the one implied in the denial of a writ under that petition. The need of relief from the deprivation caused by the death of the employee and the questions of public policy involved rest upon the fact that the employee has in good faith taken into his home and assumed the support of one without other means of subsistence. The hardship to the individual dependent, and the incidental burden to the insurer or to society from the death of a breadwinner are no different whether the maintenance of the dependent has been voluntarily and gratuitously assumed or legally imposed.

As has been pointed out, the benefits of this law are not provided as an indemnity for negligent acts committed or as compensation for legal damages sustained, but is an economic insurance measure to prevent a sudden break in the contribution of the worker to society by his accidental death in the course of his employment. From this economic standpoint it makes no difference whether the workman's earnings are being distributed to those whose support he has voluntarily assumed, or to those who are legally entitled to such support. In either case they are the reliance of dependent members of society. The only difficulty is that where there is no legal dependence it is harder to determine that the contribution of support has been made so as to constitute the recipient a dependent in good faith.

The power of the Legislature to extend the benefits of industrial accident insurance beyond the wage-earner himself being recognized, it is left to reasonable legislative discretion in the light of the general purposes of these laws to determine what dependents shall become the distributees of the indemnity assessed against the industry, and we do not think we are compelled to look to analogies of the common law, or to the limitations of compensation acts in force at the time our constitutional provision was adopted, to fix the measure of the legislative power thus conferred.

[2, 3] It only remains to determine whether Ida Miller, the claimant here, comes within the terms of the California statute. Section 9, subdivision 11 (1) and (2) of the Workmen's Compensation Act provides that "in case a deceased employee leaves a person or persons wholly dependent upon him for support" such dependents shall be allowed certain indemnity benefits. Section 14 (a) provides that the wife and children under certain conditions are conclusively presumed to be wholly dependent. Section 14 (b) provides that in all other cases the questions of entire or partial dependency and questions as to who constitute dependents, and the extent of their dependency, shall be determined in accordance with the fact, "as the fact may be at the time of the injury to the employee"; 14 (c) provides, that "no person shall be considered a dependent of such employee unless in good faith a member of the family or household of such employee, or unless such person bears to such employee the relation of husband or wife, posthumous child, adopted child or stepchild, father or mother, father-in-law or mother-in-law, grandfather or grandmother, brother or sister, uncle or aunt, brother-in-law or sister-in-law, nephew or niece."

The two classifications here, one of persons who are in good faith members of the employee's family or household, and the other of persons having specific relations of kinship, are clearly used in the alternative, and are to be separately considered. Temescal Rock Co. v. Industrial Acc. Comn., supra. As Ida Miller belongs to none of these degrees of relationship, either by birth, marriage, or adoption, we are only concerned with the first division.

There are three vital conditions required to establish dependency in this case under the Compensation Act: First, was Ida Miller actually dependent upon the decedent for her support; second, was she a member of his family or household; third, was the relation or connection sustained in good faith.

The Industrial Accident Commission has found on these points as follows: That "Ida Miller, a minor, was, at the time of the injury of Albert Bauer, referred to in said findings, totally dependent in fact upon him, and was a member of his family and household within the meaning of section 14 of the Workmen's Compensation Insurance and Safety Act of 1917." Under the provision of the act making the findings of fact of the commission conclusive on this court, the fact of total dependency, and that the relation of the child to decedent's household existed in good faith, must be accepted as established.

The only question open to discussion is whether as a matter of law the relation shown by the undisputed evidence constitutes bona fide membership in a "family or household" on the part of the claimant. There is little to be gained by reviewing the numerous definitions given by the courts and lexicographers of the words "family" and "household." They mean different things under different circumstances. The family, for instance, may be an entire group of people of the same ancestry, whether living together or widely separated; or it may be a particular group of people related by blood or marriage, or not related at all, who are living together in the intimate and mutual interdependence of a single home or household. Again, the word "household" is variously used to designate people, generally, who live together in the same house, including the family, servants, and boarders; or it may be used as including only members of the family relation. It is probable that the two terms are coupled together in this statute to indicate that they are used synonymously, the "family" to include only those of the household who are thus intimately associated, the "household" to exclude those of the family not living in the home. There can be no doubt that Bauer, Mrs. Miller, and the little girl constituted a family or household. They were living together in all the interdependency and intimacy of man and wife and their legitimate offspring. The only thing to exclude Mrs. Miller from the benefit of this relationship was lack of good faith. She and Bauer were living together in open and conscious defiance of law. In Temescal Rock Co. v. Ind. Acc. Comn., supra, a similar state of facts existed as to the unlawful relation, but the court there held the man and woman to constitute a "family or household," and that they were such in good faith because they were cohabiting under the belief that they were married. In this case Bauer and Mrs. Miller were not in good faith because they knew their relations were unlawful. We cannot, however, agree with counsel for petitioners that the bad faith of the mother must be imputed to the child. It is true that for many purposes the status of the parent fixes that of their minor children. It may be conceded that such is the law in the matter of domicile, but, as we have seen, so far as her domicile is concerned, Mrs. Miller was also a member of Bauer's household. But the bad faith of Bauer and Mrs. Miller in their relations with each other cannot rebut entire good faith in the act of Bauer in assuming the maintenance and support of the child and accepting her as a member of his family. He might have adopted her, and thus made her a legal dependent, but the meretricious relations between him and Mrs. Miller would have remained the same. This suggestion answers the claim made by petitioners that there could be no family relation to include the child while the mother was living in adultery with Bauer, for the reason that the law would take the child from them and make her a ward of the juvenile court. So it could, if there has been a legal adoption, or if Bauer was the father of the child. It may be plausibly urged that if the evidence showed that Bauer was only maintaining the daughter in furtherance of his illegal relations with the mother, it would follow that he was making her a member of his household in bad faith, but the commission has found, and we think the facts justify the conclusion, that Bauer had in good faith assumed the support of Ida Miller and made her a member of his household for her own sake and because of personal care for her. It is true the child was too young to entertain either good or bad faith, but if that is a legal obstacle it would apply as well if she had been taken into the household as a homeless and abandoned waif. We think that Ida Miller was a member in good faith of Bauer's household. The courts should not be called upon to visit the iniquities of the parents upon the children, beyond the penalties inherent under natural law.

The petition is denied.

We concur: ANGELLOTTI, C. J.; LENNON, J.; LAWLOR, J.

OLNEY, J. I concur in what Judge Sloane has said, and would add merely a word. It seems to me that in view of the finding of the commission that Bauer had assumed the relation of father toward the child, the character of his relations with the child's mother is a false quantity in the case. The final question was, Did Bauer stand in loco parentis toward the child, had he genuinely assumed toward the child the relation of father? If he had (and the commission finds he had and the finding is supported by the evidence), it makes no difference how or why he had. The relation was there, and by virtue of it the child was a member of his household in good faith, and that is enough. If an unmarried man should pick up some waif, become attached to it, have it live with him, support it and look after it, assume toward it in every way the character of a father, could any one seriously doubt that it was a dependent member of his household? If it would be a dependent member of his household under those circumstances, how is the relation changed or affected by the fact that it originated in an unlawful relation with the child's mother? That fact might have some weight in determining whether he had genuinely assumed the relation of father toward the child, but if it appeared that he had, the reason or reasons why he had done so become wholly unimportant.

WILBUR, J. I dissent. In the case of Temescal Rock Co. v. Industrial Accident Commission, 180 Cal. 637, 182 Pac. 447, the parties believed in good faith that the procurement of a marriage license constituted them husband and wife, and in good faith entered upon that relation. Under the common law and in this state prior to 1895, such acts would constitute them husband and wife. Only a mistake of law prevented such conduct constituting a valid marriage. There was no moral turpitude in the conduct of the parties, and they did not discover the invalidity of the marriage before the putative husband was killed; in such a case there was no injustice in giving validity to the actual bona fide intention and relationship of the parties.

In the case of Maryland Casualty Co. v. Industrial Acc. Comn., the commission had allowed compensation to two minor children whose mother had married the decedent and who he apparently believed to be his wife. The children were being supported by the deceased as members of his family. After his death it was discovered that the mother of the children had married decedent the day before an interlocutory decree of divorce had been entered in an action for divorce against the husband and father of the children. The mother claimed that she entered into the relationship in good faith, although the commission found otherwise. The petition for a hearing in this court was denied. Whatever force that denial may have as a precedent it does not cover a case where the employee deliberately enters upon an adulterous cohabitation with the wife of another man. Such a relationship violates the law of God and man. Deut. v:18; Matt. v:27, 28; Pen. Code, 269a. The woman and child were the family of another man. How can it be said that a family altar had been erected in good faith. It is one thing to hold that parties may establish a family in good faith where both are acting under a mistake of law, and quite another to hold that a family may be established where both the man and woman deliberately assume the family relationship in conscious violation of the criminal law and where such conduct is malum in se. Indeed, the commission found that such relationship was not in good faith, and consequently disallowed compensation to the woman, except $500, as stipulated. The question, then, is whether the infancy of the child can justify an allowance to it where the two adult parties to the relationship were not acting in good faith in establishing the relationship. In other words, can the good faith of the child, or rather its lack of bad faith, characterize the family as one existing in "good faith" sufficiently to cover the bad faith of the mother and of the employee? To so hold would, in effect, strike out the words "good faith" from the statute. For assuredly the intent of the minor child could not be determinative of the case. The support of the child was, no doubt, a mere incident to the meretricious relationship, and we may well assume one of the considerations moving from the man to the woman for her continuance of the relationship.

To assume that the Legislature, in the enactment of the Workmen's Compensation Act, intended to reward parties to a relationship entered into in defiance of the penal laws of the state and against good morals is to violate the most fundamental canons of statutory construction. It should be said, however, that the commission found that the husband of Mrs. Lola Miller died before she began to cohabit with the deceased. Presumably this finding is the result of the application of the presumption of innocence, but is in opposition to her statement that they intended to get a divorce.

Whatever may be said as to the rights of a child taken into the home with a bona fide intent to continue its support, coupled with actual support for a long time, it seems clear that where the consent of the child's mother to a criminal relationship is an essential element in such conduct, such a family or household is not established in good faith, and the child is not a member of decedent's family in good faith. Our previous decisions in favor of those who ignorantly violate statute law have, I think, gone to the utmost limit in liberality in favor of the employee's family and against the employer.

SHAW, J. I concur with Justice WILBUR.

185 Cal. 255

GLOBE MFG. CO. v. HARVEY. (L. A. 6358.)

(Supreme Court of California. March 4, 1921.)

1. Contracts 🔑322(3)—Evidence held to show defendant not guilty of breach of manufacturing contract.

In an action for breach of a contract to manufacture goods, evidence *held* to support a finding on conflicting evidence that the defendant had not failed, neglected, or refused to proceed with such manufacture, as alleged, but had diligently proceeded with the work.

2. Evidence 🔑442(6)—Where contract did not adjust rights under superseded contract, evidence as to such arrangements admissible.

Where a contract to manufacture automobile self-starters was superseded by a second contract, which, being in the form of a quotation of defendant manufacturer accepted by plaintiff, did not purport to set forth that part of the agreement which adjusted the rights of the parties in regard to what had been done under the first contract, evidence as to arrangements as to such matters was admissible, provided the arrangements were not inconsistent with the terms of the written agreement embodying the second contract.

3. Contracts 🔑247—In action for breach, evidence held to show payments intended under second contract, and that purchaser was to pay for changing manufacturing patterns.

In an action for breach of a second contract to manufacture automobile starters, evidence *held* to justify the conclusion that all the starters were to be paid for under the terms of the second contract and none under the terms of the first, and to justify a finding that plaintiff assumed to pay for the cost of changing patterns under supervision of plaintiff purchaser's agent.

4. Evidence 🔑377—Where party testified of own knowledge as to correctness of statement, unnecessary that his bookkeeper testify to correctness.

In an action for breach of a manufacturing contract, where defendant's statement or summary of expenditures, admitted under Code Civ. Proc. § 1855, subd. 5, because the original consisted of numerous accounts, which could not be examined without great loss of time, was made from original bills, of the payment of which defendant had personal knowledge, defendant was competent to testify to the correctness thereof; his bookkeeper's testimony as to correctness being unnecessary.

5. Appeal and error ⟹843(2)—Matters not necessary to decision not considered.

On appeal from a judgment for defendant in an action for breach of a manufacturing contract, the claim that there was no evidence to support the finding that defendant had no knowledge of plaintiff's contractual obligation to furnish the articles ordered by defendant to others need not be determined, where defendant was adjudged not in default in the performance of the contract.

Department 2

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Globe Manufacturing Company against Leo M. Harvey, doing buiness under the fictitious name and style of the Harvey Machine Company. Judgment for defendant, and plaintiff appeals. Affirmed.

James I. Shepherd and John E. Carson, both of Los Angeles, for appellant.

Wm. Hazlett, of Los Angeles, and Burritt S. Allen, of El Centro, for respondent.

LENNON, J. Plaintiff appeals from a judgment in favor of defendant in an action for damages for breach of contract. The undisputed facts, briefly summarized, are these:

The plaintiff corporation and the defendant entered into an agreement, dated March 5, 1918, whereby defendant agreed to manufacture and deliver to plaintiff, at Los Angeles, 1,000 self-starters for Ford automobiles, to be known as "Globe starters," a device covered by patent of which plaintiff was the owner. Plaintiff agreed to pay defendant $8 apiece for said starters, paying $1,000 in advance and $7 each per starter as and when deliveries of any number of said starters were made. Plaintiff paid the $1,000.

On April 16, 1918, after considerable negotiations between the parties, plaintiff and defendant entered into a second contract, which it was agreed was to take the place of the prior agreement. By the terms of the second contract plaintiff was to pay $10 each for 1,000 starters in the following manner: The $1,000 already paid under the first contract was to be considered as a first payment under the second contract. Plaintiff was to make another $1,000 payment on May 1, 1918, and was to pay $8 each for the starters as delivered. Six days after the execution of this second contract, namely, on April 22, 1918, the president and vice president of the plaintiff corporation, who conducted all the arrangements on behalf of plaintiff, called at defendant's place of business and had a conversation with defendant in regard to the progress of the work contracted for. During that conversation, defendant presented for payment by plaintiff a bill of approximately $200. Whether or not defendant unjustifiably refused to perform his part of the contract of April 16, 1918, unless plaintiff paid the bill so presented, was the primary point for determination by the trial court in the instant case.

Shortly after the conversation of April 22, and without further communication with defendant, plaintiff, on April 29, 1918, instituted the present action for damages for alleged failure and refusal of defendant to proceed under the contract. Defendant denied the allegations that he had failed or refused to carry out the contract, and filed a cross-complaint, alleging a breach of contract on the part of plaintiff in failing to make the $1,000 payment called for by the contract on May 1, 1918, and claiming damages for such breach. Judgment was rendered in favor of defendant and cross-complainant in the sum of $1,698.93.

[1] It appears that 5 starters, the only ones which have been manufactured or delivered by defendant, were received by plaintiff from defendant on April 13, 1918, three days prior to the consummation of the second contract. It also appears that, when the first contract was made, plaintiff transferred to defendant certain patterns for use in the manufacture of the starters, that some changes in these patterns were later found to be necessary and were authorized by a Mr. Poole, a mechanic in the employ of plaintiff, who was the inventor of the starter, and was placed by plaintiff in defendant's shop for the purpose of supervising and making suggestions for the proper carrying out of the work and directing changes that he found necessary in the construction of the starters. The said changes in the patterns were ordered and paid for by defendant. The items of the bill presented by defendant, during the conversation of April 22, for payment by plaintiff consisted of charges for the alterations to the patterns and $50 for the 5 starters delivered on April 13.

It was the testimony of the president of the plaintiff corporation, corroborated by that of the vice president, who is the father-in-law of the president, that, upon their refusal to pay this bill when presented by defendant at his office on April 22, defendant declined to continue with the work on the starters. On the other hand, defendant himself positively and repeatedly testified that, while he urged the payment of the bill on that occasion, he did not refuse to go ahead with the work under the contract if the bill was not paid, but, on the contrary, that he endeavored to point out to the two officers of the plaintiff corporation that the work was progressing with all possible rapidity. When asked by the court as to whether he said that he would not proceed with the work under the contract unless the bill was paid, defendant answered: "No, sir. I wouldn't say it, even if I wanted to say it." Plaintiff contends that this voluntary statement of defendant accompanying the denial was so evasive as to destroy the force of the denial. The statement may have been superfluous and not responsive to the question, but it can scarcely be designated as evasive. Moreover, this denial is only one of several denials by the same witness to the same question, the rest of which are clearly unqualified.

Defendant's testimony in this behalf was corroborated by that of his sister, who, during the whole of the conversation in question, was sitting at her desk, which was located a few feet away from where the parties sat during their conversation. This witness' desk was in a room adjoining the office in which the conversation was held, and was beside an open window in a wooden partition which separated the two rooms. Defendant's testimony was further corroborated by the assistant manager of defendant's business, who was summoned by defendant and introduced to the president of the plaintiff corporation for the purpose of assuring him of the progress of the work. Plaintiff suggests that the corroborating testimony is without force, because it does not appear that either witness heard all of the conversation in question. Both witnesses repeated in detail what they heard said in regard to the payment of the bill. The conversation so reported by them corresponded exactly with that testified to by defendant, and amounted to nothing more, on the part of defendant, than mere requests for payment and assurances that the work was progressing. Both witnesses testified that, after the conversation in regard to the bill had been closed, defendant took the plaintiff's representatives about the shop, endeavoring to demonstrate that the work was progressing as rapidly as possible. The testimony of these two witnesses indicates that they heard all of the substantial and material part of the conversation, and is sufficiently clear and definite to possess weight in corroborating the statements of defendant.

The testimony in behalf of defendant upon this phase of the case is amplified by inferences naturally and reasonably arising from the proven circumstances. There is little likelihood that, a few days before the second $1,000 payment became due under the contract, defendant would have made a refusal of performance contingent upon the payment by plaintiff of a bill amounting to less than $200. The possibility is rendered more negligible by the steps which had already been taken by defendant in carrying out the contract. Admittedly a large amount of castings for use in making the starters had been delivered to defendant, and defendant had placed an order for springs to be used in said starters with an Eastern firm. There was testimony to the effect that as many men as could be spared were engaged in setting up machinery in defendant's shop preparatory to working on the starters, and that the necessary plans, etc., had been prepared. Defendant continued to accept deliveries of castings and keep men at work upon the starters after the conversation of April 22, and until it became apparent, by the institution of the present suit 2 days before the $1,000 payment was due from plaintiff, that plaintiff had no intention of performing the contract. The order for springs was not canceled until after the present suit was commenced. It would seem that all this tends to show sufficient activity of the defendant to indicate an effort on his part in good faith to perform the obligations of the contract, particularly when it is remembered that the contract had been in existence only 6 days when the demand for such evidence was made by plaintiff.

Plaintiff insists that, in passing upon the question of whether conditions indicated that defendant was proceeding in good faith, consideration should be given the fact that the preparation relied upon by defendant did not cover a period of only 6 days, but extended back over 40 days to March 5, the date of the first contract. It is admitted that little was actually accomplished under the first contract. The reason for this, according to findings of the trial court based upon competent testimony, is to be found in the fact that, after the first contract was signed, plaintiff decided upon considerable changes in the construction of the starters, which made the manufacture of them more expensive. In addition, defendant discovered that it was impossible to obtain the springs necessary for the starters at the price which the president of plaintiff had represented they could be obtained, and that they could not be obtained in Los Angeles in the quantity required, as said president had represented, but must be ordered from a distance. For these reasons, it was found impossible to manufacture the starters at the price fixed in the contract of March 5, and, after considerable negotiating, new terms were agreed upon, and, therefore, most of the preparations above set forth were taken after the new agreement was reached, on April 16. Furthermore, both contracts were made at a time when defendant was engaged on work required by the government for war purposes, to which other work was necessarily subordinate, and, because of this situation, defendant refused to consent to specify the times of delivery in the contract with plaintiff. These facts, we think, are sufficient to show that there was no unreasonable delay on the part of defendant in proceeding under the contract.

From what has been said it is apparent that this appeal, for the most part, presents the oft-recurring and fruitless question of the correctness of a decision of a trial court based on a consideration of conflicting, competent evidence. In view of the sufficiency of the evidence in support thereof, the trial court must be upheld in its finding that—

> "It is not true that defendant failed, neglected and refused, or failed or neglected or refused, for a period of 42 days, or for any period, or at all, to proceed with the work of manufacturing said starters, but on the contrary it is true that at all times after the 5th of March, 1918, defendant diligently proceeded with said work."

[2, 3] Plaintiff complains of alleged errors in regard to the admission of evidence bearing upon the question of damages. The first alleged error is the admission in evidence of the bill for alterations to the patterns and for the 5 starters delivered on April 13, and including the amount thereof in the damages awarded defendant. It is claimed that plaintiff did not agree to pay for the changes to the patterns and did not owe more than $35 for the 5 starters for the reason that they were delivered under the terms of the first contract. Inasmuch as the written contract of April 16 was in the form of a quotation of defendant accepted by plaintiff, it does not purport to set forth that part of the agreement which adjusted the rights of the parties in regard to the steps which had previously been taken under the contract of March 5. Therefore, evidence of these arrangements was admissible, provided they were not inconsistent with the terms of the written agreement of April 16. Guidery v. Green, 95 Cal. 630, 30 Pac. 786; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 594, 96 Pac. 319.

In view of the total absence of any agreement making a special exception of the 5 starters delivered, and in view of the fact that the whole of the $1,000 paid under the contract of March 5 was to operate as consideration under the new contract, and that the prior contract was superseded for all other purposes by the contract of April 16, we think the trial court was amply justified in concluding that it was the intention of the parties that all of the starters should be paid for under the terms of the second contract. Likewise the conditions under which the patterns were altered, namely, the authorization for the changes by the man employed by plaintiff to supervise and direct the work of construction and the knowledge of the president of the plaintiff corporation that the changes were being made, were sufficient to warrant the finding that plaintiff assumed the payment of the cost thereof. No question was raised as to the reasonableness of these charges.

[4] An itemized summary of the expenditures of defendant under the contract was admitted in evidence under the issue of damages. Plaintiff assigns this as error for the reason that the person who kept defendant's books did not testify to their correctness. The statement, or summary, was admitted under subdivision 5 of section 1855 of the Code of Civil Procedure, because the original consisted of "numerous accounts or other documents, which cannot be examined in court without great loss of time." Defendant maintains a card system of bookkeeping, and testified that he personally made up the statement in question by going over the cards and checking up the entries thereon with the original bills, which he retained and which he knew had been paid. Therefore the statement was, in fact, made from the original bills, of the payment of which defendant had personal knowledge, and defendant was competent to testify to the correctness of the items thereof upon his own knowledge, which he did. For this reason, testimony by the bookkeeper as to the correctness of the books of defendant was unnecessary and the statement was properly received in evidence.

It is contended that there is no evidence to support the finding that "immediately after making said agreement [referring to the agreement of March 5] defendant ordered certain castings to be used in said starters." This finding is immaterial and unnecessary to support the judgment, for, even if there is no evidence of this particular fact, there is ample evidence, as previously stated, to support the general finding that defendant proceeded diligently with the work at all times after March 5. Plaintiff complains of the finding that the order of April 16 was "supplementary" to the order of March 5, claiming that it was an entirely new agreement, and the order of March 5 was canceled. The rest of the finding in which this word appears discloses that there can be no implication from the use of the word "supplementary" that the court found that the order of March 5 was continued in force and added to by the order of April 16, for the finding is that the "supplementary" order of April 16 was made "in place of and in substitution for said order of March 5, 1918."

[5] It is claimed that there is no evidence to support the finding that defendant had no knowledge of plaintiff's contractual obligations to furnish to third persons the starters ordered by it from defendant. We need not determine this question, for, in view of the fact that defendant was adjudged not in default in the performance of his part of the contract, this fact became immaterial.

It is true, as pointed out by defendant, that plaintiff might have been more impartial in setting forth extracts from the evidence in the supplement to his brief. However, we do not deem the omissions so flagrant as to call for an order requiring plaintiff to reimburse defendant for costs and attorney's fees incurred in printing a supplement to defendant's brief containing testimony in defendant's favor.

The judgment is affirmed.

We concur: SLOANE, J.; WILBUR, J.

(185 Cal. 218)

BUTTE COUNTY WATER USERS' ASS'N et al. v. RAILROAD COMMISSION OF CALIFORNIA. (Sac. 3111.)

(Supreme Court of California. Feb. 28, 1921.)

1. Waters and water courses 🔑216—Statute, providing for prorating water between irrigation company's voluntarily admitted consumers, held valid.

St. 1913, p. 84, placing water companies under the jurisdiction of the Railroad Commission and providing in section 6 that as between consumers voluntarily admitted by a corporation to participate in its water supply there shall be no priority, and that in time of shortage the water shall be prorated, is valid.

2. Waters and water courses 🔑256—First consumers contracting after prorating act have no greater right than subsequent consumers.

Consumers contracting with a water company after the passage of St. 1913, p. 84, providing for prorating between consumers in case of shortage of supply, could be given no greater right than permitted by such act, and would be required to accept a prorating with subsequent contracting consumers.

3. Waters and water courses 🔑256—Relation of public utility company and consumer established by contract obligation to furnish water without actual delivery.

Where owners of land contracted with a water company to furnish irrigation waters for the season, such owners became consumers, if the company had authority to so admit them, and it was not necessary that water be actually delivered upon the lands to make them consumers in the legal sense; the company's obligation being sufficient to establish the relation of public utility company in consumer.

4. Waters and water courses 🔑256—Public utility company may take on new consumers without Railroad Commission's permission.

A public utility company furnishing water for irrigation of lands has authority to take on new consumers without, though not against, an order of the State Railroad Commission, for St. 1913, p. 85, §§ 5, 6, does not require the Railroad Commission's permission.

5. Waters and water courses 🔑256—Public utility company may admit new consumers, but not beyond the limit of its water, by leaving a reasonable factor of safety.

A public utility company supplying water for irrigation does not have the power to take on new consumers without limit, and has no right to take them on after reaching the limit of its water supply, and should allow some factor of safety against exceptional dry seasons, which should be greater in localities where crops are wholly dependent upon irrigation than in other places; the matter being one of judgment, to be exercised conservatively by the water company in the absence of any regulatory order of the Railroad Commission.

6. Waters and water courses 🔑256—Railroad Commission's conclusions that water company acted reasonably in admitting new consumers held decisive.

The Railroad Commission's finding that a public utility company furnishing water for irrigation had acted reasonably in admitting owners of additional lands as consumers, being sustained by the evidence, is decisive.

7. Waters and water courses 🔑256—Decision of Railroad Commission on conflicting evidence conclusive if supported by any evidence.

A finding of the Railroad Commission upon conflicting evidence that a public utility company furnishing irrigation water had acted reasonably in taking on new consumers, in view of the amount of available water, cannot be disturbed upon appeal, where there is some evidence to support it.

8. Waters and water courses 🔑256—Facts held to justify public utility company in taking on new consumers.

Facts *held* to justify a public utility company furnishing irrigation water in taking on new consumers who must share ratably with prior consumers in case of water shortage.

In Bank.

The Butte County Water Users' Association filed a complaint with the State Railroad Commission against the Sutter Butte Canal Company to prevent the latter from supplying water to additional lands, the owners of such lands, as the Sutter County Water Users' Association, opposed the application, and the Commission decided that the water should be prorated between all consumers in case of shortage. The Butte County Water Users' Association brings certiorari to review the Commission's order. Affirmed.

George F. Jones, of Oroville, and Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for petitioners.

Douglas Brookman, Isaac Frohman, and A. E. Chandler, all of San Francisco, and Hugh Gordon, of Los Angeles, for respondent.

A. H. Hewitt, of Yuba City, for intervener Sutter County Water Users' Ass'n.

W. H. Carlin, of Marysville, and Arthur H. Redington, of San Francisco, for interveners W. H. Carlin and others.

OLNEY, J. This is an application by an association of those consumers of the Sutter Butte Canal Company, who were consumers prior to 1920, to annul an order of the Railroad Commission that, beginning with the year 1920, that company serve with water some 14,400 acres of land not theretofore served by it. The company was organized as, and has always been, a public utility company supplying water for irrigation, and its articles of incorporation empower it to sell and distribute water in the counties of Butte and Sutter. It takes its water from the Feather river near Oroville in Butte county, and its water rights, which are appropriation rights, are all for water for public sale and distribution. From a comparatively small beginning the system of the company was extended and enlarged gradually as the market for its water grew until in 1919 it was supplying some 55,000, or slightly more, acres of land, mostly in Butte county. In September of that year the company contracted with the owners of 14,400 acres of land in Sutter county that it would extend its system to supply their lands, and pursuant to this contract the company made the necessary enlargements and extensions of its system, at a cost to it of between $200,000 and $250,000. The making of this contract, the enlargement and extension of the company's system, and the purpose of the company to serve the 14,400 acres of additional lands were, the commission finds, a matter of common knowledge in the region served by the company. Nevertheless, no objection was made to the company so doing. The company's rules require that applications for water for the ensuing year be filed by the 1st of January, and by that date in 1920 the owners of the 14,400 acres had filed their applications and paid the company's regular charge. The three preceding winters had been winters of light rainfall, and the winter of 1919–20 was exceptionally dry, so that by spring it became evident that there was a serious danger of a water shortage. The company's old consumers, through the instrumentality of their association known as the Butte County Water Users' Association, thereupon filed a complaint with the Commission against the company, alleging in brief that the company would not have water enough to irrigate both their lands and the 14,400 acres of additional lands, and asking for an order of the Commission directing the company not to supply the latter. The company answered the complaint, and the owners of the 14,400 acres on their part organized themselves into an association known as the Sutter County Water Users' Association, and intervened in the proceeding, alleging that they had been accepted by the company as consumers, and in reliance thereon they had prepared their lands at large expense for the raising of rice by irrigation, and asking for an order from the Commission directing the company to serve them. The owners of certain of the 14,400 acres also intervened in their individual capacities in opposition to the complaint of the old consumers.

The matter was promptly heard and decided by the Commission, its order being handed down on April 21, 1920. At that time, of course, it was not possible to know with exactness just what water conditions during the summer to come would be. The Commission's decision finds that the 14,400 acres were within the area which the water company was organized to serve and for serving which it had made its water appropriations; that in a normal year the company's supply of water was adequate for the needs of the 14,400 acres as well as for those of the lands theretofore served; that at the time the contract between the company and the owners of the 14,400 acres for the supply of those lands was made, and at the time the applications of those owners for service were presented and accepted, it was reasonable to expect that the company would have a sufficient supply for all during the ensuing year, and the company was justified in accepting the applications. The critical month in supplying water by the company's system, that is, the month when the demands for irrigation are most apt to approach or exceed the available supply, is the month of August. The Commission found that at the time of hearing, that is, in April, it appeared that the company would, so far as could be determined, have in August sufficient water from its then existing supply to irrigate 70,000 acres (all the land) for from 80 to 90 per cent. of the time, and in addition could obtain a further substantial quantity under a water right which it had recently obtained for the diversion from the Feather river of some additional 500 second feet. Upon the facts so found, the Commission held in effect that the owners of the 14,400 acres had the status of consumers of the company, and were entitled to be served, and made its order that they be served, on an equal basis with the company's other consumers. The reasons of public policy underlying its decision, the Commission states as follows:

> "It would be uneconomical, and would retard the development of this state if an irrigation company were restricted in its delivery of water to only that area for which it would have a sufficient supply in the driest years. A restriction such as this would prevent the cultivation of large areas of land which would otherwise be cultivated and produce a crop a very large proportion of the time. As a matter of fact, years of drought such as this do not ordinarily occur more frequently than from 10 to 20 year periods, and it would be unjustly restricting the expansion of the agricultural pursuits of the state if a company were permitted to serve only the area for which it would have available water during years of extreme drought and consequent minimum water supply.
>
> "Applicants applying to a utility for an extension of service, whose applications are accepted in good faith by the utility at a time when it could reasonably expect to have available a sufficient supply of water in addition to

> that needed for the lands theretofore served, should in justice receive their ratable proportion of the available supply if a shortage occurs, even though that shortage may occur prior to the actual delivery of any water to them."

After the decision, the old consumers petitioned the Commission for a rehearing, and being refused, commenced the present proceeding before this court for the annulment of the Commission's order. The contentions of the petitioner are three in number. The first, as stated by its counsel, is as follows:

> "The orders of the Railroad Commission do not make any provision for the supplying of prior consumers before the 14,400 acres are taken care of. On the contrary, said orders specifically direct the Sutter Butte Canal Company to prorate the available supply in the event of a shortage. The effect of this order is to deprive petitioners of property without due process of law and without compensation."

[1] Assuming that the owners of the 14,400 acres had entered into relationship with the company as consumers, the ground so stated is not so much an attack on the Commission's order as it is on the validity of a statute adopted by the Legislature. It may well be that in advancing this ground of attack petitioner's counsel do not make the assumption stated, but their position on the point is not entirely clear, and it will make clearer what we believe to be the real point in the case, if we make the assumption. Assuming, then, that the owners of the 14,400 acres had entered into relationship with the company as consumers, the contention of the petitioner is that the old consumers of a public utility water company have a vested right to water in preference to new consumers, so that in case of a shortage the water is not to be prorated, but the old consumers take all they require and the new consumers get only what is left. But the act of April 25, 1913 (Stats. of 1913, p. 84; Deering's Gen. Laws, Act 4348a), which places water companies under the jurisdiction of the Railroad Commission, provides in section 6 that—

> "As between consumers who have been voluntarily admitted to participate by the corporation in its supply of water or been required to be supplied by an order of the Railroad Commission, in times of shortage there shall be no priority or preference, and such corporation in times of shortage shall be required to apportion such supply ratably among its consumers."

If the foregoing provision of the statute is valid, manifestly the order of the Commission in the case is valid, so far as the ground of attack under consideration is concerned, for the order is merely in accord with the explicit direction of the statute. The statute is attacked only through the attack upon the order of the Commission, that is, inferentially, but the only ground upon which it can be attacked, and the only ground upon which it is attacked, even inferentially, is that the consumer of a public water company has a vested right, not merely to service from the company, but to service in full in preference to later consumers, so that the respective rights of the company's consumers are ranked, as it were, in the order of time in which they have become consumers. This is rather a novel doctrine, and one whose statement alone is well-nigh sufficient for its rejection. In fact, it is not stated by petitioner's counsel as we have stated it. It is said merely that the right of a consumer, particularly of a consumer taking water for irrigation of his lands, is a vested right of which he cannot be deprived by the diversion of water to others. This proposition is undoubtedly correct, so far as a diversion to other objects or to persons not consumers goes, but it does not support the contention that as between consumers one has a vested preference over another in times of a water shortage. No authority supporting that contention is cited, and we doubt if any can be found. It is a contention directly contrary to the principle upon which Leavitt v. Lassen Irrigation District, 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213, was decided, and wholly opposed to the fundamental principle that a public utility must hold itself out as ready to serve and must serve the public or its portion of the public without discrimination or preference other than such as corresponds to differences in the value or cost of the service rendered. It has taken years of struggle in this country to establish this principle and to compel its general observance, as witness the long struggle against discrimination by transportation companies. But it is now thoroughly established and its value recognized, and every reason of public policy supports it. In particular, in connection with a water company supplying water for irrigation, it would be most unjust and very injurious to the state to hold that in times of shortage the older consumers could have a full supply and the later none. In many instances, such a rule would mean, as to the later consumers, not only that their crops for the year would be lost, but that their orchards or plantings would be destroyed, when by prorating the water the orchards and plantings of all would be preserved with some impairment of crops for the time, but no serious permanent injury. The rule would operate directly to limit, in many parts of the state, the land available for orchard and similar plantings to such as could be certain of a full supply even in times of extreme drought. There is no occasion for any such extreme limitation, and it would be directly contrary to the economic welfare of the state. As between the consumers of a water company, even one supplying water for irrigation, the rule must be that in times of a shortage of supply the water available must be prorated.

[2] Certainly this is true as to every consumer in the present case who became such after the passage in 1913 of the act referred to. He could get no right greater than was permitted by the law in effect at the time he entered upon the relationship. There is no allegation in the present case that any of the water company's present consumers became such prior to 1914, and no right is claimed by reason of any of them having been consumers prior to the passage of the statute. This being the case, it must be held that the order of the Commission requiring a prorating is valid so far as the petitioner's first ground of attack is concerned.

[3] What we have just said has, of course, application only to the company's regular consumers; that is, to those who have entered into relationship with it and whom it has undertaken to serve on the basis of its having an adequate supply for that purpose. It has no application as between such consumers and what we may call surplus consumers; that is, consumers whom the company undertakes to serve only when and as it has a surplus over and above the needs of its regular consumers. As between these two classes, and very possibly even as between individuals in the second class a preferential right can properly exist. In no other way can use be made of the surplus water which any irrigation company is apt to have at times.

But in the case now before the court, the new consumers of the water company, if they properly became consumers at all, became such as regular and not as surplus consumers. They were admitted upon the basis of the company having an adequate supply and engaging regularly to supply them. They were therefore on an equal footing with the company's older consumers, provided the assumption with which we started is true, that they had properly been admitted as consumers. Whether they had been so admitted is, we believe, the real question in the case. It is directly involved in the second contention of the petitioner.

The petitioner's second contention is stated as follows:

> "Concededly the only authority which the Railroad Commission has to make an order in a matter of this kind is that contained in sections 5 and 6 of chapter 80 of the Statutes of 1913. The latter part of section 5 reads as follows:
>
> " 'The Commission shall likewise have power after hearing upon its own motion or upon complaint, to require any such water company to allow additional consumers to be served when it shall appear that to supply such additional consumers will not injuriously withdraw the supply wholly or in part from those who theretofore had been supplied by such public utility.'
>
> "This, and this alone, constitutes the authority and the power of the Railroad Commission to make the orders which petitioners ask to have set aside. It is respectfully submitted that there is nowhere in the opinion or the orders under review, in the evidence at the hearing, or in any part of the record, a determination, a finding, or a statement of any kind that the supply of water available to the Sutter Butte Canal Company during the year 1920 and thereafter will be sufficient to allow additional consumers to be served without injuriously withdrawing the supply in part from those who theretofore have been served by said utility. On the contrary, it affirmatively appears in the evidence and upon the face of the Railroad Commission's opinion that the old consumers will be injuriously affected by the delivery of water to the 14,400 acres which has not heretofore been supplied with water. In fact, the Commission, recognizing from the evidence that this result will undoubtedly follow, makes explicit provision for a prorating of the short supply."

Epitomizing this, it is that the Commission's only authority in this case was to make an order allowing additional consumers to be served only when it appeared that the former consumers would not be injuriously affected thereby, and that it affirmatively appeared and the Commission found that there was going to be a shortage of the company's supply during the coming summer, so that it of necessity appeared that the former consumers would be injured by admitting others to share in the supply.

We are not certain that the Commission's finding was really that the company's supply would not be adequate during the summer to follow for both the new lands and the old. Its finding is that at the intake of the company's canal there would be enough water available in the critical month of August for from 80 to 90 per cent. of the time to irrigate all the lands, and that in addition the company had a permit from the State Water Commission for the diversion of 500 second feet from the Feather at a point about 12 miles below, where a substantial quantity could be obtained. Nor are we certain that if this finding be one that, with the additional right of diversion mentioned, there would be no shortage, it is without support in the evidence. It was a case where the supply in normal years was more than adequate, and where it was sought to foretell, as well as possible, the extent to which that supply would fail during the particular summer because of an exceptionally dry winter just coming to an end. It was largely a matter of guessing, and it would be difficult to say that the Commission's guess that the company would have an adequate supply with what it could get by the further diversion it was authorized to make was so unreasonable as to be without support in the evidence. But however this may be, we may grant for purposes of discussion the contention that it did appear at the time the Commission made its order that because of the drought the company's supply would not be fully adequate during the summer for both the new and the old consumers, and that the Commission so found. Even so, it does not follow that the Commission's order was without authority.

The argument for petitioner assumes as its basis that the owners of the 14,400 acres of land were not consumers at the time of the application to the Commission, and that therefore the Commission's order, directing that they be served, was in effect an order that they be admitted as consumers, made under the authority of the provision of the statute quoted in the statement of petitioner's position. But the order of the Commission was not in fact that. It was not made on the basis of the owners of the new lands not yet being consumers, but on the basis that they were already consumers, and was not an order that new consumers be admitted, but that consumers already admitted, but at a later date than the company's other consumers, be served without preference against them. In its opinion denying the petitioner's request for a rehearing, the Commission placed its order explicitly upon this ground. If it be true that the owners of the new lands had already been admitted as consumers, then in accordance with our discussion of the petitioner's first contention it would follow that they were entitled to be served without preference, and the Commission's order was not only correct, but the only one which it could legally make. The order must be upheld, therefore, unless it appear that the owners of the new lands were not consumers at the time of petitioner's application to the Commission.

The facts in the matter are, as we have said, that in September, 1919, the company and the owners of the new lands contracted for service for those lands; that the company thereupon extended its system and the owners prepared their land, both at very considerable expense; and that prior to January 1, 1920, pursuant to the company's rules, the respective owners had made application to it for water for the ensuing year, and those applications had been accepted, and the owners had paid the company's charges. These facts are not disputed, and upon them certainly the owners had become consumers, provided only the company had authority to admit them as such. It was not necessary that water had been actually delivered upon the lands, to make the owners consumers in the legal sense; that is, persons whom the company was obligated to serve. The relation of public utility company and consumers was established as soon as the company came under obligation to serve and the owners came under obligation to take. Both these obligations had been assumed by the respective parties by January 1, 1920, so far as they could assume them. The actual delivery and receipt of the water thereafter would follow as a mere incident of the relation that had been entered upon. Unless, then, the company did not have the right to enter into this relation with the owners of the new land, the relation was in existence and those owners were consumers of the company prior to the petitioner's application to the Commission, and were entitled to water on an equal footing with the company's other consumers. The question, then, reduces itself to one as to the authority of the company, not of the Commission, to admit these new consumers.

[4] It is evident, we think, that on the one hand a public water company has authority to take on new consumers without, though not against, an order of the Commission, and, on the other hand, its authority is not without limitation, even in the absence of any order of the Commission. Certainly, in the absence of some prohibition upon it, either by statute or by order of the Commission, a water company, like any other utility, has the general power to take on new consumers. There was no prohibition by order of the Commission, nor was there any prohibition by statute, unless it be that the act of 1913 referred to provides that a water company may not take on new consumers without an order of the Commission. But the act does not in fact so provide. It provides merely that the Commission may forbid the taking on of more consumers, or may order their taking on, but it does not purport to limit or change the usual authority of the company in the absence of any order by the Commission. This is evident from a reading of the entire section (section 5) of the act which is pertinent to the point. It reads:

> "Whenever the Railroad Commission, after a hearing had upon its own motion or upon complaint, shall find that any water company which is a public utility operating within this state has reached the limit of its capacity to supply water and that no further consumers of water can be supplied from the system of such utility without injuriously withdrawing the supply wholly or in part from those who have theretofore been supplied by such corporation, the Railroad Commission may order and require that no such corporation shall furnish water to any new or additional consumers until such order is vacated or modified by the said Commission. The Commission shall likewise have the power after hearing upon its own motion or upon complaint, to require any such water company to allow additional consumers to be served when it shall appear that to supply such additional consumers will not injuriously withdraw the supply wholly or in part from those who theretofore had been supplied by such public utility."

[5, 6] On the other hand, a water company supplying water for irrigation has not the power to take on new consumers without limit. Its power to supply water is, of course, limited by the amount of its supply, and when the demands of its consumers upon it have reached this limit, it has no right to take on new consumers to the necessary injury of those it has. But it is not always easy to determine just when the limit of supply is reached, and the factor of safety which should be allowed against exceptional seasons may vary from locality to locality. In those localities where the crops are wholly dependent upon irrigation and perish if deprived of it for any considerable period, the factor of safety which should be allowed is of necessity greater than in those localities where this is not true. The matter is one of judgment, a judgment which it may well be should be exercised conservatively, but a matter of judgment nevertheless. The exercise of this judgment is left to the water company in the absence of any regulatory order of the Commission, and if the judgment is reasonably exercised, the action of the company in admitting new consumers is valid. Upon this point the Commission found in the present case that the company had acted reasonably in admitting the owners of the 14,400 acres as consumers, and if this finding is sustained by the evidence, it is decisive of the case.

[7] It may be claimed with some truth that the commission based this finding in part upon the fact that the normal flow of the Feather river available to the water company, that is, the flow in the critical month of August, averaged over a period of years, is sufficient to supply both the company's old and its new consumers. It may also be claimed, and is in fact claimed, that such an average is not the true limit of the extent to which a water company may take on new consumers; that in effect there must be a factor of safety allowed against seasons of less than average flow. This claim has great force, which is hardly affected by the casual remarks in some decisions that the limit is the normal available supply. Blakeley v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. 249; First, etc., Bank v. Bitter Root, etc., Co. (D. C.) 251 Fed. 320. It has also, we believe, been the practice of the Railroad Commission in this state to allow some such factor of safety against the normal supply. On the other hand, it is evident that the permissible limit should not be held to the available supply in years of drought. There is no occasion for any such extreme rule. It would virtually destroy the irrigability for anything but annual crops of large amounts of land, when by a temporary prorated diminution in deliveries of water in years of drought, such years could be endured without permanent injury or too great loss. See, also, the opinion of the commission in Security Inv. Co. v. Palermo Land & Water Co., 7 Ops. R. R. Comn. 180.

But it is not necessary to make the present case turn on whether it is the normal, in the sense of average, supply, or the normal supply less a reasonable factor of safety for years of less than average supply, which should be taken as the limit to which an irrigation company may take on requirements against its system. What we have said on the point has been largely for the purpose of making clear the utmost position that the old consumers here can reasonably take, and then ascertaining if in view of that position the order of the Commission can be upheld. If there was evidence before the Commission which justified the conclusion that the company by taking on the new consumers would not increase the demands upon its system beyond the amount of its average supply less a reasonable factor of safety, it is evident that the order must stand; and this, although there may be a conflict in evidence, for it is the function of the Commission alone to resolve any conflict, and we can disturb its ruling only when there is no evidence whatever to support it.

[8] The testimony of the engineer for the Commission was that the average flow of the Feather river in August for the period from 1902 to 1913 was 1,681 second feet. The years subsequent to 1913 showed a very much higher average, but the flow for those years was not considered, since the natural flow was augmented by water stored in the mountain reservoir of the Great Western Power Company and released for power purposes during the summer with the right, or assumed right at least, on the part of that company to retake it. The lowest flow of the years from 1902 to 1913 was that of August, 1913, when it was only 969 second feet. The next lowest August flow was 1,350 second feet.

As to the other side of the balance sheet, the demands upon the company's system which it had assumed by January 1, 1920, the testimony was that they would aggregate 930 second feet delivered on the lands, and that about one-third should be allowed for loss in transportation, making the amount required to be diverted 1,395 second feet. Between this amount and the average flow of the river of 1,681 second feet, there was then a margin or factor of safety of 286 second feet. In percentages, there was a margin of 20 per cent. of the demands upon the system and of 17 per cent. of the average flow. Comparing the amount of demands, 1,395 second feet, with the flow in the particular years in the period taken to ascertain the average, it appears that with the exception of 1 year the lowest flow was 1,350 second feet, or but 36 second feet below the demands for 1920. This difference could undoubtedly easily be made up by reduction of wastage and by economies. In other words, the situation when the water company accepted the applications of the new consumers was that the demands upon the company's system could be met from the natural flow of the river for every year but one in the period of 8 years prior to the time when the natural flow was augmented by the power company's storage.

There was also evidence justifying the conclusion that instead of 935 second feet delivered being required to meet the demands for 1920, the amount as called for by the company's contracts and accepted applications was but 884 second feet. Allowing a loss of one-third in transportation, this would require a diversion of but 1,326 second feet, and leave a margin of 355 second feet between the necessary diversion and the average flow of 1,681 second feet. There was also evidence that the figure of 884 second feet delivered should be somewhat reduced for August, owing to the slackening in irrigation after July.

It is not possible, in view of these figures and this evidence, to say that the Commission was not justified in finding that the action of the company in taking on new consumers prior to January 1st, and before the dry character of the winter had become apparent, was reasonable and proper, even assuming that a factor of safety below the average flow of the river should have been allowed. The evidence showed that such a factor existed, and in a substantial amount. What the factor should be was a matter of judgment for the company in the first instance, and for the Commission in the second. It is a factor that must vary from locality to locality and from system to system. It is necessarily higher in extremely arid localities and in localities where the normal fluctuations in rainfall are high, and it is to be noted that Sutter and Butte counties are not of this character, and that in both crops can be grown and even orchards maintained without irrigation. It is not possible for us to say that the factor in this case was too small.

It should be said that in computing the water company's available supply counsel for the petitioner deduct from the figures we have stated 600 second feet diverted by the Western Canal Company, or which that company claims the right to divert. But we do not follow them in making such deduction. There is nothing to show that the right of the Sutter Butte Canal Company is not a prior right so far as the natural flow of the river is concerned, and it does appear that it was diverting water long before the Western Company. It also appears, inferentially at least, that the water claimed by the latter is water the Great Western Power Company stores in the mountains and releases in the summer; in other words, is water which is not a part of the natural flow in summer. It is for this reason, as we have said, that the high average flow in the years subsequent to 1913, when the reservoir of the power company was completed, was disregarded by the Commission's engineer in computing the average natural flow.

It should also be said, even at the expense of repetition, that the case was presented to the Commission and has been presented to us almost entirely as if the question involved were one as to the right of the Commission to permit the taking on of new consumers at the time of the hearing, in face of the coming shortage then apparent. The Commission did not so view the real question in the case, nor do we, and we express no opinion as to the right of the Commission to permit the taking on of new consumers in a year of known shortage, even though their being taken on would be amply justified under normal conditions. The vital point in the case is that the new consumers had already been taken on and at a time when there was no reason to anticipate a drought, and when, according to evidence upon which the Commission had a right to rely, the company could reasonably anticipate that it would have an adequate supply for both the new and the old consumers. This being the situation, it is worthy of note again that, while the result would be the same in the absence of any statute, the case comes directly within the provision of the act of 1913 that—

> "As between consumers who have been voluntarily admitted to participate by the corporation in its supply of water or been required to be supplied by an order of the Railroad Commission, in times of shortage there shall be no priority or preference, and such corporation in times of shortage shall be required to apportion such supply ratably among its consumers."

We have discussed the case upon the assumption that the company had the right under the appropriation under which it was diverting water and supplying it to the old consumers to divert the further amount required to supply the new consumers, if the water were there to divert. This right is questioned in argument, but the facts, if they exist, which would negative the right, were not shown. It does appear that the appropriation right claimed by the company was for 1,500 second feet. This was more than enough for both the old and new consumers. If the company did not in fact have the right to this amount or the right to divert a greater amount than it had previously been diverting, that fact should have been shown. The case as presented to the commission by the old consumers was practically one where relief was sought against the company supplying the new consumers on the ground solely that a shortage in the natural supply due to a season of extreme drought was threatened. The Commission's order denying relief upon this ground was supported by the evidence presented to it.

The conclusion so reached is decisive of the case, and renders unnecessary the consideration of the petitioner's third contention. It is really a contention by way of reply to one made by the company and the Sutter county consumers. The latter claimed that there had been a previous dedication of water for use on the Sutter county lands because water had in a preceding year been delivered to a small portion of them. The commission found that water had been so delivered, and the third contention of the Butte county consumers was that such delivery was not a dedication of water to those lands. But it is evident, in view of what we have said, that it is wholly immaterial whether this contention be correct or not. The owners of the Sutter county lands had nevertheless been properly admitted as consumers by the water company, and this fact required that they be served without preference against them.

Order affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.

SHAW, J. (concurring). If the petitioners had shown that the water company had originally, by its declarations to proposed consumers, or by acts evincing to them an intention to that effect, held out that it proposed to use its water supply, so far as was necessary, for irrigation and other uses upon a definite area or district of farming land, embracing the lands of such consumers, including the petitioners, and that in pursuance of this purpose it had constructed a system of canals extending to said lands and no further, and had obtained consumers in that district on the faith of such purpose, and thereafter supplied them with water through said canals, I think it is clear, both from the Civil Code (section 552), from our decisions on the subject, and from considerations of sound public policy and justice, that such consumers would have a right to insist on the continuance of the supply to their lands, that such right would be paramount to that of consumers in any newly formed district to which the water company might afterwards undertake to supply water, and that such new users would be entitled to receive water only from the surplus of the company's water after the users in the first-mentioned district were supplied to the extent of their needs, not exceeding the amount per acre originally stipulated.

But as I understand the case the petitioners did not attempt to show such conditions. Their theory appears to be that the water company did construct its canals to the region in which their lands are situated, and by means thereof did supply water to their lands, and that inasmuch as this canal system was thus maintained and this water so supplied for a number of years without taking on new consumers, except for lands lying "under said canals," as the phrase goes, and without extending its canals to distinctly new territory, the water of the company must now be deemed to have been dedicated exclusively to the use of these first consumers and to lands lying "under said canals," so far as may be necessary for beneficial uses on said lands, and that consumers in other territories can have no right except to the surplus.

These facts do not establish the exclusive dedication so claimed. They do not show the intent to confine the service of water to the first users alone, and they are entirely consistent with the existence of the intent on the part of the company to continue the extending of their system and the service of a part of their original supply to other users in other territory.

The evidence shows that the rights of the original users of the water included among the petitioners, for the most part at least, were obtained under contracts with the Sutter-Butte Canal Company to serve water to particular tracts of land belonging to particular consumers for the term of the corporate existence of said company and at specified rates per acre for each year, and that these agreements contained a clause whereby the canal company reserved the right to "contract for the delivery of 1,000 cubic feet of water per second," and provided that when its water supply became less than 1,000 cubic feet per second, each user should be entitled only to a proportional share thereof. They also declared that the water right thereby created should be appurtenant to the land described. By these contracts the company agreed to deliver water at the rate of a constant flow of 1 second foot for every 160 acres of land. The landowner was to pay a lump sum of $13.50 per acre and a yearly rate of $2 per acre. By notice on or before January 1 of any year the landowner could have at $3 per acre 2 second feet more for each 160 acres for that year, only. Contracts in this form were made covering about 40,000 acres. Other contracts were made covering from 12,000 to 15,000 acres, which were similar in form, except that the water was to be used only for rice crops, the quantity was not limited, the landowner agreed positively to take it for a short term of 2, 3, or 4 years, and thereafter could take it or not at his option. No price was stated, but the evidence is that $7 per acre was charged for water on these contracts. Water was also furnished to other lands along the canals for a year, on application to the company, at rates fixed by the Railroad Commission. The proper irrigation of rice, it appears, required about three times as much water as is necessary for ordinary crops, the quantity varying with the composition and texture of the soil. There was evidence before the Commission showing that the area of land irrigated from this system had increased from time to time, until in 1919 the area irrigated for rice was 22,000 acres and that for other crops was 28,000 acres. The water required for the rice land would be the equivalent of that required for 66,000 acres in ordinary crops. The acreage irrigated for that year would require enough water, therefore, to irrigate 28,000 plus 66,000 acres, or 94,000 acres, at 1 second foot per quarter section, the minimum rate fixed by the contract, or a constant flow of 587 second feet.

The reservation by the aforesaid contracts, giving the company the right to make like contracts for supplying at least 1,000 second feet of water and to compel the landowners to prorate the water when less than that quantity was available, shows that the original proposal of the company was that the company would devote a water supply amounting to 1,000 second feet, constant flow, to all landowners who applied for water for irrigation of their land, under such contracts, until the water so contracted for amounted to that quantity, that the water used should not exceed the rate of 3 second feet for each quarter section of 160 acres, and that the particular land covered by this limited number of contracts should constitute the area, district, or territory to which this particular 1,000 second feet of water should be dedicated. This was a dedication to a public use. Traber v. R. R. Commission, 191 Pac. 370. The contracts did not prohibit the company from extending its canals into new territory and selling a part of the 1,000 second feet for use therein, or from furnishing at the rate of more than 3 second feet to each quarter section of land. The company could therefore dispose of the entire proposed supply of 1,000 second feet at such places and in such quantities as it pleased, without departing from the terms of the dedication, and such disposition would not constitute a new dedication of which any of such contract users could lawfully complain.

I am of the opinion that if the company had thus disposed of this entire supply, it would have amounted to a dedication of that quantity of water to public use for irrigation exclusively upon the lands described in the several contracts, and that neither the company nor the Railroad Commission could enlarge the dedication or expand the territory entitled thereto, so as to give to other lands an equal right to receive water out of that 1,000 second feet in common with the lands described in such contracts. The land so described would be entitled to preference in such use, and other lands could rightfully receive water only from the surplus remaining after the rightful users had taken the quantity they had respectively contracted for so far as it was required for beneficial uses on their lands. Civ. Code, § 552; Merrill v. Southside Irr. Co., 112 Cal. 435, 44 Pac. 720; Palmer v. R. R. Comn., 167 Cal. 174, 138 Pac. 997; Del Mar, etc., Co. v. Eshleman, 167 Cal. 681, 140 Pac. 591, 948; South Pasadena v. Pasadena, etc., Co., 152 Cal. 588, 93 Pac. 490; Thayer v. Cal. Dev. Co., 164 Cal. 135, 128 Pac. 21; Riverside Land Co. v. Jarvis, 174 Cal. 321, 322, 324, 163 Pac. 54; Fallbrook Irrig. District v. Bradley, 164 U. S. 161, 162, 17 Sup. Ct. 56, 41 L. Ed. 369.

But here it does not appear that the company had yet dedicated the whole of this 1,000 second feet at the time it proposed to supply the additional 14,400 acres in 1920, to which the petitioners object. As above stated, the total area supplied up to and including the year 1919 required only a constant flow of 587 second feet. The 14,400 acres to be taken on in 1920, even if it were all irrigated for rice and required 3 second feet for each quarter section, would consume only 270 second feet in addition, making in all 857 second feet. This comes well within the proposal to supply 1,000 second feet, and the petitioners do not appear to have any legal reason for their claim to preference in the use of the small supply available. Their contracts require them to prorate with the other beneficiaries in that public use, in such a case. It does not appear from the evidence, so far as I am advised from the briefs, that those of the petitioners who have received water only under the yearly applications require more water than could be supplied out of the margin of 133 second feet remaining of the original 1,000 second feet to be devoted to these lands. They therefore cannot claim any greater rights than the original contract users.

I wish to say further that the mere fact that the notice of appropriation under which the water company originally diverted the water from the Feather river named the counties of Sutter and Butte as the places of use has, in my opinion, no significance whatever with respect to the question of the dedication of the water to any particular use or place. The facts in that respect are not essentially different from those considered in Palmer v. R. R. Comn., 167 Cal. 174, 138 Pac. 997, wherein it was held that the dedication of the water taken under appropriation notices designating the place of use by similar indefinite statements would be manifested only by the actual taking of the water and supplying it to particular tracts or districts of land, and that the appropriation notices did not constitute such dedication. I mention this because from the proceedings before the Railroad Commission it appears to have been assumed that these clauses in the appropriation notices constituted a dedication of the water to public use upon all the land embraced in the two counties named.

For these reasons I concur in the conclusion that the Railroad Commission acted within its powers in making the order here sought to be reviewed.

51 Cal. App. 109

BOSBYSHELL v. CLINE, Sheriff of Los Angeles County, et al.

HAMMOND LUMBER CO. v. BOSBYSHELL et al.

(Civ. 3442.)

(District Court of Appeal, Second District, Division 1, California. Jan. 20, 1921. Hearing Denied by Supreme Court March 21, 1921.)

1. Attachment 🔑63—Possession by debtor of property bought by mother held immaterial.

Where it appeared that a debtor transferred his interest in dairy cattle to his mother, who owned the remaining interest, but that at the time of the attachment all of the stock so transferred and their increase had died or been sold, and that the stock attached had been subsequently purchased by the mother from others with her own funds, the fact that there was no transfer of immediate possession of the property sold by the son to his mother as required by Civ. Code, § 3440, does not sustain the attachment.

2. Fraudulent conveyances 🔑299(13) — Employ of debtor by mother held not to indicate ownership of property.

Where a son had transferred his interest in a dairy farm and the stock thereon to his mother in satisfaction of his debt to her, the fact that he was thereafter retained by her at a salary as manager of the property does not indicate any ownership of property subsequently purchased with her money, which would subject such property to attachment for the son's debt.

3. Attachment 🔑63—Mortgage given by debtor held not to show ownership of property.

The fact that the attachment debtor, who was employed by his mother on a salary to manage her dairy farm, gave in his own name a mortgage for part of the purchase price of cattle paid for with the mother's money, does not subject such stock to attachment for the son's debts.

4. Attachment 🔑63—Defendant's claim mother was dependent held not to disprove her ownership of property attached as his.

The fact that a son, when asking for exemption from military duty, claimed his mother was dependent upon him, if competent evidence in determining the right to attach property as his under a writ levied before he made such claim, has no weight to shown his ownership of the property, where the mother was more than 70 years of age and feeble, so that she might be dependent on him, though she had property sufficient for her support.

Appeals from Superior Court, Los Angeles County; John M. York, Judge.

Separate actions by Maggie J. Bosbyshell against John C. Cline, as Sheriff of Los Angeles County, the Hammond Lumber Company, and others, in claim and delivery for property attached, and by the Hammond Lumber Company against Maggie J. Bosbyshell and another, to set aside the transfer of real estate on the ground of fraud. From a judgment for the plaintiff in the first action, defendants therein appeal, and from judgment for the defendants in the second action, the Hammond Lumber Company appeals. Judgment in each case affirmed.

R. L. Horton, of Los Angeles, for appellants.

Richard A. Dunnigan, of Los Angeles, for respondents.

SHAW, J. The two above-entitled actions were tried together. The first one is in the nature of claim and delivery to recover certain personal property. In the second, plaintiff therein, alleging that certain real estate had been fraudulently conveyed by its debtor, William Bosbyshell, to Maggie J. Bosbyshell, sought to have the transfer thereof declared fraudulent and void. Judgment was entered for the plaintiff in the first case and for defendants in the second, from which defendants in the one and plaintiff in the other have appealed.

As we gather from the meager statements and excerpts of evidence from the typewritten transcript, as printed in the briefs, the facts material to a decision of the cases are: That Maggie J. Bosbyshell is the mother of William Bosbyshell, who, prior to February 2, 1915, had been engaged in the business of building contractor, as a result of which he was at the time indebted to the Hammond Lumber Company in the sum of $6,323.67, for which on said date he made and delivered his promissory note in evidence thereof; that at the same time he was indebted to his mother in the sum of some $19,000, as evidenced by his promissory notes theretofore delivered to her. At the time, he and his mother were joint owners of a small ranch, upon which neither resided, but through employés they conducted a dairy consisting of some 15 or 20 head of cows, and possessed other personal property used in connection therewith, all of which they owned jointly. On March 1, 1915, William Bosbyshell, in payment of the indebtedness due to his mother, conveyed to her his one-half interest in the ranch, which deed was on the same day duly filed for record, and by bill of sale transferred to her his one-half interest in the cows and personal property thereon so owned by him, in consideration of which she canceled and surrendered to him the promissory notes evidencing his indebtedness to her. The note to the Hammond Lumber Company was reduced by payments made to the extent that on August 9, 1917, there remained a balance due thereon of $3,989.35, for which, on said date, William made and delivered to the Hammond Lumber Company his note for said sum, and upon which the Hammond Lumber Company, some four years after the alleged fraudulent transfer, to wit, on February 10, 1919, brought an action and therein caused a writ of attachment to be levied upon his interest in the real estate involved herein, and also to be levied upon all the personal property which at the time was located on the ranch. This property consisted of some 50 head of Jersey cows, heifers and yearlings, a bull, 6 head of horses, and other personal property, and constitutes the subject of the first-entitled action herein, and of all of which, as found by the court, plaintiff was the owner.

Appellant suggests no reason and makes no argument in support of a reversal of the judgment rendered in the case of Hammond Lumber Company v. Maggie J. Bosbyshell and William Bosbyshell.

[1] As to the other case, that of Maggie J. Bosbyshell v. Cline, Sheriff, etc., et al., it conclusively appears that at the time of the alleged transfer made on March 1, 1915, by William to his mother, he was justly indebted to her in the sum of upwards of $19,000. Indeed, appellants do not question the good faith of the parties in this transaction; but, invoking the provisions of section 3440, Civil Code, claim that the purported transfer was not accompanied by an immediate delivery of the property, nor followed by an actual and continued change of possession of the things so transferred, and hence the alleged transfer as to the Hammond Lumber Company must be deemed to be void. Without quoting the testimony bearing upon the question, we may concede that, as claimed by appellants, the evidence is insufficient to support the finding to the effect that the transfer of title to the property made on March 1, 1915, was accompanied by an immediate delivery thereof and followed by an actual and continued change of possession. However this may be, such finding must be deemed immaterial, for the reason that the court, upon sufficient evidence, found that the writ of attachment was not levied upon any of the property so transferred, but—

> "That said cattle and the increase thereof so transferred by Wm. Bosbyshell * * * to the plaintiff herein, on the 1st day of March, 1915, were sold or died prior to the levy of the attachment on said property by the sheriff, * * * and that on the said date that said cattle were so attached, to wit, on the 13th day of February, 1919, no part of said cattle or personal property aforesaid were in the possession of said plaintiff;" and "that all of the personal property described in plaintiff's complaint herein and now in the possession of the sheriff, * * * hereinbefore found to be the property of the plaintiff, was by the plaintiff purchased with her own separate funds from persons other than the said Wm. Bosbyshell, * * * and has, at all times since said purchase and up to the unlawful taking by the said sheriff, * * * been in the exclusive possession of plaintiff, by and through her servant and agent;" and, further, "that in so far as Wm. Bosbyshell * * * has exercised any control or possession in connection with all of the said personal property described in plaintiff's complaint, he was at all times acting as the agent, servant and employé of the plaintiff herein and not otherwise."

Since no part of the property transferred by William to his mother on March 1, 1915, was made the subject of the levy of attachment, it is therefore immaterial whether or not the transfer was accompanied by the acts required by section 3440, Civil Code.

[2] Title to the ranch was, by deed duly recorded, conveyed to the mother on March 1, 1915, of which fact the Hammond Lumber Company must be deemed to have had notice; and while it is true that, commencing in June, 1915, and for a period of nearly four years prior to the levy of the attachment, she, at a salary of $150 per month, employed her son to manage the ranch and, as her agent, to care for the dairy stock and personal property, which she had, subsequent to March, 1915, purchased with her own funds and placed upon the ranch in his charge, such facts would not justify the conclusion that, as to debts contracted by him prior to March 1, 1915, the property, by virtue of such employment, should be deemed subject to the payment thereof, any more than if Maggie J. Bosbyshell had bought another farm, stocked it, and employed her son in charge thereof. He never was owner of the property, and had no interest therein.

[3] It was alleged and proved that on November 1, 1916, William Bosbyshell bought a herd of cows for which his mother paid a part of the purchase price in cash, and he, instead of his mother so doing, executed a mortgage thereon for the balance and immediately thereafter executed a bill of sale of the property to his mother, subject to the mortgage, which mortgage she thereafter paid. Appellants insist the judgment should be reversed because the court made no finding upon the issue as to the giving of this mortgage by William. We see no reason for so doing. The act of William in executing the mortgage at most raised a presumption that merely by virtue of his executing the mortgage he was owner of the herd of cows so purchased. The testimony touching the transaction and the fact that his mother paid the entire purchase price is ample to overcome such presumption.

[4] The fact that William, long after the making of the levy, to wit, on July 10, 1919, when asking for exemption from military duty, made an affidavit that his mother was dependent upon him, which affidavit, in view of the fact that she was more than 70 years of age and feeble, he might very well have made, is, if competent evidence, of no weight whatsoever touching the issue which was tried, namely, whether he or his mother owned the property. In Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95, it is said:

> "What constitutes an immediate delivery, or an actual and continued change of possession,

in the sense of section 3440 of the Civil Code, is a question of fact to be determined on the evidence; and where, as in this case, the evidence tends to prove such delivery and change of possession, the finding of the court will not be disturbed."

And in Feeley v. Boyd, 143 Cal. 282, 76 Pac. 1029, 65 L. R. A. 943, the court says that such question is governed by no definite rule, but depends upon the facts and circumstances of the particular case, and where there is conflicting evidence and a variety of circumstances from which conflicting inferences may be drawn, the findings of the trial court must govern.

The judgment in each case is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(51 Cal. App. 139)

GILLONS v. TURNER OIL CO. (Civ. 3229.)

(District Court of Appeal, Second District, Division 2, California. Jan. 21, 1921.)

1. Pleading ⚷8(7)—Principal and agent ⚷89(5)—Complaint held sufficiently to allege delivery of oil under contract without allegation that oil was delivered under contract, a mere conclusion.

In an action for recovery of commissions for sales of oil to the defendant, assertion made by defendant that plaintiff's pleading contained no allegation that any oil was ever delivered to defendant "under the contract" between defendant and the seller was wholly without merit, being based apparently upon a contention that an allegation in terms was necessary to complete the statement of a cause of action, since such allegation would be but the statement of a conclusion that would be stricken on motion, the complaint setting forth the contract between defendant and the seller of the oil, and stating that a certain number of barrels of oil was delivered by the seller to defendant.

2. Pleading ⚷125 — Denial of indebtedness without traverse of averments showing indebtedness raises no issue.

Where complaint alleged the facts showing an indebtedness due plaintiff from defendant, and further that the amount of the indebtedness was due, owing and unpaid, a denial of the latter allegation without a traverse of the averments showing the indebtedness raised no issue, and a motion for nonsuit was properly denied.

3. Principal and agent ⚷89(5)—Answer in action for commissions held not to set up defense of fraud.

In action for commission on sales of oil from a third person to defendant, an answer that before the consummation of the agreement to purchase oil it was fraudulently represented that the oil proposed to be delivered to defendant did not have a foreign content in excess of a certain stated percentage of its volume failed to state a defense or counterclaim, where the contract as finally executed contained several provisions showing that defendant bound itself to take oil without limitation or diminution because of the presence in it of a foreign content of any percentage whatever.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by George H. Gillons against the Turner Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 190 Pac. 183, 185.

William H. Fuller and Earl L. Wisdom, both of Los Angeles, for appellant.

Bordwell & Mathews, of Los Angeles, for respondent.

WORKS, J. This is an action for the recovery of commissions for certain sales of oil made by Graham-Loftus Oil Company to the appellant. The appeal is from a judgment for the plaintiff.

The respondent's cause of action is based upon a written contract between him and the appellant, reciting that he had rendered services in the obtaining of a contract between appellant and Graham-Loftus Oil Company; the appellant, in consideration of such services, promising to pay a commission of a certain amount for each barrel of oil delivered under the contract between the two companies.

[1] At the commencement of the trial the appellant objected to the reception of evidence on the ground that the complaint fails to state a cause of action. The objection was overruled, and it is claimed that the ruling was erroneous. This point is based upon the assertion, made in appellant's brief, that plaintiff's pleading contains no allegation that any oil was ever delivered to appellant "under the contract" between the two companies. The appellant evidently means to contend, strange as it may seem, that such an allegation, in terms, is necessary to the complete statement of a cause of action in a case like this. Such a proposition cannot be maintained. It requires no citation of authority to support the assertion that such an allegation would be but the statement of a conclusion, and that it would be stricken on motion. The complaint set forth the contract between the appellant and the other company in full, and stated that a certain number of barrels of oil was delivered by the Graham-Loftus concern. It was further alleged that statements of the amount delivered, made up pursuant to a scheme provided in the contract, were rendered to appellant and were retained by it. We are at a loss to perceive a better method of pleading plaintiff's cause of action without a violation of the salutary rule against the averment of conclusions. The complaint was, of course, sufficient.

[2] At the trial the plaintiff rested without the introduction of evidence, upon the theory that the state of the pleadings warranted that course, and the court determined that the burden of proof was upon the defendant under the allegations of its answer and counterclaim. A motion for a nonsuit was then presented and denied. Appellant assigns this ruling as error, upon the utterly untenable ground that the answer raised an issue by means of a denial contained in it "that there is now due or owing to plaintiff by virtue of or under" the contract sued on "the sum" for which judgment was asked in the complaint, "or that there is due or owing from said defendant to plaintiff any sum whatsoever." The complaint alleged the facts showing an indebtedness due the respondent from the appellant, and further that the amount of the indebtedness was due, owing, and unpaid. A denial of this latter allegation, without a traverse of the averments showing the indebtedness, raised no issue. Lightner v. Menzel, 35 Cal. 452. The motion for a nonsuit was properly denied.

[3] The remaining contention of the appellant is that the trial court erred in sustaining an objection to an offer of evidence intended to prove allegations of the answer and counterclaim to the effect that the appellant was induced to enter into the agreement with the Graham-Loftus Oil Company through fraudulent misrepresentation to which the respondent was a party. The facts constituting the alleged fraud are set forth in appellant's pleading with great particularity. Reduced to a brief compass, they amount to a charge that it was represented to appellant, before the consummation of the agreement between the two companies, that the oil proposed to be delivered to appellant did not have a foreign content in excess of a certain stated percentage of its volume. The difficulty is, however, that when the contract was finally executed it contained several provisions showing that appellant bound itself to take oil from the other company without limitation or diminution because of the presence in it of a foreign content of any percentage whatever. We need not refer to these parts of the contract. They are plainly apparent from a reading of it, and, moreover, they are specifically mentioned and pointed out in the brief of respondent; and the appellant does not, in its reply brief, attempt to harmonize their presence in the contract with its theory of fraudulent misrepresentation in its procurement. The point made by appellant is totally without merit, and its pleading failed to state a defense or counterclaim.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

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49 Cal. App. 545

FIRTH et al. v. RICHTER. (Civ. 3353.)

(District Court of Appeal, Second District, Division 1, California. Oct. 11, 1920.)

1. Partnership 🔑199—Action may be maintained in name of all partners, though contract was made by only two.

Where plaintiffs were copartners and had filed the required certificate, action may be maintained in the name of all of the partners under the doctrine of undisclosed principal, and in view of Code Civ. Proc. §§ 367, 378, though the contract sued on was made in the name of only two of the several parties.

2. Sales 🔑264—Where seller states the kind of article sold, he warrants the kind.

Where the buyer in terms asks for an article of a particular kind, and the seller purports to comply with his request, or states that the article is of that kind, he must be deemed to warrant the article being of that kind; hence, where plaintiffs offered to purchase Valencia orange trees, and the seller pointed out a row of trees as Valencia and agreed in writing to furnish such trees, he must be deemed to have warranted that the trees furnished would bear Valencia oranges.

3. Limitation of actions 🔑46(9)—Action for breach of warranty of fruit trees does not accrue until they bear.

Where defendant, by written contract, warranted that trees sold were Valencia orange trees, such warranty included a warranty that the trees would bear Valencia oranges, so the cause of action for breach did not arise until the trees bore fruit when breach of the warranty could be discovered, hence, though more than four years elapsed between the sale and the action for breach, it was not barred by Code Civ. Proc. § 337, subd. 1; the trees having begun to bear within less than four years of the time of commencement of the action.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by John P. Firth and others, copartners doing business under the firm name and style of the Dry Bog Orange Company, against Ernest Richter. From a judgment for plaintiffs, defendant appeals. Affirmed.

Frank F. Oster, of Los Angeles, for appellant.

Guy Knupp, of Porterville, and Kemp, Mitchell & Silberberg, of Los Angeles, for respondents.

CONREY, P. J. Action to recover damages resulting from breach of warranty. The defendant appeals from the judgment.

The action is based upon a contract dated February 28, 1912, which, as written, was entered into between the defendant as party of the first part and E. J. Wilson and J. P. Firth as parties of the second part. It was provided therein:

> "That the party of the first part agrees to sell and the parties of the second part agree to buy nine hundred and ninety-six (996) Valencia orange trees, running in size ½ inch and up, said trees grown by O. M. Bert, near his pumping plant. Price to be paid for trees, One, twenty-five cents ($1.25) f. o. b. trees to be balled and scrubbed and defoliated delivered f. o. b. in good condition and to pass inspection before shipping."

It will be noted that the action is brought by Firth and Wilson and by George H. Bradley as copartners. It was alleged in the complaint that the plaintiffs are and at all times mentioned therein were copartners doing business under the firm name and style of the Dry Bog Orange Company, and that they had filed with the county clerk of Tulare county the certificate required by sections 2466 and 2468 of the Civil Code, and have in all other respects complied with the provisions of said sections of the Civil Code; that the plaintiffs, as such copartners, are and at all of said times were the owners of certain described real property in the county of Tulare, which land was specially adapted to the growing of citrus fruits; that said agreement was made for and on behalf of and as the agreement of all the plaintiffs as copartners, and that the trees to be purchased under the terms of the agreement were purchased for the purpose of planting same upon said real property; that under the terms of said agreement the defendant delivered to the plaintiffs 996 orange trees which were accepted and paid for. It was further alleged:

> "That at the time of the delivery of said orange trees by said defendant, the said defendant represented said trees to be Valencia orange trees as provided in said contract hereinabove set forth, and that said plaintiffs accepted said orange trees relying on the representation of said defendant that they were Valencia orange trees. That at the time of the delivery of said orange trees it was impossible to tell or determine what kind of oranges said trees would bear, and that the said plaintiffs accepted said orange trees and planted all thereof upon the real estate hereinabove described, relying upon the contract hereinabove set forth and upon the representation of said defendant that said trees were Valencia orange trees; that the plaintiffs did not know and had no means of ascertaining whether or not the trees were of the kind as ordered by them and as represented by the defendant at the time of their delivery, and that the said plaintiffs in accepting said trees and in planting the same upon said real property relied upon the terms of said agreement and upon the warranty and representation of defendant that all of said orange trees were Valencia orange trees."

Further facts are alleged to the effect that in the fall of 1915 a part of the trees for the first time bore fruit, and in the fall of 1916 the remainder of the trees for the first time bore fruit, at which time it was for the first time discovered and for the first time became possible for the plaintiffs to discover that 183 of said trees were navel orange trees and not Valencia orange trees. Further facts are alleged showing the damages incurred. The findings of the court correspond to the allegations thus made. The amount of damages awarded and the method of measuring such damages are not attacked by appellant; his claim being that he is not subject to any liability whatever. The action was commenced on the 25th day of February, 1918.

[1] By demurrer to the complaint and by objections made at the trial and now renewed, appellant insists that there is a misjoinder of parties plaintiff, and that George H. Bradley is not a proper party plaintiff. We think that there is no merit in this objection. "As a rule a suit on a transaction in the name of the individual partner, but for the firm's benefit, may be brought, either by the party appearing in the transaction as the sole plaintiff, or, under the doctrine of undisclosed principal, by all of the partners." 30 Cyc. 563. This is in harmony with the requirements of the Code of Civil Procedure to the effect that (with exceptions not necessary to note here), every action must be prosecuted in the name of the real party in interest, and that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs. Code Civ. Proc. §§ 367, 378. See, also, 20 Ruling Case Law, 921.

[2] Counsel for appellant in his brief has contended that there is no warranty shown by the evidence in this case. Counsel for respondents dispose of the argument that there can be no implied warranty by denying that respondents place any reliance on an implied warranty, but do claim that the terms of the contract are such that, since they provide for a sale of the trees by description as Valencia orange trees, the defendant thereby expressly warranted, not only that they were Valencia orange trees, but that they were trees which would bear fruit of the kind known as Valencia oranges. The position thus taken by respondents appears to be sustained by authority in this state. Where the circumstances are such as to amount to a representation of fact on the part of the vendor that an article sold is of a particular kind or description, as, for instance, where the buyer in terms asks for a particular kind, and the seller purports to comply with his request, it was said that "he would probably be held to warrant the article as being of that kind, although he may not have made any declaration in words to that effect." Rauth v. Southwest Warehouse Co., 158 Cal. 54, 60, 109 Pac. 839, 842. In the case at bar it appears that the buyers definitely limited their request by asking for

Valencia orange trees, and the seller not only delivered the trees in direct response to that request, but, further, in a written contract, agreed to deliver Valencia orange trees. We are aware that, as shown by the evidence to which we have been referred, the particular trees were first selected by the buyers. Appellant had bought from O. M. Bert a quantity of trees, including those delivered to respondents. The trees were growing in rows in Bert's nursery. At the request of appellant, Bert exhibited to respondents certain rows of trees which he said were all Valencia orange trees. Respondents then selected these particular trees from the rows thus designated, and those are the trees that were delivered. No charge of bad faith is made herein, but, on the contrary, the court found and the parties admit that there was no such bad faith or deception; nevertheless appellant assumed the responsibility of selling those trees as Valencia orange trees, and there is nothing in the evidence showing any conduct on the part of respondents which should estop them from claiming the benefit of that warranty. The terms used were sufficient to state an express warranty. Polhemus v. Heiman, 45 Cal. 573, 578, 579.

[3] Appellant next contends that the action having been commenced more than four years after the time when the contract was made and the trees delivered, it was barred by the provisions of the statute of limitations. It is an action upon a contract in writing executed within this state. Code Civ. Proc. § 337, subd. 1. It is admitted that the time limited begins to run from the time of the breach of the contract. If the warranty in question was broken immediately when the trees were delivered (they being other than Valencia orange trees), and if the warranty was limited to the fact that they were then and there Valencia orange trees, then this action was commenced too late, and the plaintiffs cannot recover. It has been settled by decision in this state that a warranty of the kind here in question is not limited to the present fact that the trees are of the description given, but it is further a warranty that the trees will bear the kinds of fruit corresponding to such description. Shearer v. Park Nursery Co., 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125. The statute of limitations was not applicable in that case, but it is authority upon the question as to the time when under facts like those in this case the breach of warranty actually occurred. In the Shearer Case the court after first stating its opinion that the warranty was to the effect above stated, said: "If so, the breach occurred when they first bore a different kind of fruit." This conclusion was not arrived at in conflict with the admitted rule that the plaintiff's right of action begins at the time when the warranty is broken, but it did apply the additional rule that the time of breach of the warranty was the time when the trees first bore fruit, that being the earliest date at which the purchaser discovered or could have discovered the breach of the warranty. See, also, Burge v. Albany Nurseries, Inc., 176 Cal. 313, 318, 168 Pac. 343. In Ingalls v. Angell, 76 Wash. 692, 137 Pac. 309, upon facts very similar to those in the present action, the statute of limitations was pleaded as a defense, and the question was directly presented: When did the cause of action accrue? The plaintiff had in writing ordered Carman peach trees. The defendant in response to that order delivered trees labeled "Carman." The court said:

> "It must then be determined whether, by the warranty here pleaded, which is that the trees sold were Carman peach trees, it was intended to warrant that if they should produce peaches they would be of that variety. The purpose of the purchaser, unquestionably, was to buy trees which would produce Carman peaches. A construction of the language to the effect that the trees were to be Carman, and yet that there was no warranty that, if they produced fruit, it would be of that particular variety, would be to magnify form and minimize substance. The modern trend of authority is to look to the substance rather than to the form. When this is done, it would seem plain that the purpose intended was that the peaches, if any, which grew upon the trees which were the subject of the sale, would be of the Carman variety. It must be admitted that this view is not in harmony with the case of Allen v. Todd, 6 Lans. (N. Y.) 222, and the conclusion reached by a majority of the court in Battley v. Faulkner, 3 B. & Ald. 288. We think, however, that, in so far as these cases are out of harmony with the views herein expressed, they are unsound, and we decline to adopt them."

It was therefore held that, since the warranty related to a future event by which its truth could be ascertained, the warranty was not broken until the happening of such future event. The California decisions in the cases to which we have referred lead us to the like conclusion here.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

51 Cal. App. 106

BARE v. PARKER (HARVEY, Intervener). (Civ. 3650.)

(District Court of Appeal, First District, Division 1, California. Jan. 19, 1921.)

1. **Husband and wife 🔑264—Deed to husband and wife prima facie evidence that wife's interest is a separate property interest.**

Where title to property is taken in the name of a husband and wife, the deed itself is prima facie evidence. under Civ. Code, § 164, that the wife's interest is a separate property interest, and that the property was not community property.

2. **Husband and wife 🔑264—Presumption of wife's separate interest sufficiently rebutted.**

The presumption, under Civ. Code, § 164, that a wife had a separate property interest in land, title to which was taken in the name of the husband and wife, was sufficiently rebutted by a showing that the property was purchased after marriage from accumulations of the community, and that the husband had had title taken in their joint name for his personal convenience and for the further purpose of pleasing her.

3. **Stipulations 🔑17(3)—Inadvertent stipulation properly ignored.**

There was no merit in complaint of counsel for intervener that the court ignored an oral stipulation of himself and counsel for plaintiff, and made a finding contrary thereto, where assent of plaintiff's counsel was doubtless unwittingly given to such stipulation, as it negatived plaintiff's case and would have stipulated him out of court; for a trial judge does not sit as a mere referee in a contest of wits, and it is not only within his province, but is his duty, to see that as nearly as possible the issues shall be disposed of on their merits.

Appeal from Superior Court, Kern County; H. A. Peairs, Judge.

Action to quiet title by Charles B. Bare against George B. Parker, as administrator of the estate of Jennie Bare, deceased, wherein Mary A. Harvey intervened. Judgment for plaintiff, and intervener appeals. Affirmed.

T. F. Allen and George Flournoy, both of Bakersfield (Dorris & Henderson, of Bakersfield, of counsel), for appellant.

Boyce R. Fitzgerald, of Bakersfield, for respondent.

SEAWELL, Presiding Justice pro tem. Charles B. Bare, plaintiff herein, and Jennie Bare, were married March 7, 1911. The latter died December 11, 1918, leaving surviving as her only heirs, a husband, plaintiff herein, and her mother, Mary A. Harvey, intervener. Defendant, George B. Parker, was duly appointed administrator of the estate of said Jennie Bare, deceased. At the time of the latter's death, the record title to certain real property stood in the joint names of Charles B. Bare and Jennie Bare, his wife. This property was purchased after marriage from the accumulations of the community.

It is the claim of intervener and also of the administrator of said estate that said Jennie Bare owned at the time of her death an undivided one-half interest in said property as her separate estate, and her said interest should be distributed according to the rules of descent to her heirs at law. This action was accordingly brought by the husband to quiet his title as against all adverse claimants. Judgment went in his favor, and intervener alone has appealed.

[1] The findings of that court that "plaintiff provided that the title to said property be taken in the name of himself and wife for his personal convenience and for the further purpose of pleasing her" (his wife) and "by virtue of said deeds the property so acquired was community property and the interest of Jennie Bare therein was only a community interest," are assailed as standing without evidentiary support. The deeds themselves were prima facie evidence that decedent's interest was a separate property interest. Section 164, Civ. Code. The question then is: What was the intention of the husband at the time he directed or consented that his wife be named jointly with him as a grantee?

[2] In affairs matrimonial, such as this, men are often moved to action by the prompting of emotion or sentiment, or even by considerations of domestic policy. To relate all the operating causes that influenced human conduct long after the passing of the occasion, with varying attending circumstances, is quite difficult for the average person. The rigid rules of logic, properly applied in an effort to explain conduct in ordinary business transactions, are often unsatisfactory aids in divining motives that may have influenced matrimonial conduct. For this reason, all other things being equal, careful consideration must be given to the testimony of the survivor of the marriage, who, perhaps, alone has knowledge of the secret understanding of marital purposes and intentions. The credibility of the witness, however, is subject to the test of the general rules of evidence. It has been held that title placed in the wife's name, with no intention of making a gift to her of the property, but merely for the purposes of pleasing her, is sufficient to rebut the presumption prescribed by section 164, Civil Code. Fulkerson v. Stiles, 156 Cal. 703, 105 Pac. 966, 26 L. R. A. (N. S.) 181.

[3] No question of a purchaser or incumbrancer in good faith is involved here. Counsel for intervener complains that the court ignored the oral stipulation of himself and counsel for plaintiff and made a finding contrary thereto. Nearing the close of trial, counsel for intervener proposed several stipulations that were assented to by counsel for plaintiff. One was that "the property which

stood in the name of Charles B. Bare and Jennie Bare was, at the date of the deeds and thereafter, held by them as tenants in common." Undoubtedly assent was unwittingly given to this stipulation. It negatives the theory of plaintiff's case, and would have stipulated him out of court. The trial court appreciated the situation, and properly refused to permit an inadvertence or want of attention on the part of counsel to work what he conceived to be an injustice.

"A trial judge does not sit as a mere referee in a contest of wits between counsel in the case, but that it is not only within his province, but is his duty, to see that as nearly as possible the issues shall be disposed of on their merits. * * *" Farrar v. Farrar, 182 Pac. 989.

The judgment appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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51 Cal. App. 174

SINCLAIR v. PIONEER TRUCK CO. et al.

(Civ. 3621; L. A. 6193.)

(District Court of Appeal, First District, Division 1, California. Jan. 26, 1921. Hearing Denied by Supreme Court March 26, 1921.)

1. Negligence 🔑141(8)—Instruction on contributory negligence held sufficient.

Where the court instructed the jury that, if the plaintiff was negligent and his negligence amounted to want of ordinary care and contributed proximately to the injury, he could not recover, the instruction was sufficient, although defendants requested the court to instruct to find for defendants, if plaintiff's negligence contributed "in any degree" to the injury sued for.

2. Trial 🔑296(12)—Instruction failing to define required amount of care not erroneous, in view of other instructions.

An instruction that "the contributory negligence which will bar recovery must be such as to establish that the plaintiff, by failure to exercise the required amount of care, proximately contributed to produce the injury complained of, so that but for his concurring and co-operative fault the injury would not have happened," was not erroneous, in that the court did not define the phrase "required amount of care," where the degree of care to be exercised by both parties was repeatedly stated to the jury.

3. Trial 🔑260(3) — Refusing requested instructions as to burden of proof on different issues not error, in view of instruction given.

Court did not err in refusing to give defendants' proposed instructions advising the jury as to where the burden lay as to each of the issues, enumerating them, where the jury was familiar with the only controverted issues in the case, namely, the negligence of the defendants and the contributory negligence of the plaintiff, and the court instructed generally to the effect that the duty was imposed upon the plaintiff to prove the allegations of his complaint by a preponderance of the evidence, and that matters of defense pleaded by the defendants could be established only by a preponderance of the evidence.

4. Appeal and error 🔑1066—Part of instruction referring to duty of automobilist in business district not prejudicial, though not sustained by evidence.

In an action for damages resulting from automobile collision, there was no prejudicial error in reading from the statutes the provision which defines the term "business district" and duties of drivers of motor vehicles as to speed, etc., although there was no evidence that collision in question occurred in business district, where it was only part of an instruction covering a much wider scope and fixing the speed limits in various districts.

On Hearing in Supreme Court.

5. Evidence 🔑10(1)—Judicial notice of character of streets.

Courts may in a proper instance take judicial notice of the character in some respects of a street.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by O. A. Sinclair against the Pioneer Truck Company and others. Judgment for plaintiff, and defendants appeal. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

Warren E. Libby, of San Diego, for appellants.

Chester C. Kempley, of San Diego, for respondent.

KERRIGAN, J. This is an appeal by defendants from a judgment in favor of the plaintiff in an action for personal injuries sustained by reason of the alleged negligence of defendants, from which resulted a collision between an automobile operated by plaintiff and a truck driven by defendant Avery, an employee of his codefendants, at the intersection of Tenth and B streets in the city of San Diego.

[1] The sole point urged by the appellants relates to the giving or refusing of instructions to the jury. The defendants requested the court to instruct the jury as follows:

"If the jury believe from the evidence that the plaintiff by his own negligence directly contributed *in any degree* to the injury sued for, they will find for the defendants."

The court gave substantially this instruction and several others on the subject of contributory negligence, omitting from each of them, however, the words "in any degree" included in the proposed instruction. It is urged that the court's refusal to thus emphasize the measure of any contributory negligence chargeable to the plaintiff was error sufficiently prejudicial to entitle the defendants to a new trial. This contention is not maintainable. It is true that in some of the cases cited by the appellants this phrase is used in connection with the legal effect of contributory negligence, but it is nowhere held that it is an essential qualification of such negligence, but adds emphasis only. Where, as here, the court instructs the jury that if the plaintiff was negligent, and his negligence amounted to want of ordinary care, and contributed proximately to the injury, he cannot recover, such an instruction is sufficient.

[2] In another instruction the jury were advised that—

> "The contributory negligence which will bar recovery must be such as to establish that the plaintiff by failure to exercise the required amount of care proximately contributed to produce the injury complained of, so that but for his concurring and co-operative fault the injury would not have happened."

This instruction is claimed to be erroneous for the reason that no attempt was made by the court to define the phrase "required amount of care"; but the degree of care to be exercised by both parties was repeatedly stated to the jury, consequently the criticism of this instruction is wholly without merit.

[3] The court refused to give defendants' proposed instructions 1 and 22, advising the jury as to where the burden lay as to each of the issues, enumerating them. Instead of adopting the language proposed, the court instructed the jury generally to the effect that the duty was imposed upon the plaintiff to prove the allegations of his complaint by a preponderance of the evidence, and that any matter of defense pleaded by the defendants could be established only by a preponderance of the evidence. It appears that the jury was familiar with the only really controverted issues in the case, namely, the negligence of the defendants and the contributory negligence of the plaintiff, so that the instructions given by the court on this subject were, we have no doubt, sufficient.

[4] In the course of the reading of the instructions to the jury the court read several of the provisions of the Motor Vehicle Act, (Laws 1915, p. 397), including the provision designating the maximum speed at which motor or other vehicles may be driven in various districts, a portion of which is that it shall be unlawful to drive such vehicles on any public highway where the territory contiguous thereto is closely built up at a greater rate of speed than 20 miles an hour, or in a business district of an incorporated city or county or town at a greater rate than 15 miles an hour. The court also read the provision of said act which defines the term "business district" as that portion of a highway which is mainly built up with structures devoted to business. While the collision occurred at Tenth and B streets in said city of San Diego, there was no evidence in the case to indicate that this precise location is a business district, and, of course, courts do not take judicial notice of the character or condition of streets. The appellants contend that this instruction gave to the jury an opportunity which under the evidence they should not have had, namely, to find the defendants guilty of negligence if their automobile approached the point of collision at a rate of speed in excess of 15 miles an hour. We can conceive of cases where such an instruction would properly be regarded as prejudicial, but here the court was reading the law generally applicable to the operation of motor or other vehicles, defining the rights and duties of those operating such vehicles, and fixing the speed limit in various districts, and, while it cannot be said that there was any evidence in the case making specially applicable to it the portion of the instruction complained of, still as it was only part of an instruction covering a much wider scope the jury could not infer from its mere inclusion therein that the point of the collision was a business district, so that it cannot be fairly claimed that they were misled by it.

The appellants complain of the court's action with reference to another instruction—one regarding the duty of operators of vehicles approaching the intersections of streets, asserting that an instruction on this subject requested by them was refused by the court. The record, however, fails to show any such request, and, on the other hand, does show that with the exception of one word the instruction in question was included in one which the court gave. When the record is examined as to this point the claim of the appellants appears to us to be quite hypercritical. We may say as to this, as well as every other feature of the case, that the jury were fully and fairly instructed as to the law, and could not have been misled.

The judgment is affirmed.

We concur: SEAWELL, Presiding Justice pro tem.; RICHARDS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied.

[5] In denying the petition we desire to note, however, that the statement contained in the opinion of the District Court of Appeal that "of course courts do not take judicial notice of the character or condition of streets" is altogether too broad. Courts may in a proper instance take notice of the character in some respects of a street. See Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223.

All concur.

51 Cal. App. 189

PEOPLE ex rel. BRADFORD, Dist. Atty., v. MILLER et al. (Civ. 2242.)

(District Court of Appeal, Third District, California. Jan. 27, 1921.)

1. Nuisance ⟹84—Complaint under Red Light Abatement Act held sufficient.

In an action under the Red Light Abatement Act, a complaint alleging that the premises "are used for purposes of lewdness, assignation, and prostitution, and upon said premises acts of lewdness, assignation, and prostitution were held and did occur, and said premises were and now are a nuisance," is sufficient as against the objection that it does not charge the commission of any specific acts.

2. Appeal and error ⟹994(3)—Credibility of testimony was for the trial court, not the appellate court.

It was the province of the trial court, and not of the appellate court, to weigh the credibility of the testimony.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action under the Red Light Abatement Act by the People of the State of California, on the relation of Hugh B. Bradford, District Attorney, against Alice A. Miller and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. A. Gett, of Sacramento, for appellants.
Hugh B. Bradford, Dist. Atty., of Sacramento, for respondent.

PREWETT, Presiding Justice pro tem. An action under the Red Light Abatement Act (St. 1913, p. 20). The plaintiff had judgment in the trial court and the defendants appeal.

[1] It is urged in support of a reversal that the complaint does not charge the commission of any specific acts constituting the alleged nuisance. The complaint alleges, however, that the premises "were and now are used for the purposes of lewdness, assignation, and prostitution, and upon said premises acts of lewdness, assignation, and prostitution were held and did occur, and said premises were and now are a nuisance." These allegations are sufficient within the purview of the act.

[2] The second point is that the evidence is insufficient to sustain the findings and judgment in that it rests upon the "testimony of a hired, tricky reformer," etc. While the evidence presents the usual characteristics of this class of actions it cannot be said that the testimony of the chief witness for the prosecution is inherently or otherwise improbable. It presents a straightforward story, abundantly sufficient, if true, to justify a decree against the defendants. It was peculiarly the province of the trial court to weigh its credibility, and we are satisfied with the conclusions at which it arrived. There is no other point in the case.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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50 Cal. App. 565

SMELAND v. RENWICK et al. (Civ. 2197; Sac. 3056.)

(District Court of Appeal, Third District, California. Dec. 23, 1920. Hearing Denied by Supreme Court Feb. 21, 1921.)

1. Corporations ⟹319(6)—Complaint against officers held based on Code and not to state cause of action for fraud at common law.

Complaint, in action against a corporation's officers to recover damages for obtaining from plaintiff real property in consideration of mortgage bonds and stock of the corporation on false and fraudulent representations, *held* to be based entirely on Civ. Code, § 316, and not to state a cause of action for fraud and deceit at common law under section 1572, the charging words of the complaint being "that on and prior to the said 30th day of January, 1912, the said defendants, as such officers and directors of said corporation, willfully gave and published certificates and willfully made and published official printed reports, etc., which were false and untrue," etc.

2. Fraud ⟹41—Essential allegations.

To state a common-law action for fraud and deceit under Civ. Code, § 1572, there must be more in the complaint than the bare statement that defendants made certain false and fraudulent representations upon which, believing the same, plaintiff entered into the transaction from which he asks to be relieved, or as to which he seeks any appropriate legal or equitable relief, as it must also be charged, not only that the defendant knew that the alleged false representations were false and untrue at the time they were made, but that they were made with the intent to deceive and defraud the plaintiff.

3. Corporations ⟹319(7)—Verbal fraud not admissible under complaint in action against corporate officers for fraudulent entries.

In an action against corporate officers to recover damages for fraudulent entries, etc., resting entirely on the liability fixed by Civ. Code, § 316, any evidence tending to establish a case of fraud and deceit under section 1572 would be wholly irrelevant, and the court properly excluded proof of oral representations as to the transactions of the corporations; that is to say, representations which in and of themselves independently of those referred to in section 316 would constitute a sufficient foundation for a cause of action against the defendants.

4. Evidence ⟹253(2)—Misrepresentations of one corporate officer inadmissible against other officers unless made during conspiracy or in furtherance thereof.

In an action against corporate officers by one defrauded into purchasing stock and bonds, any oral representations or statements made by one of the officers relative to the affairs of the corporation would not be binding on other officers unless it were first shown that all the officers had corruptly conspired together and so entered into a mutual understanding that the false representations should be made to the plaintiff with a view of inducing him to buy stock and bonds, in which case it would also be necessary to show as a prerequisite that the misrepresentations were made before the accomplishment of the object of the conspiracy or understanding, or in furtherance thereof.

5. Trial ⚷60(1)—Trial judge held not to abuse discretion in control of order of proof.

In an action against corporate officers to recover damages for fraud under Civ. Code, § 316, in a sale of stock and bonds, where plaintiff introduced certain papers as documents purporting to be statements showing the capitalization, estimated earnings, gross and net holdings, mortgage bonds sold, names of officers, correspondents, and references of the corporation, and prior to the introduction of these papers or documents plaintiff was attempting to show that many of the important representations implied from the papers or records of the corporation referred to therein were in fact not true and that the corporation was in a state of bankruptcy at the time he purchased the stock, the court/did not err in sustaining objection by defendant's counsel upon the ground that no proper foundation had been laid for such proof and requiring that the alleged report or notice, or certificate concerning the corporation or its officers, be first shown, followed by a showing that it was made by an officer of the corporation to plaintiff and that it was false, before proof of damage resulting to plaintiff by reason of the transaction would be permitted.

6. Appeal and error ⚷970(3)—Trial court may control order of proof.

Discretion of trial court as to order of proof cannot be interfered with by the reviewing courts unless it is plainly made to appear that it has been abused to the substantial detriment of the party complaining.

7. Corporations ⚷319(7)—Evidence held insufficient to show circulars were issued by or at instance of corporate officers.

In an action under Civ. Code, § 316, against corporate officers to obtain damages for false representations while selling stock, evidence *held* not to show that defendants were responsible for issuance or giving out of the circulars or papers referred to in the complaint, and the court did not err in striking out testimony of plaintiffs as to conversations with defendants.

8. Corporations ⚷317(4)—Officers not responsible for circulars issued by other officers in absence of preconcerted arrangement.

In an action for damages by purchaser of stock against corporate officers under Civ. Code, § 316, corporate officers were not liable and bound by circulars issued by other officers, unless it is shown that the issuance of the circulars and the presentation of such documents to plaintiff were the result of a preconcerted arrangement and design by and between all of the officers to cause the issuance of the circulars, etc.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by H. G. Smeland against Harold S. Renwick and others. Judgment for defendants, and plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

A. H. Carpenter, of Stockton, for appellant.

Clary & Louttit, A. L. Levinsky, C. E. Fleming, Nutter, Hancock & Rutherford, O. B. Parkinson, C. C. Case, and Scott Rex, all of Stockton, for respondents.

HART, J. This is an appeal by the plaintiff from a judgment entered upon an order granting a nonsuit upon a motion made immediately upon the close of plaintiff's case.

The defendants, with the exception of defendant Frank V. Smith, were directors of a corporation designated and known as the "San Joaquin Valley Electric Railway," which was incorporated on October 3, 1908, under the laws of this state, and remained in existence as such until March 1, 1913, when, according to the complaint, its charter was duly declared forfeited because of its failure to pay its corporate license tax, as required by law, for the year 1912. The defendant Smith was secretary of said corporation.

The object of said corporation was, so the complaint states, to build and operate a railroad from the city of Stockton, in San Joaquin county, to the city of Modesto, in Stanislaus county.

The purpose of the action is to recover from said defendants damages in the aggregate sum of $13,400 for obtaining from the plaintiff certain real property of the alleged value of $11,400 in consideration of certain mortgage bonds and common and preferred stock of said corporation upon alleged false and fraudulent representations by said defendants with regard to conditions then existing as to said corporation and the progress it had made in the construction of the road, the securing of a franchise, the securing of a lease from another railroad company, and the sale of sufficient bonds of said corporation to enable it from the proceeds of such sale to fully furnish and equip its said railroad from Stockton to Modesto.

The defendants Salmon, Rothenbush, Latta, and McCormick filed answers to the complaint, putting in issue all the material allegations thereof. The defendant Renwick also filed an answer, but did not appear at the trial. Brackett, Covert, and Smith, the other defendants, were not served with process, and did not appear.

The trial court excluded on objection and struck out on motion certain testimony pro-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

posed and presented by the plaintiff, and the action of the court in doing so as well as its order granting the nonsuit constitute the bases of the complaint urged on this appeal against the legal stability of the judgment.

The solution of the question whether there is just legal ground for complaint against the rulings above referred to is contingent upon the determination of the nature, technically, of the action, as to which proposition the parties are in controversy and entertain and advance on this appeal variant views.

The defendants contend, and upon that theory the case was tried by the court below, that the action is based upon section 316 of the Civil Code, which reads as follows:

> "Any officer of a corporation who willfully gives a certificate, or willfully makes an official report, public notice, or entry in any of the records or books of the corporation, concerning the corporation or its business, which is false in any material representation, shall be liable for all the damages resulting therefrom to any person injured thereby, and if two or more officers unite or participate in the commission of any of the acts herein designated, they shall be jointly and severally liable."

The plaintiff vigorously urges here that the complaint states both a cause of action founded on the above statute and a cause of action for fraud and deceit. Civ. Code, § 1572.

[1] We doubt not that it must be held that the action is based entirely on the statute. The very language of the complaint, it seems to us, admits of no other conclusion. It is true that the complaint contains, as we shall presently see, a few statements which might be taken, as an attempt to state a common-law action to recover for fraud and deceit, but that pleading wholly fails to measure up to the requirements for the statement of such a cause of action.

The charging words of the complaint are as follows:

> "* * * That on and prior to the said 30th day of January, 1912, the said defendants, as such officers and directors of said corporation, willfully gave and published written certificates, and willfully made and published official printed reports and public printed notices concerning the aforesaid railway corporation, its business, financial standing, and assets, which were false and untrue in the following material respects, namely: That on and prior to the said 30th day of January, 1912, the said defendants, as such officers and directors of said corporation, falsely represented and stated to plaintiff *verbally* and by means of said printed certificates, officially printed reports and printed public notices, to which their names as such officers were appended, attached and printed, that the said railway corporation had sold mortgage bonds of said corporation to the amount of six hundred and twenty thousand dollars, and that the proceeds of such sale were sufficient to finish and fully equip its said railroad from Stockton to Modesto, which was then only partially graded, and put the same in operation and in a condition whereby it would, and could, earn dividends of 15 per cent. on its common stock; when in truth and in fact all said representations, *both oral* and in said certificates, official reports and public notices, made and issued by said defendants as such officers and directors, were then and there false and untrue."

[2] It seems to us that no more fitting language could be employed than the above to state a case of fraud under section 316 of the Civil Code. Indeed, it will be noted that the above language of the complaint is substantially the language of said section. It is, however, the words italicized in the above excerpt from the complaint, to wit, "falsely represented and stated to plaintiff *verbally*," etc., and "when in truth and in fact all said representations, *both oral*," etc., which the plaintiff assumes constitute a sufficient predicate for a just contention that he relied upon and pleaded in his complaint both the statutory and the common-law action for fraud, as the cause for the latter action is defined and embodied in section 1572 of the Civil Code. But, to state a common-law action for fraud and deceit, there must be more in the complaint than the bare statement that the defendants made certain false and fraudulent representations upon which, believing the same, the plaintiff entered into the transaction from which he thus asks to be relieved or as to which he seeks any appropriate legal or equitable relief. It must also be charged, not only that the defendant knew that the alleged false representations were false and untrue at the time that they were made, but that they were made with the intent to deceive and defraud the plaintiff. This rule in such cases is so well and throughly settled that it is axiomatic in the law. Indeed, the rule must necessarily be so for it is not inconceivable—in fact, it has often been found to be true—that one may honestly and in good faith and with no intent to deceive or commit thereby a fraud upon another, make statements or representations in regard to a certain matter which are subsequently discovered to be untrue.

It would seem hardly to be necessary to cite authorities expounding a rule so well settled and understood, but we will nevertheless refer to a few cases directly in point.

In Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351, the rule is thus stated, using the language of the syllabus:

> "The essence of a cause of action for deceit consists in the fact that the false representations were made with intent to deceive, such intent being a necessary element to constitute actual fraud."

And the complaint "must also allege that the representations were made with a fraudulent intent and for the purpose of inducing the other party to act on them." R. C. L. 167.

In Heller v. Dyerville Mfg. Co., 116 Cal. 127, 47 Pac. 1016, it is said:

> "It will be presumed, in the absence of an averment to the contrary, that the representation was without deceit, and with a belief in its truth."

See, also, Carlson v. Farm Land Co., 32 Cal. App. 538, 164 Pac. 344, 348; Newman v. Smith, 77 Cal. 23, 26, 18 Pac. 791; Feeney v. Howard, 79 Cal. 528, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Harding v. Robinson, 175 Cal. 534, 166 Pac. 808; Ayers v. S. P. R. Co., 173 Cal. 74, 159 Pac. 144, L. R. A. 1917F, 949; 20 Cyc. 100.

In Nash v. Rosesteel, 7 Cal. App. 504, 509, 94 Pac. 850, the action was for damages following from alleged false and fraudulent representations made by the defendant to the plaintiff, whereby the latter was induced to buy certain corporate stock. The court there said:

> "Appellant insists that this action is brought under the provisions of section 1572 of the Civil Code, which defines actual fraud to consist in: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;' (2) 'the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true, with intent to deceive another party thereto, or to induce him to enter into the contract.' Admitting that the representations set forth in the complaint were false, it is not alleged that defendant did not believe them to be true; nor is there any allegation therein negativing the fact that, if untrue, defendant's information did not warrant him in making the representations. Upon the trial defendant objected to the reception of any evidence upon the ground that there were no actionable issues. We think that the objection should have been sustained."

See, also, Gratz v. Schuler, 25 Cal. App. 117, 142 Pac. 899; Kilpatrick v. Miller, 55 Colo. 419, 135 Pac. 780; Robertson v. Frey, 72 Or. 599, 144 Pac. 128; McNulty v. Durham, 63 Colo. 354, 167 Pac. 773.

Thus, beyond peradventure, it is established that the complaint signally falls far short of stating a common-law case of fraud and deceit as the same is adopted into and defined by section 1572 of our Civil Code. Indeed, the record here discloses that the learned counsel for the plaintiff, during the progress of the trial, repeatedly stated, upon offering certain testimony, to which objection by opposing counsel was made, that the complaint was founded upon section 316 of the Civil Code, and that the basis of the plaintiff's action was the liability fixed and arising out of said section, and, on one occasion, in the course of the trial, stated to the court that he desired and intended to ask leave to amend the complaint so that it would also state a cause of action against the defendant under section 1572 of the Code. But it appears that no such amendment was thereafter or at any time presented or proposed by counsel and the complaint remained in the form of its original draft. In this connection, and parenthetically, it is only fair to the attorney who conducted the trial in behalf of the plaintiff to say that it appears from the record that he did not himself prepare the complaint and was not present in court when the pleadings were settled.

[3] The case, then, stands before us as one which rests entirely on the liability fixed by section 316 of the Civil Code, from which proposition it of necessity follows that any evidence tending to establish in this case any other liability, or, concretely, a case of fraud and deceit under section 1572 of the Civil Code, would be wholly irrelevant to the issue made by the pleadings, and the rulings of the court excluding such evidence was eminently proper. In other words, the complaint is wholly insufficient to warrant proof of oral representations as to the transactions of the corporation of which the defendants were officers bearing with more or less directness upon the subject-matter of this action—that is to say (to be more explicit), representations of that character which in and of themselves, independently of those referred to in section 316, would constitute a sufficient foundation for a cause of action against the defendants.

Thus we are brought to the consideration of the assignments of error based upon the several rulings disallowing certain testimony and the order granting the nonsuit.

[4] Assignments of error Nos. 3, 4, 5, 6, 7, and 35 all involve attacks upon the rulings of the court disallowing testimony of oral representations which it is claimed were made by one of the representatives (Latta) and the defendants Brackett and Covert; the last two, as seen, not having been served with summons and made no appearance. Necessarily, if our construction of the complaint be correct—that is to say, if the cause of action stated in the complaint is, as we hold it to be, founded wholly upon section 316 of the Civil Code or the liability therein established in cases to which said section relates—it follows that any testimony which was offered or might have been offered in proof of oral representations made by the respondents or any of the defendants is and would be entirely incompetent as in proof of the allegations of the complaint. This being so, the result is that the rulings now referred to were eminently proper. Moreover, any oral representations or statements which might have been made by any one of the officers named in the complaint to the plaintiff relative to the affairs of the corporation would not be binding upon the others, unless it were first shown that all the parties, including the nonanswering defendants, Brackett and Covert, had corruptly conspired together and so entered into a mutual understanding that the alleged false representations should by all or any of them be made

to the plaintiff with the view of inducing him to buy stock in the corporation, in which case, it may be added, it would also be necessary to show as a prerequisite to the proper introduction of such testimony, that such misrepresentations were made before the accomplishment of the object of the conspiracy or understanding and in furtherance thereof. Some of the testimony which was offered and received of oral representations, but subsequently stricken from the record, appears to have related to conversations the plaintiff had with Brackett and other officers of the corporation after the plaintiff had purchased the stock, and even if we may assume that it was within the issues to show oral misrepresentations by Brackett and Covert or the respondents, it is obviously true that any statements or representations made by any one of them in the absence of the other confederates (assuming that there was a confederation) after the stock had been purchased by the plaintiff would not be competent as proof against the other conspirators. The rules thus stated are elementary and require the citation of no authorities to confirm the statement hereof. But, as at first declared, there is no issue made by the pleadings as to oral representations or misrepresentations, and such testimony was not, under such circumstances, in any view competent.

The remaining assignments involve exceptions to the rulings disallowing certain testimony offered upon the theory that it tended to establish a case under section 316 of the Civil Code, upon which, as seen, the complaint is based. There are so many of these assignments that it would be impossible, without extending this opinion to an unreasonable length, to give to each of them herein special consideration. In fact, it is not necessary to do so, since all of said assignments involve questions of the same general character and what may be said of one will apply to all. Hence, a general consideration of the points thus urged is all that will be required for the purposes of this opinion.

A preliminary general outline of the situation as it arose at the trial with reference to the evidential features thereof will tend to clarify the discussion to follow.

It will be kept in mind that, as before stated, the defendants Brackett and Covert were not served with summons and made no appearance, and that Smith and Renwick, although filing answers, did not appear at the trial.

[5] The plaintiff introduced in evidence certain papers as documents purporting to be statements showing the capitalization, estimated earnings, gross and net, the holdings, mortgage bonds sold, names of officers, correspondents, and references of the corporation. Prior to the introduction of these papers or documents, the attorney for the plaintiff was attempting to show that many of the important representations implied from the papers or "records" of the corporation referred to therein were in fact not true, and that the corporation was in a state of bankruptcy at the time he purchased the stock of the corporation, and that his investment was, consequently, a financial failure. Objections were interposed by counsel representing the several respondents to that line of inquiry upon the ground that no proper foundation had been laid for such proof. The court sustained the objection, saying that the alleged report or notice or certificate concerning the corporation or its business would first have to be shown, followed by a showing that it was made by an officer of the corporation to the plaintiff and that it was false, before proof of the damage resulting to the plaintiff by reason of the transaction would be permitted. It was then that the papers or documents above referred to were offered and received in evidence.

[6] The order of proof suggested by the trial judge was the natural or logical one, and that it was within the discretion of the trial court to control the order of proof, is a proposiion too well settled to be for a moment questioned; and such discretion cannot be interfered with by the reviewing courts unless it is plainly made to appear that it has been abused to the substantial detriment of the party complaining. Gordon v. Searing, 8 Cal. 50; Hawkins v. Kingston, 1 Cal. Unrep. 413; Baird v. Duane, 1 Cal. Unrep. 492; Barkly v. Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413; First Nat. Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748.

Typical of the rulings generally under the present head to which the appellant here objects is one which may thus be explained: By the witness Beard, who once held the position of superintendent of construction of the corporation, and called as a witness by the plaintiff, it was sought to show that the corporation, because of having no financial means with which to do so, failed to pay for certain work of construction of the roadbed of the corporation's railroad; that the fact of its failure to pay for said construction and of its financial embarrassment generally existed at the time the plaintiff was induced to purchase the stock of the corporation or to exchange certain of his real property for said stock.

Nothing more need be said than is above declared relative to the testimony thus attempted to be brought into the record.

While the proof offered of the inability of the corporation to meet its financial obligations might have tended to support the proposition that, at the time the plaintiff was given the documents in question, it was practically a bankrupt and as a consequence its stock and bonds of little, if any, value, there was not at this stage of the case, nor as we shall later see, at any stage of the case, any proof that the alleged printed reports of the corporation's financial condition and future prospects, upon the faith of which the plaintiff claims to have taken the stock and bonds of the corporation, were issued or authorized to be issued or given out by respondents or any one or more of them, particularly to the plaintiff, and, as already pointed out, it was within the discretion of the trial court to exclude all such testimony as the witness Beard was called upon to give until it was first shown that the respondents or some one or more of them had issued and given to plaintiff or had authorized the issuance or giving out generally of said reports, etc. It must be borne in mind that the action is not against the corporation but against its officers individually, although, of course, by virtue of their official connection with the company.

The foregoing observations are, of course, equally applicable to other rulings disallowing testimony tending to disclose the loss or damage sustained by the plaintiff from his unfortunate investment in the stock of the company. Indeed, what we here say answers all the objections which were made at the trial and are urged here to the action of the court refusing any testimony to be given relative to the transaction whereby plaintiff became the owner of stock of the corporation, all such testimony having been offered in the absence of proof that the respondents had anything to do with the issuance or publication, or the giving to plaintiff, the papers or records or reports purporting to represent the financial condition or the assets and liabilities and the probable prospects of the corporation for a prosperous and profitable business after the completion of the construction and equipment of its railroad.

Some of the other specifications of error involving the court's rulings will be disposed of in considering the order granting a nonsuit, to which proposition attention will now be directed.

The plaintiff was, after considerable discussion between court and counsel, permitted to testify about certain conversations he had with certain of the defendants relative to the business or the affairs of the corporation upon the express condition that such testimony would be stricken out if it did not connect with or tend to sustain the charge that some one or more of the answering defendants "willfully" gave or made, particularly to plaintiff, the alleged false printed official report or records concerning the corporation and its business. Accordingly, he was allowed to testify that early in January, 1912, having previously advertised that he had some country real property which he would exchange for city property, accompanied a Mr. Bennett to the office of the corporation in question and there made inquiry as to the financial status of the corporation and its business, with a view of exchanging his said property for the stock or bonds or both of said corporation. On that occasion the only officers of the corporation he met and talked with were Brackett and Smith. The former was then vice president and general manager of the company. Immediately negotiations were started between the plaintiff and Brackett for the exchange of the former's property for stock of the corporation. Brackett displayed before the plaintiff the documents or papers purporting to contain a statement or report of the affairs of the corporation, its assets, and probable prospects as a business enterprise. These documents or reports were on several loose pieces of paper, and they were attached together, by order of Brackett, by the secretary of the company, Smith (also, as seen, one of the defendants not answering or otherwise making an appearance in the action). The plaintiff testified that Brackett stated to him that the statements contained in the papers were true, and thereupon he (plaintiff) deposited all the papers in his pocket and later "looked and read them over carefully," and then called at the office of the defendant, Dr. Latta, in the city of Stockton, and exhibiting to the doctor the printed papers received from Brackett, asked him if they represented the truth concerning the affairs of the company at that time; that the doctor replied that they did; that $600,000 of the bonds of the company had been sold in France; that the company had obtained it rights of way; that the grading was done, etc. The plaintiff testified to other conversations with Latta, McCormick, and Renwick; the last named being treasurer of the company. These conversations were held with each of the parties named on different occasions and when no one was present but the plaintiff and the particular director of those last named so conversed with. Whether all these conversations occurred before or after the stock was taken by the plaintiff, it is difficult to determine from the record. It is plain enough, however, that some of them took place after the transfer of the stock to plaintiff was effected, particularly the conversation in which Latta declared to plaintiff that the failure of the enterprise was due entirely to the bad management or the insinuated malversation of Brackett as manager of the company. At any rate, the substance of the plaintiff's testimony as to these several conversations was that in the course thereof the directors named stated that the financial condition of the company was such as it was represented to be by the papers the plaintiff received from Brackett.

Plaintiff was further permitted to testify that, several days after his first interview with Brackett and after he had been given the alleged printed reports, etc., of the affairs of the company, Brackett and Smith called at his ranch and there attempted to persuade him to take the stock and bonds in exchange for the real property which he desired to dispose of in exchange for city property, and that subsequently, and after the above-mentioned conversations with Latta and other directors, he completed the transaction by taking stock and bonds of the company, giving in consideration therefor said real property.

Other testimony showing that the road was never completed, tending to show that $600,000 worth of the bonds of the company were not sold and that other statements contained in the circulars were not true, was admitted upon the condition that it would stand in the event only that it was "connected up," as above suggested.

Thus we have presented in rather a summary manner the testimony received, and we may add that that portion of the testimony to which we have not made special or particular reference herein is of the same general nature as that of which an outline is above given.

On the close of plaintiff's case, the court granted the motion of the defendants to strike all said testimony from the record on the ground that it related solely to conversations with individual defendants occurring severally and in the absence of the other defendants, and on the further ground that, in the main, its effect was merely to establish oral representations by the defendants between whom and the plaintiff the conversations to which it related occurred, and had no tendency to establish the charge laid in the complaint and based upon section 316 of the Civil Code. The granting of said motion was followed by a motion for a nonsuit, which, as seen, was also granted.

It is obviously true that if the order granting the motion eliminating from the record all the testimony of which we have above presented a brief conspectus was well grounded, it follows that the order allowing the nonsuit was proper, since there was left in the record, after the motion striking out was granted, no testimony whatever to support the averments of the complaint.

[7] It will be observed from the statement herein of the testimony that there is not a line or word of the evidence tending in the slightest degree to connect the answering defendants with the issuance or giving out of the circulars or papers referred to in the complaint. It is true that their names, with those of the other officers of the company, are printed in one of the printed documents given to the plaintiff by Brackett. If the action was one against the corporation or if the names of these respondents were subscribed to said documents in their own proper signatures, we can now think of no sound reason why, as to that particular document, it could not justly be held that thus there was made out a prima facie showing, sufficient at least to put them upon their defense, that they authorized the issuance and publication of the paper or report, assuming, of course, that proof of the falsity of the statements it contained were also made. But, for all that appears to the contrary from the document itself or any of the other testimony which was conditionally received, Brackett himself might alone have been responsible for the preparation, the printing, and the publication of the document. These respondents and not the corporation are, as before stated and as is obvious from the nature of the action, proceeded against as individuals, against whom it is sought by this action to secure an individual judgment, which, as the statute declares, may be either joint or several, and to establish a case against them under section 316, it is requisite that by competent testimony they should be shown actually to have been parties to the issuance and publication of the documents in question, and, to that end, that they actually subscribed their names to the document in which their printed names as officers of the corporation appear. There was no such testimony offered.

[8] The plaintiff stated that the only officers of the company that had anything to do with bringing to his attention the circulars were Brackett and Smith. Of course, as we have before shown, the other defendants could not be bound by what Brackett and Smith did, unless it were shown that their acts—that is, the issuance of the circulars and the presentation of those documents to plaintiff by them—were the result of a preconcerted arrangement and design by and between Brackett, Smith, and the other defendants to cause the issuance of said circulars, etc. There was no testimony tending to show any such confederation between Brackett, Smith, and the other defendants.

The testimony of conversations between the plaintiff and the defendant Latta does not show that the latter had anything to do with the issuance or publication of the circulars. It merely shows that the plaintiff himself first called Latta's attention to the circulars, the former, as seen, having the same in his possession on the several occasions he conversed with Latta. There being no showing that the defendants were in a prearranged league with each other to issue and publish the documents in question, the representations or statements or acts of Latta could in no event bind the other defendants; but the very most that can be said of the statements of Latta in said conversations is that they involved, if anything at all, oral representations of the business affairs and financial condition of the corporation, and, as we hold herein, such representations are wholly foreign to the issues made by the pleadings, and therefore testimony disclosing the statements and representations of Latta concerning the corporation and its financial condition is immaterial and out of place in this record. And what is here said applies with equal pertinency to the testimony given by plaintiff of conversations with Renwick of similar import to that of the conversations with Latta.

It thus appearing that the testimony given by the plaintiff failed to connect any of the answering defendants with the acts of Brackett and Smith in issuing and giving to plaintiff the circulars in question (assuming, but not deciding that said acts are within the ban of section 316 of the Civil Code), and it thus further being shown that said testimony related only to oral representations made by the directors with whom plaintiff had the conversations to which said testimony related, it follows that there was but one course left for the trial court to take on the motion to strike out the testimony, and that was to grant the motion.

It is very probable, if we may rely upon certain statements made by the defendant Latta concerning the defendant Brackett's management of the company's affairs, that the plaintiff was defrauded of his property through the transaction giving rise to this controversy, and, of course, it is a matter greatly to be deprecated that he has not thus far succeeded in having the wrong inflicted upon him, if any, redressed, but his attempt in this action to secure relief was due, not to his attorney, who, it clearly appears, employed every legitimate effort to support the action, but to the want of proof to establish a case under section 316 of the Civil Code upon which his action was founded.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. It should be said, in denying the application for a hearing in this court after decision by the District Court of Appeal for the Third Appellate District, that respondents contend in their answer to the application that the District Court of Appeal opinion, in stating that there was evidence that appellant brought to defendant Latta's knowledge or observation any of the circulars or notices, is not sustained by the record, and our examination of the record satisfies us that this contention is well based. Were there such evidence there would be grave doubt of the correctness of the conclusion in so far as defendant Latta is concerned.

The application for a hearing in this court is denied.

All concur, except OLNEY and SLOANE, JJ.

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51 Cal. App. 196

TURNER v. FROST et al. (Civ. 2092.)

(District Court of Appeal, Third District, California. Jan. 27, 1921. Hearing Denied by Supreme Court March 28, 1921.)

1. Judgment ⟾153(1)—Laches barred application to set aside default.

Where the defendant knew his default had been entered ten days before judgment was rendered against him, but thereafter waited until just before the expiration of the 6 months period within which he could move to have it set aside, he was guilty of laches, which was not excused by his claim he was misled by his attorney, where he procured another attorney in time to have made his motion two months before he did.

2. Judgment ⟾138(1)—Facts shown by plaintiff held to require refusal to set aside default against defendant.

The showing by plaintiff in opposition to a motion to set aside a default that the action was based on an agreement by defendant to pay certain sums made by him to procure his discharge from contempt proceedings in a prior action brought against him by plaintiff, as a result of which defendant was enabled to secure release from a cash bail of $1,000, deposited by him, and that, as soon as defendant recovered the deposit of bail, he repudiated his agreement, shows that defendant was not entitled to have the default entered against him set aside.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by Sallie C. Turner against Herman Frost and another. From an order refusing to set aside default of the defendant Herman Frost, that defendant appeals. Affirmed.

Samuel T. Bush and William Sea, Jr., both of San Francisco, for appellant.

Dodge & Barry, of Reno, Nev., for respondent.

PREWETT, Presiding Justice pro tem. The appellant brings this appeal from an order of the lower court refusing to set aside a default and judgment taken against him after failure to answer. The motion for the order was based upon the provisions of section 473 of the Code of Civil Procedure and was supported by affidavits. The judgment was entered on March 13, 1919, and this motion was noticed on August 26, 1919, and was so noticed to be heard on September 10, 1919, or about three days before the expiration of the statutory limit of six months. The appellant had notice as early as March 4, 1919, that his default had been entered. This was nine days before the entry of the default judgment. About two days before the entry of the default, the attorney for the appellant telegraphed to the judge of the trial court asking for an order granting additional time

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⟾For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes within which to answer, though he made no showing whatever in support of such request. The request was denied, though a longer period than the ten days sought actually elapsed before the judgment was entered.

[1] Upon the showing thus far, there is no question that the appellant waived, by his laches, all right that he had ever possessed, to move to open the default. He claims, however, that he was misled by his own attorney. But on July 26th he retained another attorney, who, on July 28th, gave notice of his appearance in behalf of the appellant and substitution was on that day made. The appellant still continued inactive for about one month, when at the last moment he gave notice of his intention to move for an order relieving him from the default. But whatever may be said of the showing made by the appellant—and even if it had been uncontradicted it would have been insufficient—it was entirely overcome by the countershowing of the respondent. In fact, the showing is so strong and so clear that the appeal of the appellant must be regarded as frivolous.

[2] On June 17th the respondent levied upon a large quantity of property, sufficient, according to the affidavits, to satisfy the judgment of $8,393. On or about April 18, 1919, the appellant was served with a citation to appear and answer as to his property. Failing to obey this citation proceedings in contempt was taken against him and on June 17th, he applied to this court for his discharge on habeas corpus. His application being denied, he was released on $1,000 cash bail. On or about June 17th the appellant and the respondent entered into a written agreement reciting the entry of said judgment. The agreement further provided that said appellant should pay $750 in cash on the judgment and should liquidate the entire balance thereof before August 16, 1919. At the same time he pledged various collateral securities as security for the agreed payment. The agreement contained a provision that if the appellant should fail to make the payment as agreed, then the respondent could sell the securities and apply the proceeds toward the satisfaction of said judgment. The appellant then and there paid the initial payment of $750. About one week later said appellant and his attorney appeared in the lower court, and stated to the court that the action had been satisfactorily settled, and asked that he be purged of contempt and be permitted to withdraw his $1,000 cash bail. His requests were granted, and appellant departed with the $1,000 bail money in his pocket. He never at any time expressed any dissatisfaction with the agreed settlement until about the 13th or 14th day of August, when he notified the attorney for the respondent that he did not intend to make the balance of the payment. Upon the entry into the agreement, the property that had been levied upon was released. Under this state of facts the appellant gravely asks this court to set aside his default. A mere recital of the facts is itself an answer to his appeal.

The order denying the motion of appellant to open his default is affirmed.

We concur: HART, J.; BURNETT, J.

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51 Cal. App. 194

ARNETT v. NALL et al. (Civ. 2231.)

(District Court of Appeal, Third District, California. Jan. 27, 1921. Hearing Denied by Supreme Court March 28, 1921.)

1. Appeal and error ⚷1032(1) — Appellant must show injury from ruling complained of.

Unless the facts themselves are such that injury follows as a necessary result, the aggrieved party must show affirmatively that the obnoxious ruling of the trial court assigned as error has injured him.

2. Appeal and error ⚷1043(6)—Exclusion of plaintiff's deposition not shown prejudicial.

In an action on a promissory note, exclusion of plaintiff's deposition offered at the opening of his case *held* not prejudicial to plaintiff, where he could have been present but chose not to do so and plaintiff's attorney knew the facts and could have testified thereto.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Lee Arnett against Ira Nall and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Waldo S. Johnson, of Marysville, for appellant.

W. H. Carlin, of Marysville, for respondents.

PREWETT, Presiding Justice pro tem. After trial in the court below, findings and judgment against the plaintiff were made and filed. The plaintiff, at the opening of his case, offered to read his own deposition taken in another state. Upon objection that the commission issued upon insufficient notice, that the commissioner did not purport to be acting under the commission, and that the interrogatories that accompanied the commission had not been settled by the court, the court excluded the deposition. This is assigned as error. The plaintiff thereupon moved, without any showing, that the court grant a continuance. This motion was denied. It is claimed that this was an abuse of discretion. The plaintiff then rested his case without introducing any evidence. After judgment the plaintiff moved on affidavit that the court grant him a new trial. The plaintiff himself filed no affidavit on this motion.

The only ground urged in support of the motion was that of surprise at the ruling of the court in excluding the deposition and denying a continuance. The motion for a new trial was denied and plaintiff appeals.

[1] Some of the objections to the deposition appear to be grave, yet it is perhaps unnecessary for the court to determine whether or not they are fatal, since the judgment must be affirmed for other reasons. Conceding that the objections were not well founded and that the deposition should have been admitted, it becomes necessary to inquire whether or not injury was done to the plaintiff. Under the wise constitutional and other provisions that have been injected into our jurisprudence within the last few years, injury is no longer presumed. Unless the facts themselves are such that injury follows as a necessary result, the aggrieved party must show affirmatively that the obnoxious ruling has injured him. In this case there is no attempt at such a showing. The court excluded certain offered evidence. The plaintiff may or may not have been injured thereby. We do not know what this evidence was nor is there any method whereby we can conjecture it. The plaintiff did not care to be present in person at the trial. This we know from the fact that he attempted to send his deposition. The point often arising that a litigant desired to be present to oversee his own case or defense does not arise in this case. The matter stands before us in all respects as though the deponent had no interest in the case. In other words, it is a mere case of alleged error in the exclusion of evidence.

[2] From no point of view can it be insisted that any injury has been affirmatively shown. On the contrary, it seems that the plaintiff suffered no injury. The promissory note was present in court. The attorney for the plaintiff knew of a positive fact that there was a good consideration for the note and that the assignment was made for a valuable consideration and without notice. This is fully shown by his affidavit on motion for a new trial. He could have testified to these matters on the trial of the action. He chose not to do so.

If we may conjecture that the deposition dealt with the same matters, then the deposition would have done no more than corroborate the attorney. It should be noted that the affidavit on motion for a new trial in no place sets out the contents of the deposition, though there is a general recital that the attorney relied upon it to prove the facts stated in the complaint. The defense is fraud and failure of consideration, breach of warranty, and assignment with notice. It is somewhat significant that this plaintiff, in the face of this defense and especially of the assignment to him with notice, should have chosen, though only a few hours' distant from the place of trial, to absent himself from the trial. That he was not ill or necessarily detained is shown by the offer of his counsel to produce him in court at a later date if a continuance was granted. It is clear that no injury is affirmatively shown.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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51 Cal. App. 92

NELSON v. ANDERSON-COTTONWOOD IRR. DIST. et al. (Civ. 2185.)

(District Court of Appeal, Third District, California. Jan. 17, 1921.)

1. Evidence 🔑83(1) — Mandamus 🔑90 — Mandate requiring irrigation district to construct laterals not granted where no money is available; action of irrigation directors presumed proper.

Where an irrigation district had previously expended moneys raised by bond issue for improvements in the construction of the laterals and there was no money available under St. 1919, p. 472, authorizing assessment, a writ of mandate requiring the district to construct a lateral for the benefit of a landowner cannot be issued, for it will be presumed that directors expended the proceeds of bond issue for the purpose raised and were not able to complete the construction of the lateral out of such proceeds.

2. Waters and water courses 🔑249—Supply for irrigation limited to beneficial use.

While Wright Irrigation Law, § 18, as amended by St. 1897, p. 259, provides that water shall be apportioned to a landowner upon the ratio which the last assessment upon his land bore to the whole sum assessed upon the district, a landowner is not entitled to his proportionate share of water unless he can make a beneficial use thereof, although he may assign his right to a person prepared to make such use.

3. Waters and water courses 🔑249—Supply for irrigation limited to use under regulations.

Where an irrigation district under Wright Irrigation Law, § 15c, added by St. 1917, p. 758, adopted a rule requiring landowners to keep their ditches and facilities for distributing water in good condition so that it could be used without undue loss or waste, a landowner is not entitled to a writ of mandate to compel an irrigation district to furnish him the pro rata share to which he is entitled under section 18, without showing that he is prepared to use the same.

4. Mandamus 🔑14(1)—Before writ can issue, specific demand must be made.

Before writ of mandate should issue, it must appear that a specific demand has been made by the petitioner for that to which he is entitled in order that the one on whom the demand is made may have opportunity to comply.

5. Mandamus ⚷14(2)—Demand that irrigation district furnish water not sufficiently specific.

An application to an irrigation district for water describing the crops as alfalfa, blank acres, orchard, blank acres, etc., rice 1,100 acres, all to be applied to 300 more or less, signed by the landowner, is not a specific and direct demand for any particular number of second feet so as to entitle the landowner to a writ of mandate against irrigation district to compel the furnishing of water.

Original application by L. W. Nelson for a writ of mandate to be directed against the Anderson-Cottonwood Irrigation District, Walter Brown and others, as directors of such District and individually. Writ denied.

Roscoe J. Anderson, of Redding, and Cornish & Moore, of San Francisco, for petitioner.

Carr & Kennedy, of Redding, for respondents.

PLUMMER, Presiding Justice pro tem. This is an original application for writ of mandate wherein the petitioner seeks an order of this court directing such writ to issue, commanding the respondents forthwith to proceed with the construction of, and speedily complete, a certain canal lateral known as No. 3—1—2; and also to deliver to the petitioner, upon lands belonging to him, 11 second feet of water. The petitioner is the owner of land situate in the Anderson-Cottonwood irrigation district, an irrigation district formed for irrigating lands lying along the banks of the Sacramento river, principally in the county of Shasta. The lands belonging to the petitioner comprise about 1050 acres, divided into two tracts, designated as "tract A" and "tract B," tract B being served by a ditch or canal, designated as lateral 3—1. Tract A is not susceptible of irrigation from this lateral; and before said tract can be irrigated with any degree of success, lateral 3—1—2 must be completed. Upon the hearing hereof, the whole matter was referred to the Hon. James W. Bartlett, as sole referee, to take testimony and submit findings. Upon the return of the findings of the referee, it being made to appear to the court that some additional testimony should be taken and findings made thereon, a second reference was ordered. In accordance with the orders of this court, such testimony was taken and findings made and returned, and the matter is now before the court upon the motion of the respondents for judgment upon the findings, and upon the motion of the petitioner to set aside the findings of the referee, and that findings be made by the court upon the testimony.

The testimony taken before the referee covered a wide range of inquiry, including the capacity of the ditches belonging to the district, the character of the soil composing the lands belonging to the petitioner, its adaptability to the growing of different crops, the uses of water, and the quantity supplied during the years 1918 and 1919 and a portion of the year 1920. While the testimony taken and returned by the referce covers a wide range of inquiry, the questions tendered for decision by this court involve only the issue as to whether this court should make any order directing the construction of lateral 3—1—2; the amount of water to which the petitioner is entitled, and whether sufficient grounds have been laid to authorize the issuance of a writ of mandate herein directing that such quantity be furnished to the petitioner. As to these matters we have carefully examined the testimony and the findings of the referee, and are of the opinion that the findings of the referee touching these matters are amply supported by the evidence.

It appears from finding 10 of the referee that the construction of lateral designated as 3—1—2 has always been included as a part of the plan for the construction of laterals within the defendant irrigation district; that funds have twice been provided by bond issues for the construction of necessary irrigation canals, the acquiring of water rights, and the building of reservoirs, but that the funds so provided were exhausted in the construction of the proposed works of the district before reaching said lateral; that the expenses of constructing the works exceeded the estimates, and that the proposed works of the district were not completed according to the plans and specifications by reason of the lack of funds available for such purposes. It also further appears from the findings that during the month of May, 1920, an additional bond issue was authorized by the voters of the district in the sum of $200,000; that the works included in the plans and specifications for which such bond issue has been authorized include lateral 3—1—2. It does not appear that any of these bonds have been issued or sold, or that any money is immediately available for the present construction of said lateral; but it does appear from the finding referred to that the trustees of the defendant district are taking the necessary legal steps for the purpose of obtaining money that can be used in its construction.

[1] By finding 16 it appears that there is no money available, and cannot be made available, for the immediate construction of lateral 3—1—2, under the law authorizing an assessment of 2 per cent. of the aggregate value of the lands within the district, as provided by chapter 291 of the statutes of the state of California enacted in 1919; and that the amount of money in said fund so created does not exceed the aggregate of the duly authorized and issued warrants of said irrigation district. As to when any of the funds of the district can be used for construction

purposes, and what steps must be taken to authorize such use, have been discussed by this court in Buschman et al. v. Turlock Irrigation District, 190 Pac. 491, and need not here be repeated. And until these funds are available for the construction of the canals, ditches, and laterals authorized by the voters of the district, it is evident that this court can issue no mandate requiring the immediate undertaking of such work. It will be presumed that the directors of the district will expend the money for the purposes for which it has been raised, and the fact that the directors of the district were not able to complete the construction of the lateral referred to out of the moneys raised as the proceeds of prior bond issues does not authorize the issuance of the writ of mandate. It must be first shown that the money is available before its application can be directed. We do not deem it necessary to cite authorities upon this point.

[2] By the petition for writ of mandate herein, it is insisted that the petitioner is entitled to eleven second feet of water. The testimony taken before the referee, and the findings made thereon by him, as amended by the additional testimony and additional findings, show that the district has an inchoate right to 400 second feet of the waters of the Sacramento river for irrigation purposes; that the capacity of the main canal through which water is taken from the Sacramento river, as now constructed, is limited to about 278 second feet of water. It further appears from the testimony and the findings that the last assessment assessed upon the lands of said Anderson-Cottonwood irrigation district amounted to the sum of $1,561,803.22, and that the amount of the assessment upon the lands belonging to the petitioner situate within said district was the sum of $43,500. Under the provisions of section 18 of the Wright Irrigation Law, as amended St. 1897, p. 259, each landowner is entitled to have apportioned to him water upon the ratio which the last assessment upon the land of such owner bears to the whole sum assessed upon the district. At the time the petition was filed herein, the capacity of the canal referred to was limited to 230.94 second feet, which gave the petitioner at that time a right to 6.43 second feet. Upon the same calculation, according to the provisions of said section, the capacity of the canal, as improved during the pendency of these proceedings to carry 278 second feet, would entitle the petitioner herein to 7.738 second feet.

The right of the landowner to any quantity of water, however, under the irrigation laws pertaining to a district, is limited always to its beneficial use. In other words, under section 18, a landowner has a right to the beneficial use of that portion of the water available for use in the district calculated according to the ratio provided by section 18, or, if not prepared to use that water himself, he may assign his right to any one who is so prepared. It does not mean, as we construe the section, that any landowner is entitled to have so much water delivered to him and then permit the same to run to waste. Considerable testimony was introduced touching the fitness of the land belonging to the plaintiff for profitable rice culture. We do not deem it necessary to go into this question further than to state that beneficial use of water upon lands, and the possibility of the landowner making a profit upon the crops raised by means of irrigation upon his lands, are not one and the same thing. In other words, the fact that a landowner may not be able to make a profit off of any particular crop does not limit his right to use his proportionate share of the water of the district, to pay for which he has been assessed in making the effort.

[3] Section 15c of the Wright Irrigation Law added by St. 1917, p. 758, authorized the directors of an irrigation district to adopt rules and regulations governing the distribution of water. In accordance with this section, the directors of the respondent district have adopted a set of rules, and by section 8 of the rules so adopted it is provided, among other things, that landowners must keep their ditches and facilities for conveying and distributing water in good condition, so that the water may be used without undue loss or waste of time; that the land must be leveled and prepared so that water can be distributed without waste.

The evidence shows and finding 21 of the referee, among other things, sets forth the fact that tract A of the land belonging to the petitioner was not in a condition for irrigation; that it had not been leveled or prepared for irrigation purposes; that at the time of the institution of these proceedings, about 40 acres of tract B had been planted to rice by the petitioner's tenants, and about 140 acres more of said lands were partially prepared for the planting of rice; and that all of the lands situate in tract B which were prepared for the planting of rice for the season of 1920 lie under, and are susceptible of irrigation from, lateral 3—1 as already constructed; that the amount of water required to economically irrigate the lands planted to rice in tract B would not exceed one miner's inch per acre for each acre of land so planted; that the respondents were ready, able, and willing to supply petitioner such an amount of water for irrigation of lands in tract B as could be distributed without waste as provided by rule 8 regulating the distribution of water in said district.

There is no finding as to the exact quantity of water delivered by the district to the petitioner, nor can it be satisfactorily ascertained from the testimony just exactly what quantity of water was delivered; but it does appear that considerably less than 6.43 second feet of water were being delivered at the time of the institution of this action, and it would also seem that less than 7.738 second feet were being delivered at any time during the course of these proceedings. This, however, does not alter the situation by reason of the findings to which we have referred, which appear to be supported by the testimony that the respondents were able and willing to deliver at all times the quantity of water of which the petitioner and his tenants were prepared to make beneficial use.

Assuming that the petitioner, by reason of the capacity of the ditches already constructed belonging to the district, and the proportion which the last assessment upon his lands bears to the whole amount of the last assessment levied upon the district, is entitled to 7.738 second feet of water when prepared to use the same, or if prepared to use the same, it does not follow that the writ should issue herein by reason of another matter now to be considered.

[4, 5] The law seems to be well settled that before a writ of mandate should issue, it must appear that a specific demand has been made by the petitioner to that to which he is entitled, in order that the one upon whom the demand is made may have opportunity to comply. The only demand made by the petitioner herein, so far as disclosed by the testimony and the findings, is as follows:

> "Anderson Cottonwood Irrigation District. Application for water. Season of 1920. Crops as follows: Alfalfa, blank acres; orchard, blank acres; corn, blank acres; beans, blank acres; garden, blank acres; rice, 1,100 acres. All to be applied to 300 more or less. Remarks: Section 3, township 30, N. R. 4 W., and Sec. 34, T. 31 N. R. 4 W. Plains East of Sac. River. L. W. Nelson."

This application is in no sense of the word a specific and direct demand for any particular number of second feet of water, nor does it constitute any showing on the part of petitioner that he is ready and able to make a beneficial use of any particular quantity.

In Price v. Riverside Land & Irrigation Co., 56 Cal. 431, the court had before it this identical question, and it there held:

> "It is, however, an imperative rule, that before making an application for a writ of mandamus, an express demand or request must be made on the defendant to perform the act sought to be enforced by the writ; and the demand should be definite and specific."

In that case it was held that the petitioner had not demanded any specific quantity of water before filing his application for a writ of mandate. Hence, admitting that the petitioner, under the conditions as they now exist in the Anderson-Cottonwood irrigation district, would be entitled, if prepared to make beneficial use thereof, to 7.738 second feet of water before a writ of mandate could properly issue from this court, it must be first made to appear that the petitioner is prepared to use the same, that demand has been made therefor, that the water is available, and that compliance with such demand or request has been refused. We do not find anything in the testimony showing this state of facts, nor are there any findings by the referee establishing the same.

It necessarily follows that whether all of the findings of the referee are or are not supported by the testimony, the petitioner is not entitled to the issuance of a writ of mandate herein.

It is therefore ordered that the petition for a writ of mandate herein be, and the same is hereby, denied, and that the respondents have and recover their costs incurred in this proceeding.

We concur: HART, J.; BURNETT, J.

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51 Cal. App. 218

WRENNE v. HUCHTING. (Civ. 3746.)

(District Court of Appeal, First District, Division 1, California. Jan. 29, 1921.)

Venue ⚿61—Motion to change filed one day late, but before default, should be granted.

That the motion for change of venue was filed one day after the last day for defendant to appear, but before any default had been entered, does not authorize denial of the motion, since the failure of plaintiff to have defendant's default entered was in effect a grant of extension of time.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Camille Wrenne against A. H. Huchting. From an order denying defendant's motion for change of venue, defendant appeals. Reversed.

Benjamin W. Shipman and Henry O. Wackerbarth, both of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

WASTE, P. J. The defendant appeals from an order denying his motion to change the place of trial of the action from Los Angeles to San Diego county. Respondent has made no appearance in this court.

Defendant served on plaintiff, and, at the time he appeared and filed his demurrer, filed a sufficient affidavit of merits, a proper demand for change of place of trial and a notice of motion for change of venue. In due time he brought the motion on for hear-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ing and it was denied. On the moving papers the defendant was clearly entitled to have the trial of the action changed from the county of Los Angeles, wherein it was brought, to the county of San Diego, in which he resided. No counter affidavits were filed and no showing was made in opposition to the motion. The record is silent as to the ground upon which the motion was denied. If, as suggested by the appellant in his brief, it was because the demurrer and the moving papers on motion for change of place of trial were filed one day after the expiration of the time limited for the defendant to appear, there was no justification for the court's action, and we are at a loss to understand its ruling in face of the well-considered decisions of the courts of this state.

It appears that the defendant was served with a summons and a copy of the complaint in San Diego county. Consequently, he had 30 days in which to appear in the action. He served and filed his demurrer and the moving papers on the motion for change of place of trial on the thirty-first day. His default for failing to appear had not been entered and the plaintiff had not made any move to have such steps taken. By such conduct the plaintiff, in effect, granted additional time in which the defendant might appear, and he was not strictly in default when he filed the moving papers. Reher v. Reed, 166 Cal. 525, 528, 137 Pac. 263, Ann. Cas. 1915C, 737; Bank of Haywards v. Kenyon, 32 Cal. App. 635, 636, 163 Pac. 869. It was an abuse of discretion, therefore, on the part of the trial court, to deny the motion for a change of place of trial upon the ground that the moving papers were served and filed too late. As no other reason appears, the order must be reversed.

This court has had cause to complain during the calling of the present calendar, at the action of certain respondents in failing to file their reply briefs. In the instant case, however, we can well understand why the respondent did not have the temerity to attempt to defend the erroneous order of the lower court. The defendant should not have been forced to resort to an appeal to secure his rights in the matter. He has been put to unnecessary expense, trouble, and delay, the labors of the appellate court have been increased, and its calendar burdened with a case to the exclusion of others which present meritorious controversies for consideration. We cannot but view with disfavor the apparent equanimity with which the respondent has sat idly by in enjoyment of an order to which she was not entitled.

The order denying defendant's motion for change of place of trial is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(51 Cal. App. 220)

DAVEY v. GRIGSBY et al. (Civ. 3610.)

(District Court of Appeal, First District, Division 1, California. Feb. 1, 1921. Hearing Denied by Supreme Court March 31, 1921.)

1. Waters and water courses 🔑179(4)—Evidence held not to show acquisition of prescriptive right to divert waters.

In action to enjoin interference with a dam and ditch for diverting water, evidence *held* not to establish prescriptive right of plaintiff's predecessor to divert the water by such dam and ditch.

2. Waters and water courses 🔑164 — Prescriptive right to divert water must rest upon notorious claim.

In order to establish a prescriptive right to divert creek waters by a dam and ditch, appropriation of the water by such means must be shown to have been open and notorious, and asserted adversely, with the knowledge of the owners of the servient tenement, for the necessary period of time.

3. Evidence 🔑231(2)—Admission against interest of former owner held admissible.

In action to enjoin interference with a dam and ditch for diverting water, plaintiff claiming under a prescriptive right to such diversion acquired by his predecessor, evidence that defendants, purchasers of the land lower down the stream, inquired of such predecessor before purchasing, and that he disclaimed any right to such diversion, was not inadmissible as a mere admission against interest of a former owner of the tract benefited by the use of the waters.

4. Evidence 🔑219(1)—Judgment roll in former action between parties held admissible to show plaintiff made no similar claim.

In action to enjoin interference with a dam and ditch for diverting water, judgment roll in a former case bteween the same parties, in relation to claims as to the waters in suit, *held* admissible, although not concerning the land involved in the instant suit, as it showed plaintiff made no claim of any such right to the waters as asserted by him in the instant suit.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by H. C. Davey against Burt Grigsby and others. From judgment for defendants, plaintiff appeals. Affirmed.

Theodore A. Bell, of San Francisco, and Herbert V. Keeling and C. M. Crawford, both of Lakeport, for appellant.

Tum Suden & Tum Suden, of San Francisco, for respondents.

RICHARDS, J. This appeal is from a judgment in the defendants' favor upon their answer and cross-complaint in an action brought by the plaintiff to enjoin the defendants from demolishing or otherwise interfering with a certain dam and ditches, which the plaintiff claimed the right to maintain as a means for the diversion of the waters of a stream for use upon his own land. The defendants in their answer denied the plaintiff's alleged right to maintain said dam and ditches, and to the use of any waters diverted thereby from the stream in question, and in their cross-complaint asserted the sole right in themselves to the ownership and use of said waters, and the plaintiff's threatened or attempted interference with said rights through the diversion thereof by means of said dam and ditches they sought to have the court enjoin.

The stream in question was a small perennial rivulet, known as Houten creek, situated near Cobb, in Lake county. It had its source on land which prior to the year 1913 was owned by the Farmers' Savings Bank of Lakeport, which conveyed the same in that year to H. C. Davey, the plaintiff, and to W. R. Prather and H. L. Boggs. In the year 1915 said Davey, Prather, and Boggs sold the southerly 20 acres of this tract to Mrs. Grigsby, one of the defendants herein, and a Mrs. Fields, who later partitioned it between themselves; Mrs. Fields receiving the southerly half thereof, which later she conveyed to W. C. Crittenden, another of the defendants herein. On the southerly side of the tract formerly owned by the Farmers' Savings Bank lay a fractional quarter section of land, which had for many years been owned and occupied by a family named Smith. In the year 1893 J. A. Smith, one of the members of said family, had gone upon the lands of the Farmers' Savings Bank, and at a point on Houten creek thereon, somewhat to the northerly of the lands later transferred to the defendants Grigsby and Crittenden, had built a small dam of rocks and dirt, and constructed therefrom a ditch across said tract to his own land, through which, during the summer months, he diverted the waters of said Houten creek for use in the irrigation of a small portion of his said land lying adjacent to the bank tract. The dam thus constructed was temporary in character, and was washed out by the winter freshets, and was replaced from time to time as Smith desired during the summer months to use the waters of said creek for the irrigation of said small piece of land.

In 1913, when Davey and his associates acquired the said tract of land from the Farmers' Savings Bank, it was found by a survey thereof that Smith's northerly fence line was about 100 feet northward from his true line upon the lands so purchased by Davey and his associates. Smith's attention was called to this fact, and he thereupon moved his fence said distance to the southward, which had the result of placing practically all of the land which he had been wont to irrigate from the use of said dam and ditch within the boundary lines of the lands now owned by Davey, Prather, and Boggs. Thereupon Smith ceased further to use any of said waters for purposes of irrigation upon his remaining land, and also ceased to rebuild and maintain said dam and ditch. When in the year 1915 Mrs. Grigsby and Mrs. Fields were about to purchase the southerly 20 acres of the land then owned by Davey, Prather, and Boggs, Mrs. Grigsby made certain inquiries from the member of the Smith family who at that time was the owner of the Smith tract as to whether he had or claimed any right to the diversion and use of the waters of Houten creek, which throughout almost its entire course lay upon the lands about to be purchased by Mrs. Grigsby and Mrs. Fields. Smith, in response to this inquiry, disclaimed any right to the use of said waters. Upon one or two occasions thereafter he did, however, use the same; but the evidence sufficiently shows that, when he did so, it was upon permission so to do received from the Grigsbys. In the year 1918 the plaintiff herein acquired the Smith tract of land, and shortly thereafter undertook to re-establish and maintain the dam upon Houten creek and the ditch leading therefrom across the property of the defendants Grigsby and Crittenden to the lands he had recently acquired from the Smiths. The said defendants refused to permit this use, and destroyed the ditch upon their premises, whereupon the plaintiff instituted this action to enjoin them from so doing, with the result above set forth.

[1-3] It will be seen from the foregoing statement of facts that the appellant herein rests his claim of right to the use of the waters of Houten creek through said dam and ditch solely upon prescription. In order to maintain this claim he must have been able to establish by his proof at the trial of this action that his predecessor in interest, Smith, had acquired such right by prescription prior to the transfer by Smith to the plaintiff of the tract of land upon which he claims the right to use said waters. The trial court concluded from the evidence educed in the case that such prescriptive right in said Smith had not been established. From a careful review of the evidence in the case we are satisfied that the trial court was correct in this conclusion. The lands lying along and in the vicinity of Houten creek are wooded and brushy. The point where said dam was located was in the small canyon occupied by said creek, and the ditch therefrom ran along the side of a brushy hill; neither said dam nor said ditch being visible from the roadway crossing the tract on which said ditch and dam were located. There was not a particle of evidence in the case going to show that the original owner of said tract, the Farmers' Savings Bank, ever knew that Smith had constructed said dam or ditch across its land. Both dam and

ditch were in fact small and temporary in character; the former existing only during the summer months, and the latter only being used during that period of the year.

In order to have established a prescriptive right in Smith to the continued use of the waters of Houten creek through said dam and ditch, it was essential for the plaintiff, as his successor in interest, to show that the latter's appropriation of the waters of Houten creek through said dam and ditch was open and notorious, and was asserted adversely, and with the knowledge of the owners of the servient tenement, for the period of time necessary to give rise to a prescriptive right. Paige v. Rocky Ford Canal & Irr. Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875; Alta L. & W. Co. v. Hancock, 85 Cal. 219; Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. 570; Bree v. Wheeler, 129 Cal. 145, 61 Pac. 782; Churchill v. Louie, 135 Cal. 608, 67 Pac. 1052; Strong v. Baldwin, 137 Cal. 432, 70 Pac. 288. It is very doubtful whether the evidence in the case upon this subject, considered entirely apart from the admissions of Smith himself, would have sufficed to sustain the plaintiff's claim as to Smith's acquisition of a prescriptive right to the use of the waters of Houten creek. The defendants, however, on their own behalf, presented the evidence of Mrs. Grigsby, who testified that, prior to the purchase by herself and Mrs. Fields of the tract of land which they came to own, she had held a conversation with Smith, during which he had asserted that while the Smith family had theretofore used the water of Houten creek, he did not know that they had any right so to do, and who further testified that subsequent to the purchase of said land by herself and Mrs. Fields they had taken possession of said ditch, and had used it to bring the waters down to the place where their house was located, and that subsequently, when Smith desired to use said waters, he had requested and obtained their permission so to do.

To the introduction of this evidence the plaintiff objected. Upon this appeal, however, he does not venture to contend that said evidence was not admissible, but insists that as a mere admission against interest of a former owner of the tract benefited by the use of said waters said evidence is of insufficient weight and force to have justified the trial court in finding against the prescriptive right of Smith to the use of said waters, which, he claims, had fully ripened prior to the making of said admission. We are of the opinion, however, that the evidence was not only admissible, but that it shed a strong light upon the extent and quality of Smith's prior use of the waters in question, and, taken with the other evidence to which we have referred, was amply sufficient, we think, to show that the maintenance and use by Smith of said dam and ditch were never of that open, continuous, notorious, and adverse character essential to the establishment of a prescriptive right thereto.

[4] The only other contention of the appellant requiring notice is his contention that the court erred in the admission in evidence of a judgment roll in a case entitled "H. C. Davey et al. v. Isidore F. Grigsby et al.," which had been tried and determined in the superior court of Lake county prior to the institution of the present action. That was an action instituted by Davey, Prather, and Boggs against the Grigsbys, who are defendants herein, and also against Mrs. Fields, the predecessor of their codefendant Crittenden, wherein said plaintiffs asserted that they were the owners of all of the waters of Houten creek by virtue of their ownership of the tract of land lying next northerly to the lands which they had sold to Mrs. Grigsby and Mrs. Fields, and wherein they demanded a reformation of the conveyance which they had made to Mrs. Grigsby and Mrs. Fields, so as to have inserted therein a reservation in their favor of the whole of the waters of said creek. While it is true that the Smith tract of land or any right appurtenant thereto was not directly concerned in that litigation, still the whole question as to the respective rights and claims of the parties in and to all of the waters of Houten creek was presented or presentable by the issues tendered in that action, and this being so, we are of the opinion that the judgment roll in that case was properly admissible in evidence as tending to show that at the time of the institution and trial of that action the plaintiff herein made no claim nor proof of any such right in and to the waters of Houten creek as that which he is now attempting to assert in the instant case. We find no error, therefore, in the introduction of said judgment roll in evidence.

No other errors being urged by the appellant, the judgment is affirmed.

We concur: KERRIGAN, J.; BARDIN, Presiding Justice pro tem.

51 Cal. App. 199

GOOD v. BROWN et ux. (Civ. 2125.)

(District Court of Appeal, Third District, California. Jan. 28, 1921.)

1. Chattel mortgages ⚷291—First mortgage held merged in title secured on foreclosure of second mortgage.

Where plaintiff held a first and a second mortgage on live stock, and foreclosed the second, obtaining title to the stock, the lien of the first was merged in the higher title, and ceased to exist.

2. Homestead ⚷115(3)—On foreclosure of mortgage defendants held to have received full credit from other security.

In an action to foreclose a mortgage on a homestead, the defendant's husband and wife may not complain where they received full credit upon the lien against the homestead for the entire sum properly represented by the lien of a first chattel mortgage given by the husband alone on live stock, both defendants having subsequently given the homestead mortgage as security for the payment of the note secured also by such chattel mortgage.

3. Witnesses ⚷276—Cross-examination of a defendant held not too broad.

In view of Code Civ. Proc. § 2055, as added by St. 1917, p. 58, permitting a litigant to call his adversary and subject him to cross-examination as to any relevant matter without waiting for a foundation to be laid by previous direct examination, examination of one of defendants in proceedings for foreclosure mortgage against homestead *held* not erroneous as being too broad a cross-examination.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by R. E. L. Good against George E. Brown and wife. Judgment for plaintiff, and the defendants appeal. Affirmed.

Ernest Klette, of Fresno, for appellants.
Kitt Gould, of Clovis, for respondent.

PREWETT, Presiding Justice pro tem. Action to foreclose a mortgage on a homestead. The plaintiff had judgment in the court below, and the defendants appeal on the ground that other property should have been exhausted before resorting to the homestead. The defendants are husband and wife. This is the second appeal in this case. See 40 Cal. App. 753, 181 Pac. 802. On the former appeal it was distinctly held, in conformity with the general equity principle in marshaling assets, that the wife could require the plaintiff to exhaust other securities before resorting to the homestead. After remittitur a second trial resulted in a judgment for the plaintiff, but in this new judgment the court credited the defendants with the value of the outside securities. The events material to the disposition of this appeal took place in the following order:

(a) On June 12, 1912, the husband alone executed his promissory note, in the sum of $1,000 and interest, payable to the plaintiff, and at the same time, as security for its payment, executed a chattel mortgage on certain live stock;

(b) On October 8, 1912, the real property was properly dedicated as a homestead;

(c) On February 27, 1914, for a valuable consideration, both husband and wife joined in the execution to the plaintiff of the mortgage in suit. This mortgage conveys the homestead premises as security for the payment of the aforesaid $1,000 note of June 12, 1912. It makes no reference to the chattel mortgage;

(d) On March 14, 1915, the husband alone executed an additional promissory note in the sum of $750, payable to the plaintiff, and at the same time and as security for its payment gave the plaintiff a second chattel mortgage on the live stock;

(e) On December 2, 1916, the plaintiff obtained a decree against the husband alone, foreclosing the second chattel mortgage and making no reference in the action to the first chattel mortgage;

(f) On March 8, 1916, this action was commenced, and the former appeal was determined on April 22, 1919;

(g) On March 21, 1917, the live stock were sold by the sheriff to the plaintiff on said foreclosure for the sum of $455.

This sum is conceded to have represented the fair market value of the property at that time.

[1] The first chattel mortgage was never foreclosed. When the title to the live stock vested in the plaintiff in virtue of the sale to him by the sheriff, thus vesting in him both the lien of the first mortgage and the title to the live stock, the lien was merged in the higher title and ceased to exist. It is nevertheless quite true that equity could regard the lien as still subsisting so far as might be found necessary in order to protect the rights of the wife. The court, in protection of the rights of the homestead claimants, conceded to them a credit of $455 and interest to be applied as a credit on the mortgage debt against the homestead. It may be remarked that the husband testified that the title to the live stock vested in the plaintiff by virtue of an agreement between himself and the plaintiff whereby the title was transferred to the plaintiff for the sum of $455.

It is perhaps unnecessary to determine just how it vested, since it is conceded that it did in fact vest, and that the sum of $455 represents a fair appraisal of the market value of the property.

[2] The important fact, and upon this appeal the conclusive fact, is that the appellants received full credit upon the lien against the homestead for the entire sum properly representing the lien of the first chattel mortgage. This is all they had any right to

ask, and this they received in full measure. The appellants insist that the plaintiff should go through the form of some sort of an anomalous foreclosure against himself, but if such a foreclosure were a possibility it could result in no more than that appellants would receive credit for the value of the chattels, and that, as above pointed out, they have received already.

[3] The appellants insist that the court erred in permitting too wide a cross-examination of one of them. This matter as presented in the record would scarcely justify a reversal, even if it were well founded. We are of the opinion that the examination was permissible. Moreover, a recent amendment to Code of Civil Procedure, § 2055 (added by St. 1917, p. 58), permits a litigant to call his adversary and subject him to cross-examination as to any relevant matter, without waiting for a foundation to be laid by previous direct examination. We find no error in the record.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

51 Cal. App. 207

LAPIQUE v. PLUMMER et al. (Civ. 3739.)

(District Court of Appeal, First District, Division 1, California. Jan. 28, 1921. Hearing Denied by Supreme Court March 28, 1921.)

1. Evidence 🔑43(3)—Appellate court cannot be required to take judicial notice of pleadings, etc., in other causes in which plaintiff engaged.

The appellate court cannot be required to take judicial notice of pleadings, claims, proceedings, etc., in other causes in which plaintiff appellant has been engaged in the various courts of California during the past eight or nine years.

2. Landlord and tenant 🔑31—Neither lessee nor successor in interest, who have entered, can question validity of lease.

Having entered into possession of premises under a lease, neither the lessee nor his successor in interest can question the validity of the lease.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by John Lapique against E. A. Plummer and others. From a judgment for defendants, plaintiff appeals. Affirmed.

John Lapique, of Orange, for appellant.

Haas & Dunnigan, of Los Angeles, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action upon claim and delivery of certain personal property, namely, 1,321 sacks of barley and certain other crops grown upon lot B of the rancho Los Vergines in Los Angeles county, or the value of said property in case delivery thereof cannot be made, alleged in the complaint to be the sum of $1,849, with $500 damages for the alleged wrongful detention of said property.

The plaintiff claims the right to recover this property by virtue of the assignment to him by one Pierre Agoure of all the latter's right, title, and interest in a certain lease of said portion of said rancho, alleged to have been executed to said Agoure by certain persons on August 31, 1907. The defendants in their answer deny any ownership or right of said plaintiff in said personal property, and for want of information and belief deny that said Pierre Agoure ever conveyed or assigned to said plaintiff the aforesaid lease, and further allege that, if such assignment was made, it was colorable and fictitious, and was made by said Agoure for the purpose of enabling him to evade and avoid the obligations of said lease, and was not intended to divest him of his title to or interest in the same. The plaintiff demurred to this answer upon several grounds, and also moved the court to strike out that portion thereof which undertook to allege the colorable and fictitious quality of the transfer of said lease to the plaintiff. The plaintiff also moved for a judgment on the pleadings. The said demurrer was apparently overruled, and these other several motions denied by the trial court at some time during the year 1913, though from the state of the record before us we are unable to ascertain just what the action of the trial court was in these several regards.

In the year 1917 the plaintiff moved the court for leave to file a voluminous amended complaint setting up a large amount of matter, probative in character and materially varying from the plaintiff's original allegations as to the foundations and nature of his claim of right to said property. His motion for leave to file said amended complaint came on for hearing before said court and was denied on January 5, 1918, but again we are left entirely in the dark as to the grounds of said denial. The cause came on for hearing upon said last-named day, and upon its submission the trial court made its findings in the defendants' favor, and judgment was accordingly entered, requiring the return of the property which the plaintiff had taken upon claim and delivery, or the value thereof, fixed at the sum of $1,500, together with damages equivalent to the interest upon said sum from the date of the plaintiff's taking of said property, together with their costs. The plaintiff thereupon moved for a new trial upon all the statutory grounds, which motion being upon the hearing thereof denied, the plaintiff has taken and prosecuted this appeal.

The appellant in support of his appeal has presented a typewritten transcript, embracing the record of the clerk and reporter of the proceedings in this cause. He has also filed two supplements and two supplementary supplements purporting to refer to matters embraced in these original transcripts. In attempting to examine these we have found ourselves plunged into the midst of a dense wilderness of entangled and intermingled pleadings, claims, proceedings, and references to other causes and litigations in which the plaintiff herein has apparently been engaged for the past eight or nine years in the superior courts and District Court of Appeal of Southern California and in the Supreme Court.

[1] Many of the appellant's references to these various causes are by numbers merely, and we are asked to take judicial notice of the proceedings therein, which, of course, we can neither be required nor expected to do. In the attempt to perform our duty of finding a way through this labyrinth with a view to determining the merits of this appeal we have been afforded no aid whatever by the respondents herein, whose brief, had any such been filed, might, like the silken thread of Ariadne, have assisted in resolving its mysteries. In so far as we, thus unaided, are able to do so we find that the first and main contention of the appellant is that the lease, which on August 31, 1907, was made by certain lessors to Pierre Agoure and for the violation of the terms of which said Agoure was by the defendants herein dispossessed of the premises upon which the crops were being grown which the plaintiff herein now claims, was void for the reason that one of the persons named in said lease as a maker thereof did not in fact sign or execute the same.

[2] We are totally unable to understand upon what theory the plaintiff and appellant herein can be heard to urge this claim, since his own complaint in this action shows that his sole right or claim of right to the crops which he seeks to recover rests upon an assignment by said Agoure of his interest as lessee under said lease. Having entered into the possession of the premises upon which said crops were grown under said lease neither said Agoure nor the plaintiff as his successor in interest thereunder can question the validity of said lease. It would further seem, however, from the appellant's reference to the case of Plummer v. Agoure, 20 Cal. App. 319, 128 Pac. 1014, that said Agoure never did in fact question the validity of said lease nor the rights of the plaintiffs in that action (who are the defendants in this action) to recover the possession of the premises covered by its terms, but permitted said action to go by default. The appeal in that action was apparently taken by the appellant, Lapique, in the instant case after he had vainly sought to be substituted as a party defendant therein in the place and stead of Agoure by virtue of his alleged assignment from the latter of said lease, and the District Court of Appeal, in that case in adverting to this situation, said:

> "Certainly no argument is required in support of the proposition that one unlawfully withholding the possession of land and in default for the rent thereof cannot escape his obligation by assigning the liability to another."

We think the decision in the case of Plummer v. Agoure, supra, is res adjudicata as to Agoure and also as to this appellant as his successor to said interest in said lease.

The appellant makes other contentions herein based, as we have seen, upon the bewildering state of the record which he has presented. For example, the appellant asserts that the trial court was in error in whatever orders it may have made overruling his demurrer to the defendants' answer, and also refusing to strike out portions of the same and to award his judgment upon the pleadings, but we are unable to find these several orders in the record, and hence, of course, cannot determine anything respecting them.

Again, the appellant claims that the trial court was in error in refusing to permit him to file his amended complaint proffered for filing more than five years after the date of filing his original complaint, and apparently on the eve of the trial of the action upon the original pleadings. We have only the bald statement in the record that appellant's motion in that behalf was denied, but have not the order made and entered denying the same, and hence cannot know on what said order was based or whether or not it was properly made.

In so far as the appellant bases his claim of right to file his said amended complaint upon the alleged fact that he is the successor in interest of one Maria Espritu Chijulla De Leonis or of her son, Juan Menendes, in the premises upon which the crops involved in this action were grown, by virtue of the transfer to him of a certain judgment in the case of De Leonis v. Walsh, affirmed in the Supreme Court in 140 Cal. 176, 73 Pac. 813, we think the appellant's said claim of any right or interest in said premises arising out of said judgment has been finally set at rest by the decision of the District Court of Appeal for the Second District in the case of Lapique v. Plummer, 195 Pac. 293, in which case the Supreme Court, in denying a petition for rehearing, expressly, and we trust finally, stated that said judgment upon which the appellant relies had been vacated by the decision of the Supreme

Court in the case of De Leonis v. Walsh, 145 Cal. 199, 78 Pac. 637. This final order of the Supreme Court also sets at rest whatever right the appellant claims to take or prosecute the appeal in this case as the successor in interest in said De Leonis or Menendes or both.

We cannot refer in further detail to the appellant's other numerous contentions, nor attempt to unravel their labyrinthine involutions. They all appear to bear upon the plaintiff's claim of an interest in the property in litigation arising out of his assignment of the lease from Agoure, or as successor in interest to said judgment. If, as we have already determined, these claims are invalid, he had no right to maintain this action, and this being so, his other contentions are as to mere errors in procedure which, in the involved and incomplete state of the record, we cannot determine to have been prejudicial, even if it were conceded that they had in fact any merit.

In conclusion, we would again refer to the censurable conduct of the respondents herein and of their counsel in willfully failing to afford this court the assistance to which it was peculiarly entitled in the instant case.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

(185 Cal. 262)

LANTZ v. CITY OF LOS ANGELES.
(L. A. 6092.)

(Supreme Court of California. March 5, 1921.)

1. Highways 🔑1—Not created by mere user.

Under Pol. Code, § 2621, as amended in 1883, mere user will not constitute land a highway; but it must be declared such by the proper county or city authorities, or must have become such by dedication.

2. Dedication 🔑44—Use as highway some evidence of dedication.

Though under Pol. Code, § 2621, as amended in 1883, a highway cannot be created by mere user, the user may constitute some evidence of dedication.

3. Dedication 🔑41—Facts held sufficient to raise presumption of implied dedication for highway.

Where according to a map a strip dedicated for a street was not between lots, but on one lot, leaving a strip of that lot 10 feet side between the street and the other lot, but for 14 years it was used as part of the street without objection, and the owner permitted it to be sold for taxes, and claim was thereafter made to it only by the tax title purchaser, these facts are sufficient to give rise to the presumption of an implied dedication.

4. Dedication 🔑20(1)—Death of owner after use of land as street began held not to interfere with implication of dedication.

Death of the owner of a strip of land after its use as part of a street began, and failure for many years to appoint an administrator, will not interfere with the implication of a dedication as a result of a long period of permissive use.

5. Estoppel 🔑62(4)—City held not estopped to claim easement by commencing action to condemn.

A city's mere commencement of action to condemn a strip for use as a part of a street, after its right to the use thereof for such purpose through an implied dedication of an easement had ripened, does not estop it, in an action thereafter brought against it to quiet title thereto, to claim such dedication.

6. Estoppel 🔑62(4)—City held not estopped to claim easement by collecting taxes on land.

A city is not estopped to claim an implied dedication of an easement in land for purposes of a street by reason of taxes being levied and collected thereon during the time that its right to the easement was ripening, much less by such a levy and collection after such right had fully ripened.

7. Appeal and error 🔑1176(5)—Lower court may be directed to enter judgment in conformity to findings.

The judgment of the trial court not being in accordance with its findings of fact and conclusions of law therein, the appellate court may direct the lower court to enter the proper judgment.

8. Quieting title 🔑50—Proper judgment stated where plaintiff is owner in fee and defendant owner of an easement.

Plaintiff in action to quiet title being the owner of the land, and defendant owner of an easement therein for street purposes, judgment should not be that plaintiff take nothing, but it should decree him owner in fee, subject to such easement.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Charles Lantz, substituted in place of T. A. Davis, against the City of Los Angeles. From an adverse judgment, plaintiff appeals. Reversed, with directions.

Charles Lantz, Howard F. Shepherd, Samuel M. Garroway, and Winslow P. Hyatt, all of Los Angeles, for appellant.

Charles S. Burnell, Jesse E. Stephens, J. H. O'Connor, and Albert Lee Stephens, all of Los Angeles, for respondent.

PER CURIAM. The District Court of Appeal rendered an opinion, prepared by Mr. Justice Richards, affirming the judgment in this case. It is as follows:

"This action was originally commenced by one T. A. Davis against the city of Los Angeles

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to quiet title to a strip of land described as 'the westerly 400 feet of lot A of the Euclid Heights tract, as per map thereof recorded,' etc., of which the plaintiff claimed to be the owner and entitled to the possession. The answer of the defendant denied that the plaintiff was the owner or entitled to the possession of said tract or any portion thereof, and alleged that said defendant was the owner of an easement over the said property for its entire width and length for street purposes. The defendant further alleged that for more than five years prior to the commencement of the action it had been in quiet and peaceable possession of said strip of land, holding and claiming the same for street purposes adversely to the plaintiff and all other persons, and that plaintiff's alleged cause of action was barred by section 318 of the Code of Civil Procedure.

"Subsequent to the commencement of the action the present plaintiff was substituted in the place and stead of T. A. Davis as the plaintiff in said action by the order of the court.

"Upon the trial and submission of the cause the findings of fact and conclusions of law were to the effect that the said substituted plaintiff was the owner of the strip of land in question, but that for more than five years prior to the commencement of the action the city of Los Angeles had been the owner of an easement over the entire strip for street purposes, holding and using the same in quiet and peaceable possession for such purposes adversely to plaintiff and his predecessors in interest and all other persons. The decree followed the findings and conclusions of law in respect of the ownership of the tract by the plaintiff, subject to the easement of the city of Los Angeles thereon and thereover for street purposes. The plaintiff appeals from such judgment.

"The facts of the case as disclosed by the record, without serious conflict, are these:

In the year 1883 a subdivision was made of certain lands in blocks 72 and 73 of what was known as the Hancock survey, and a map of such subdivision was made and recorded by Workman & Hellman, who had made said subdivision. Certain main and cross streets were delineated upon said map intersecting said tract. One of these was Stevenson avenue, at right angles to which ran Euclid street. These two streets bounded on the south and west block 7 of said tract, which was in turn subdivided into lots 26, 27, 28, 29, 30, 31, and 32, which lay in their order along Euclid street from the point of its intersection with Stevenson avenue northerly. In the year 1887 lot 26 of this tract was subdivided by the then owner thereof into a number of smaller lots under the name of the Alta Vista tract and a map of such subdivision was made and recorded on November 22d of that year. This map purported to show the lots of the subdivision as fronting on a 60-foot street, which was given the name of Adelaide street on said map. It appeared, however, that only 10 feet of said Adelaide street was taken from said lot 26; the other 50 feet thereof being within the original boundaries of lot 27 of said larger tract. Shortly thereafter a similar subdivision was made of lots 27 and 28 of said larger tract under the name of Euclid Heights tract, and a map of such subdivision was made and recorded on December 16, 1887. By this map also Adelaide street was laid out and defined as being 40 feet in width; said 40 feet running the entire length of said lot 27, and being the inner 40 feet of the southerly 50 feet in width of said lot. It thus appeared upon the face of said map of the Euclid Heights tract that there was a strip of land 10 feet in width lying along the southerly side of Adelaide street as laid out thereon, which strip was designated as lot A, which lot, running the entire length of said street, lay between the 40-foot street laid out along the southerly portion thereof as designated upon said map and the northerly line of lot 26 of said larger tract. Upon the filing for record of these two maps Adelaide street appeared by the first of them to be a street 60 feet in width, to which there had been contributed, by lot 26, 10 feet in width along the entire northerly line of said lot; while by the other map of the Euclid Heights tract Adelaide street appeared to be a street 40 feet in width running the entire length of lot 27, but 10 feet within the exterior boundaries thereof, leaving a rectangular strip of land 10 feet in width, which was designated as lot A, and which strip of land, if held in private possession, would have cut off the lot owners of the subdivision of lot 26, known as the Alta Vista tract, from access to the 40-foot street laid out upon the map of the Euclid Heights tract.

"Such was the state of things as shown upon these two maps at the close of the year 1887. Thereafter, at some time, the name of Adelaide street was changed to Oregon street, and the public began traveling said Oregon street in going to and from the subdivisions of these two tracts and in gaining access to other connecting streets. In so doing the entire 60 feet in width of Adelaide street came to be increasingly used by the traveling public, regardless of the fact that said lot A, which stood of record in private ownership, lay along near the middle of said street for the entire length thereof. The record herein does not seem to disclose the name of the owner of record of said lot A prior to the year 1891; but it was stipulated during the trial that on January 26, 1891, the record title to said lot A was vested in one R. B. Anderson. Said Anderson died in the year 1895, but upon what date is not shown. An administrator of his estate was not appointed until the year 1909. In the meantime there had been a sale of said lot A for city taxes in the year 1896 to one Sanders, and a sale for state and county taxes for the same year to the state. In the latter part of the year 1910 said Sanders brought an action and obtained a decree quieting his title against the administrator of the estate of R. B. Anderson, deceased. In the meantime lot A had been again sold for taxes in the year 1905 to one Barlow, who shortly thereafter deeded whatever rights he had acquired by said tax sale to one Brown, who in his turn December 14, 1910, made a deed of said strip to Sanders and Lantz, who in turn deeded the strip to T. A. Davis in the year 1916. Davis reconveyed the strip to Lantz on June 23, 1917, after the commencement of this action.

"During the period between 1891 and 1910 Adelaide, or, as later known, Oregon, street, for its entire width of 60 feet, including said lot A, was being used by the traveling public, apparently without any hindrance, interference, or objection by the owner or owners of the record title thereto; the only indication of any private ownership in or claim to lot A consisting in the fact that said R. B. Anderson, during the first few years of said period, had paid the taxes which were levied and assessed thereon, but that finally said strip had been sold for unpaid state, county, and city taxes, the title thereto finally thereby passing in about the year 1908 to said Sanders, and through him by mesne conveyances into the name of T. A. Davis in the year 1916. The first connection of the present plaintiff and appellant with said strip began in the year 1910, when he acquired another tax title thereto through a tax sale thereof to one Barlow in 1905. In the year 1909 the city of Los Angeles commenced an action to condemn said lot A for street purposes, making R. B. Anderson, B. F. Sanders, Avery M. Brown, and several other real and fictitious persons parties defendant to said action, who were alleged to have or claim some interest in said strip of land. This action was apparently inspired by the fact that said city of Los Angeles had adopted an ordinance in the year 1909 providing for the improvement of said Adelaide or Oregon street, and in the course of said proceeding had been given to understand that there were certain persons who claimed to be the owners of the strip known as lot A lying along the middle of said street. The defendant A. M. Brown, and B. F. Sanders appeared and answered in said action, each alleging himself to be the owner of said lot A, and praying for considerable sums in damages in the event of condemnation thereof. This action was never brought to trial, but remained pending until some time after the present action was begun, and was dismissed by the plaintiff during the trial of this case. During all of the time between the date of the commencement of said condemnation suit in the year 1909 and the dismissal thereof in the year 1917 the general public continued to travel and use said Adelaide or Oregon street and said strip of land as a portion thereof without objection or interference on the part of any person claiming to be the owners of the same.

"The appellant herein makes several contentions upon this appeal. The first of these is that the evidence is entirely insufficient to show that the city of Los Angeles had acquired through user an easement for street purposes on or over the premises in question. This contention is based upon the construction which the appellant places upon section 2621 of the Political Code, which section, as amended in the year 1883, reads as follows:

"'A road laid out and worked, and used as provided in this chapter, shall not be vacated or cease to be a highway until so ordered by the board of supervisors of the county in which said road may be located; and no route of travel used by one or more persons over another's land shall hereafter become a public road or byway by use, or until so declared by the board of supervisors or by dedication by the owner of the land affected.'

[1, 2] "There can be no question but that since the enactment of said section of the Political Code in its present form the mere user of a route of travel by the public for a period of five years or more did not, of itself, suffice to constitute the strip of land used by said route of travel a public highway. It was essential, in order to do so under said section of the Code, that such strip of land must have either been so declared to be by the board of supervisors of the county [or by the proper city authorities of the city of Los Angeles] in which the same was located, or must have become so by dedication by the owner of the tract; but it does not follow from this that the user of such strip of land by the public may not constitute some evidence of its dedication, which, taken with other evidence showing expressly or by implication an intent on the part of the owner of the land to dedicate the same to public uses, may amount to sufficient proof of such dedication thereof as would satisfy the provisions of the foregoing section of the Political Code.

[3] "There is in the instant case sufficient evidence, we think, to establish the fact that the use which the general public made of Adelaide or Oregon street during the years 1895 and 1909 was a sufficiently continuous use of every portion of the 60-foot width of said street, and hence of that portion of the lands embraced within the exterior boundaries of said street and known as lot A, to have put the owners or claimants of said lot A upon notice that the same was being used as a portion of said street. When to this proof is added the further proof that said portion of said street was used as such without objection and with the permission, or at least without any objection on the part of said owners or claimants of said tract for a period of time sufficient to justify the finding of an implied dedication thereof; and when to these proofs there was also added certain other facts shown in the evidence herein which would aid in deducing this inference, such as the showing as to the shape of said strip and its location with respect to said street, and its severance from the other lots of the Euclid Heights tract, taken with the fact that it remained uninclosed and unimproved, and in fact not susceptible of any particular use for building purposes, and that during all those years its owners allowed it to present the appearance of being a portion of said street, and thus in a sense invited the general public to make the same use of it that was being made of the rest of said street—these facts, and the further fact that R. B. Anderson, who was the admitted record owner of said lot A in 1895, permitted it to be sold for taxes, and that neither he nor his heirs thereafter ever asserted any claim to said strip, and that the claim now asserted thereto by the plaintiff herein is one having its sole foundation in tax titles, and that even this plaintiff or his immediate predecessor never in any way interfered with the use by the public of said strip as a public street—these facts, in our opinion, amply suffice to give rise to the presumption of an implied dedication of said strip of land to public uses as a portion of said Adelaide or Oregon street. Leverone v. Weakley, 155 Cal. 395, 101 Pac. 304; Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987; Sherwood v. Ahart, 35 Cal. App. 84, 169 Pac. 240.

[4] "It is, however, urged by the appellant

that the fact that R. B. Anderson died in the year 1895, and that no administrator of his estate was appointed until 1909, would interfere with the operation of the rule above stated with respect to an implied dedication of said strip of land. It was, however, early held in this state that where the statute of limitations had commenced to run, its operation would not be suspended by the death of the person affected by its operation (Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152); and this principle has been given recent application in the case of Cortelyou v. Imperial Land Co., 166 Cal. 24, 134 Pac. 981, and Sullivan v. Gillon, 26 Cal. App. 421, 147 Pac. 215. While the doctrine of these cases was given specific application therein to the running of the statute of limitations, we are satisfied that the same principle is properly applicable to cases like the one at bar, where the adverse use on the part of the public has begun, and where consequently it was the duty of the owner or claimant of the premises to take such action in the way of asserting his claim as would interfere with the implication of dedication as a result of a long period of permissive use.

[5] "The appellant further contends that the fact that the city of Los Angeles in the year 1910 commenced an action against the predecessors of the present plaintiff to condemn said strip of land for public uses as a portion of said street, which action, while pending between the time of the institution thereof and the commencement of the present action, was never brought to trial, is sufficient to operate as an estoppel against the defendant's plea as an implied dedication in the instant case. Probably this would be true if the present claim of said defendant to an easement in said strip for public uses had not fully ripened long prior to the commencement of said condemnation suit; but that such was the fact we think is sufficiently established in the present case, and hence the principle of estoppel upon which the appellant thus relies cannot be given application to defeat the right of the public in and to said strip as a portion of said street which was fully acquired before the institution of said condemnation suit.

[6] "Neither do we think that any estoppel arose from the fact that during a period of several years between 1895 and 1909 taxes were levied and collected upon said strip of land. In the case of Burk v. City of Santa Cruz, 163 Cal. 807, 127 Pac. 154, the Supreme Court, in dealing with a similar question says: 'In truth it is too preposterous to merit serious consideration that a ministerial officer like the assessor, charged only with the duty of assessing property which should be assessed, can by his mistaken act of omission or commission raise an estoppel for or against the city as to a matter in which he has absolutely no authority' See, also, City of Seattle v. Hinckley, 67 Wash. 273, 121 Pac. 444, in which the Supreme Court of Washington says: 'The right of the public to use the land as a street established by a continuous and uninterrupted use cannot be admitted away by the taxing officers. The rights of the public in a highway are not affected by the listing of the premises for taxes, or the payment of taxes when assessed.'

"The reasoning of the foregoing cases has also application to the final contention of the appellant, which is that the trial court erred in sustaining objections to his offer to prove the payment of taxes for the years 1910, 1911 and 1912. These offers on his part related to taxes levied and assessed long after the defendant's right to its easement in said strip of land had fully ripened through its adverse user thereof as a portion of the public street, and through the implied dedication thereof to such uses by the predecessors of said plaintiff prior to his acquisition of any interest or ownership in the same."

[7, 8] This opinion is adopted as the opinion of this court. The judgment below is not in accordance with this opinion. It merely declares that the plaintiff take nothing and that defendant recover costs. This was not in conformity with the findings, nor with the conclusions of law therein declaring the relief to be given to the parties, as it should have been, and it is not just to the plaintiff. The court, on appeal, has the power to direct the court below to enter the proper judgment in such cases, and it should do so.

The judgment is reversed, neither party to recover any costs of appeal; and it is ordered that on the going down of the remittitur the court below enter judgment as follows:

It is ordered, adjudged, and decreed that the plaintiff is the owner in fee simple of the tract of land described in the findings, subject, however, to an easement therein for the use of said parcel of land as a public street, which easement is hereby adjudged to belong to the city of Los Angeles. It is further adjudged that the defendant recover of plaintiff its costs herein laid out and expended, taxed at $———.

ANGELLOTTI, C. J., and SHAW, OLNEY, WILBUR, SLOANE, LENNON, and LAWLOR, JJ., concur.

(185 Cal. 272)

MANN v. TRACY et al., Civil Service Commission. (S. F. 9721.)

(Supreme Court of California. March 10, 1921.)

1. Municipal corporations 🔑217(3) — Civil service rule terminating eligibility after three years is reasonable.

An order of the civil service commission that the determination as to eligibility resulting from the proposed examination should cease to be in force after three years was not unreasonable, since the examination might not be a reliable test after the expiration of that time.

2. Municipal corporations 🔑216(2)—Provision in examination resolution as to duration of eligibility held a valid rule.

An order of the civil service commission contained in the notice of an examination stating that the eligibility thereby determined should continue only three years is in substance and effect a rule within the commission's power to make rules.

3. Municipal corporations 🔑216(2) — Civil service rules not invalid because not printed.

The requirement that the civil service rules shall be printed does not prevent their taking effect before printing.

4. Mandamus 🔑72—Courts should interfere as little as possible with administrative boards.

Administrative boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere, since they should let such boards work out their problems with as little interference as possible.

5. Municipal corporations 🔑217(3) — Civil Service Commission can expunge names solely on expiration of charter period.

Under San Francisco Charter, art. 13, § 7, authorizing the civil service commissioners to strike off names of candidates after they had remained on the register more than two years, the commission may expunge a name from such register for no other reason than that it has been thereon for two years.

6. Municipal corporations 🔑217(3) — Civil Service Commission by rule can fix duration of eligibility.

The civil service commission need not adopt a separate resolution striking each name from the eligible list after the expiration of the two years, but may by general resolution order all names remaining thereon for such time to be stricken.

7. Evidence 🔑83(2)—Civil service rule presumed to have been printed.

It is presumed that the civil service commissioners performed the duty imposed on them by the charter of printing their rules for distribution.

8. Municipal corporations 🔑216(2)—Publication of examination notice held publication of civil service rule stated therein.

The publication for two weeks in the official newspaper of a notice for civil service examination which contained a rule of the commission that the eligibility thereby determined would continue only for three years was a publication of the rule establishing the duration of eligibility.

9. Municipal corporations 🔑217(3) — Names held to have been stricken after expiration of eligibility period.

In mandamus to compel the civil service commission to certify the petitioner's name for promotion where it appeared that more than the time fixed by the commissioner's order for the duration of the eligibility had expired, it was immaterial that the commission had not actually stricken the names from the list, nor that its action ordering them stricken was taken before the three years expired.

In Bank.

Appeal from Superior Court, City and County of San Francisco: Daniel C. Deasy, Judge.

Action for mandamus by James Mann against George A. Tracy and others, as Civil Service Commissioners to require respondents to certify petitioner for promotion as sergeant of police. Judgment for plaintiff, and defendants appeal. Reversed.

George Lull, City Atty., and Chas. S. Peery, Asst. City Atty., both of San Franciso, for appellants.

William A. Kelly, of San Francisco, for respondent.

PER CURIAM. [1-4] The order of the civil service commission under review in this case, contained in the notice of examination, stated that the determination as to eligible persons resulting from the proposed examination and the entry thereof in the register of eligible persons should cease to be in force after three years from the date of the determination and adoption of the eligible list. This order was not unreasonable. It is to be assumed that the commission was of the opinion that after the lapse of three years the examination would not be a reliable test of the continued fitness of the persons on the register. It must be obvious that in the majority of the instances this might be true. The commission has power to make rules, and the order was, in substance and effect, nothing less than a rule. The requirement that the rules shall be printed does not prevent them from taking effect before printing. With respect to the general policy of the courts toward such commissions, it was said in Maxwell v. Civil Service Commission, 169 Cal. 339, 146 Pac. 871:

> "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question. Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere."

See, also, Pratt v. Rosenthal, 183 Pac. 544.

We adopt as the opinion of this court the following portions of the opinion of Mr. Justice Brittain, filed as a dissenting opinion in the District Court of Appeal upon the hearing of the cause in that court. It follows that the judgment should be reversed. The portions of the opinion are as follows:

"The defendants, members of the civil service commission of the city and county of San Francisco, appeal from a judgment against them, entered on their refusal to amend their answer, after demurrer sustained, in an action for mandamus to require them to certify the name of the respondent as eligible for promotion from corporal to sergeant in the police department of the municipality.

"The case depends upon a single matter of law regarding the power of the civil service commission prior to examination to limit the maximum period during which the eligible list procured by an examination shall remain effective. In the particular case the notice of examination contained the following: 'The eligible list secured as a result of this examination shall expire at the close of three years from the date of the adoption of the list, and the names thereon shall then be automatically removed therefrom.' The notice of examination was signed by the civil service commissioners in their official capacity, and was attested by the chief examiner. The plaintiff took his examination when it was held in accordance with the notice and his name was entered on the list adopted in pursuance of the notice. The list was adopted on May 22, 1916. More than three years thereafter the board of police commissioners requested the civil service commission to certify the name of the person standing highest upon the register of eligibles for appointment as sergeant. The only question is the legal effect of the notice of limitation of the maximum period of the life of the list.

"Article XIII of the charter deals with the civil service. The only provisions bearing on the present subject are the following: 'The commissioners shall make rules to carry out the purposes of this article, and for examinations, appointments, promotions and removals and in accordance with its provisions may from time to time make changes in the existing rules. All rules and all changes therein shall be forthwith printed for distribution by the commissioners.' Section 3. 'The commissioners may from time to time provide by rule for the manner in which * * * positions shall be filled, * * * and no appointment to any such place shall be made except in accordance with the provisions of this article and the rules adopted thereunder by the civil service commission.' Section 2. 'The commissioners shall control all examinations. * * *' Section 5. 'Notice of the time, place and general scope of every examination shall be given by the commissioners by publication for two weeks preceding such examination in the official newspaper, and such notice shall also be posted by the commissioners in a conspicuous place in their office for two weeks before such examination. Such further notice of examination shall be given as they may prescribe.' Section 6. 'From the returns of the examiners * * * the commissioners shall prepare a register * * * of the persons whose general average standing * * * is not less than the minimum fixed by the rules of the commissioners, and who are otherwise eligible. Such persons shall take rank upon the register as candidates in the order of their relative excellence, as determined by examination without reference to priority of time of examination.' Section 7. 'The commissioners may strike off names of candidates from the register after they have remained thereon more than two years.' Section 10. It is made obligatory on the commissioners not to certify and to strike from the register the name of any one not of good moral character or who had secured a place on the list by fraud or in violation of the rules of the commission. Section 9.

"These provisions have not been construed by the courts in relation to the exact question now under consideration. Both parties cite and rely upon a dictum in the only decision referred to in the briefs. Cook v. Civil Service Commission, 160 Cal. 598, 600, 117 Pac. 662. In that case the Supreme Court denied a motion to dismiss an appeal. The motion was made upon the ground that pending appeal the commission had itself annulled and set aside an examination the validity of which was attacked in the court proceeding. The action of the commission apparently was within the two years' minimum fixed by the charter during which certified lists must remain in force. After referring to the provision permitting names to be stricken from the list after two years, the learned justice who wrote the opinion said: 'True, the superior court had declared the examination void and had ordered the list annulled, but, an appeal having been taken from that judgment, it was of no binding, mandatory effect until made final by the action of a court of competent appellate jurisdiction. If the commission could have set aside the eligible list while the matter of the validity of the examination was sub judice, it could have done the same thing in absence of any proceeding, and without any order of court. The very purpose of holding examinations by the civil service commission was to create a permanent eligible list not subject to expunction upon the caprice of any board or officer of the municipal government. There was no grant of power directly given by the charter, or necessarily implied from the prerogatives conferred, which enabled the commission properly to set aside its own action after it had declared a list of eligibles, except in the single instance cited above.'

"It is conceded by the respondent that in the present matter the appellant by adopting a formal resolution at any time after the expiration of two years after the list was made up might have stricken his name or all the names from the list, under the admitted power granted by section 10, article XIII, of the charter. In other words, the very evil pointed out in the Cook Case might have been brought about lawfully under the charter. If the commission had learned that the respondent or any other person on the list was about to receive promotion, as a mere matter of caprice, after the expiration of two years, the name or the list might have been expunged, and the beneficent purpose of the civil service provisions of the charter set at naught. This was not done. There is no suggestion that the commission has not acted with entire good faith and fairness to all who took particular examination, upon public notice given before the examination that the list secured should continue in force but three years.

[5, 6] "It is argued that the power vested in the commissioners to expunge the names after they have remained on the list for two years contemplates the exercise of an intelligent and quasi judicial discretion upon the facts appearing when the order of expunction is made. This argument disregards the fact that the commission, at the end of two years after each list has been prepared, may, upon no other consideration than that it has been in force for two years, pass a resolution expunging it. The law does not require idle acts, and,

since the commission might by repeatedly passing, mutatis mutandis, the same resolution at the expiration of two or three years after successive lists were made, under its power to make rules, it might have adopted a general rule that successive lists should expire at the ends of such periods. The determination of facts and the propriety of action of administrative boards is not a judicial function. Quinchard v. Board of Trustees, 113 Cal. 664, 45 Pac. 856; People v. Supervisors, 122 Cal. 421, 55 Pac. 131.

[7-9] "The same requirements and limitations do not apply to all classes of the civil service, nor to original appointments and promotions. The notice of examination for promotion from corporal to sergeant in this case required the applicants, among other things, to satisfy the examiners of their general knowledge of the duties to be performed, for which 50 per cent. of the total rating was credited. Under the head of general knowledge the applicants were examined upon their acquaintance with police duties, including the contents of the police manual, the transportation ordinances, and military tactics. These were matters subject to change, and the condition warranted a rule different from that applying to the appointment of clerks or laborers. Such a rule was made. The charter requires that rules shall be printed for distribution. It is presumed that the commissioners performed the duty of printing, and it is certain that the particular rule was published. Under the charter the notice of examination was given by publication for two weeks in the official newspaper and posted in the office of the commission. The respondent took the examination, and must therefore have been fully advised of the manner in which the appointments would be filled under the rule. There is but one limitation in the charter, namely, that the list shall remain in force for two years. The contention that by the rule the commission sought to bind itself or its successors to keep the list operative for three years disregards both the law and the wording of the rule. Under the law the commission could not either diminish or extend the two years' limit during which the charter provided the list should remain in force, but it could and in plain and unmistakable language it did provide that in no event should it remain in force for more than three years. The commission still retained its charter power to expunge the list at any time after the expiration of the two years limited by the charter. The suggestion that some action was necessary after the expiration of the two-years period is met by the action in striking out the names after that time. It is immaterial that they were not actually stricken out with red ink; they were automatically expunged. Neither is it material when the rule, or order, or resolution ordering the names expunged was adopted. The power granted by the charter was to strike off the names, regardless of when the determination to strike out was made."

The judgment is reversed.

ANGELLOTTI, C. J., and SHAW, OLNEY, WILBUR, and LAWLOR, JJ., concur.

(185 Cal. 279)

RANSOME-CRUMMEY CO. v. BEGGS et al.

(S. F. 9738.)

(Supreme Court of California. March 10, 1921. Rehearing Denied April 7, 1921.)

Appeal and error 🔑345(1)—New trial to extend time for appeal must be moved for within 60 days after entry of judgment.

Code Civ. Proc. § 939, extending the time for appeal from judgment beyond the 60-day limit "if proceedings on motion for new trial are pending," does not permit an appeal within 30 days after the entry of an order denying motion for new trial, where such motion was made more than 60 days after the entry of the judgment.

In Bank.

Action by the Ransome-Crummey Company against William M. Beggs and others. From a judgment therein, the plaintiff appeals. On motion to dismiss appeal because not taken within the time allowed by law. Motion granted, and appeal dismissed.

R. M. F. Soto, of San Francisco, for appellant.

R. C. McComish, of San Jose, for respondents.

PER CURIAM. Motion to dismiss appeal on ground that same was not taken within the time allowed by law. Judgment was entered November 22, 1915, an order denying a motion for new trial was entered April 14, 1916, and the appeal was taken April 24, 1916; i. e., within 30 days after the entry of such order. Section 939, Code Civ. Proc. The notice of intention to move for a new trial, however, was not served and filed until February 23, 1916, which was more than 60 days after the entry of the judgment, with the result that no proceeding on motion for new trial had been inaugurated or was pending at the expiration of the 60 days after entry of judgment within which an appeal may be taken from a judgment in the absence of any pending proceeding for new trial. Section 939, Code Civ. Proc. It is claimed by respondent that the provision of section 939, Code of Civil Procedure, extending the time for appeal from the judgment "if proceedings on motion for a new trial are pending" has no application unless such proceeding is instituted within the 60 days after entry of judgment within which an appeal may be taken from the judgment in the absence of any new trial proceeding; and that if within such 60 days no such proceeding be instituted and no appeal from the judgment is taken, the right of appeal from the judgment is forever lost. This very question was decided in accord with the respondents' claim by the District Court of Appeal of the Second Appellate District, Division 1, in the case of

Pacific Light, etc., Corp. v. Kauffman, 39 Cal. App. 499, 179 Pac. 452, and an application for a hearing in this court was denied by us. We see no escape from the views expressed in this opinion by the learned District Court of Appeal as to the proper construction of our statute, or the conclusion reached. See, also, Bates v. Ransome-Crummey Co. (App.) 184 Pac. 39.

The appeal is dismissed.

ANGELLOTTI, C. J., and SHAW, WILBUR, SLOANE, OLNEY, LENNON, and LAWLOR, JJ., concur.

(185 Cal. 799)

RANSOME-CRUMMEY CO. v. BEGGS et al.
(S. F. 9739.)

(Supreme Court of California. March 10, 1921. Rehearing Denied April 7, 1921.)

In Bank.

Action by the Ransome-Crummey Company against William M. Beggs and others. From a judgment therein the plaintiff appeals. On motion to dismiss appeal because not taken within time allowed by law. Motion granted, and appeal dismissed.

R. M. F. Soto, of San Francisco, for appellant.

R. C. McComish, of San Jose, for respondents.

PER CURIAM. Motion to dismiss appeal from judgment. The facts are the same as in Ransome-Crummey Co. v. Beggs et al., S. F. No. 9738, 196 Pac. 487, this day decided.

The appeal is dismissed.

ANGELLOTTI, C. J., and SHAW, WILBUR, SLOANE, OLNEY, LENNON, and LAWLOR, JJ., concur.

(51 Cal. App. 212)

CHAMBERS v. SECURITY COMMERCIAL & SAVINGS BANK. (Civ. No. 3616.)

(District Court of Appeal, First District, Division 1, California. Jan. 28, 1921.)

1. Banks and banking 🔑101—Bank's acceptance of lease held valid though its use of the property was ultra vires.

In lessor's action to recover premises leased to defendant's predecessor, *held*, that defendant bank could not, in view of Civ. Code, § 354, subd. 4, and the banking law, plead ultra vires as a defense against the recovery of rent on the ground that the bank did not have the right to operate a moving picture show, inasmuch as it could lawfully assume a lease, even though its use of the property might be ultra vires.

2. Banks and banking 🔑101—Banking corporation, having received the benefits of a lease, may not plead ultra vires.

In an action to recover leased premises and for rents due, if the acceptance of the lease by the defendant bank had been ultra vires where it received the full benefit of such act, it could not plead ultra vires as a defense; the remedy for such act being a proceeding by the state by quo warranto.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by George J. Chambers against the Security Commercial & Savings Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 188 Pac. 818.

Sweet, Stearns & Forward, of San Diego, for appellant.

Hunsaker, Britt & Cosgrove, of Los Angeles, and Crouch & Chambers, of San Diego, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action instituted by him against the defendant for the recovery of certain premises leased by him to the defendant's predecessor, and which the said defendant was alleged to be unlawfully holding over after default in the payment of the rent due and payable under the terms of said lease, and also for the recovery of the amount of rent due.

The case was tried before a jury, which rendered a general verdict in the plaintiff's favor and also a special verdict upon certain issues in the case.

The facts of the case upon which the questions presented on this appeal arise are practically undisputed, and are briefly as follows: The plaintiff on the 12th day of March, 1912, was the owner of the real estate in question which was at that time unimproved. On said date he executed a written lease of said real estate to three certain individuals, Fabre, Richardson, and Kerns, for the term of five years, commencing on April 1, 1912. In May, 1913, said lessees, with the lessor's consent, assigned and transferred their said lease to the Blochman Banking Company, a copartnership composed of two members, L. A. Blochman and J. A. Heap, who expressly agreed to pay all rent due under said lease after the date of said assignment. In August, 1913, the said partnership became incorporated under the name of Blochman Commercial & Savings Bank, to which said corporation the partnership transferred all of its assets, and the said copartners became, as the incorporators of said corporation, the owners of practically its entire issue of capital stock. The lessor also consented to the transfer of said lease to said banking corporation. In July, 1914, the name of said

Blochman Commercial & Savings Bank was changed to "Security Commercial & Savings Bank," and the latter thereafter continued to hold said real estate under said lease and to transact business as a banking corporation under said name. During the time that the said original lessees held said real estate under their lease they had erected certain structures and had engaged in conducting a moving picture business upon the said premises, which was continued to be conducted after the organization of said banking corporation and the transfer to it of said lease. During the period from January 1, 1915, to December 31, 1915, while the defendant as such corporation was operating and conducting said moving picture business upon said premises, they failed to pay the rent due and payable under the terms of said lease to said plaintiff, who at the expiration of said period and after giving the proper notices commenced this action in unlawful detainer.

In its answer filed herein the defendant undertook to deny that it was the transferee of said lease or that it was unlawfully holding said premises thereunder, predicating its said denial apparently upon the proposition that as a banking corporation of limited powers under its charter and also under the banking act it had no authority to conduct or operate a moving picture business, and hence that the action of its officials in taking over said premises while the same was devoted to the conduct of said business was an act ultra vires, and hence that it was not liable for the rent due to plaintiff under said lease. The possession of the premises was apparently surrendered to the plaintiff before the case came to trial, and the cause was submitted to the jury upon the issue of the amount of rent due and also upon the questions involved in the particular issues upon which a special verdict was requested.

There were three of these, the first being as to whether the assignment of the lease in question to the Blochman Banking Company was an actual sale and transfer thereof or only as security for a loan; second, whether at the time of the plaintiff's consent to said assignment he believed that said banking company was the real owner of said lease, and also whether he acquiesced in the possession of the premises by said Blochman Banking Company under such belief; third, whether the defendant during the period from January 1, 1915, to December 31, 1915, was operating and conducting said moving picture business on said premises on its own behalf.

The jury returned a general verdict in the plaintiff's favor in the sum of $6,000, the total amount of the unpaid rent due under the lease, and as to the aforesaid special issues answered each of them affirmatively. Upon the coming in of this verdict the defendant moved the court for a judgment in its favor based upon the findings of the jury upon these special issues, which motion was denied by the court. The judgment followed, from which this appeal has been taken.

[1] The first, and in fact the controlling, contention of the appellant herein is its claim foreshadowed by its answer herein, that the act of its officials in taking over said lease while the said premises were being used for the operation and conduct of a moving picture business was an act ultra vires, and that the occupation and conduct of said premises by said defendant thereunder for such purposes was also ultra vires, and hence that no obligation or liability arose or attached to said defendant under said lease. This contention on the part of the appellant is sought to be supported by the citation of numerous authorities, setting forth the limited powers of banking corporations under their charters and under the terms of the banking act under which this particular institution was organized. It is not necessary herein, in our opinion, to in any wise disagree with this line of authorities or to otherwise comment thereon for the reason, which seems to us obvious, that the appellant's asserted position in respect to this contention, and its citation of and dependence upon these authorities spring from a complete misconception of the application of the doctrine of ultra vires to the facts of the case at bar in this, that the appellant entirely overlooks the distinction between the lease of the premises in question and the purposes to which the premises are devoted by the lessees or their successors in occupancy under such lease. It is this precise distinction which differentiates all the cases cited by the appellant in its effort to apply the doctrine of ultra vires from the case at bar and from the cases cited by the respondent to which we shall hereafter refer. It could not for a moment be contended that this banking corporation is not empowered under its charter and under the provisions of the banking act in this state to take and hold leases of real property. Stats. 1913, p. 158; Civ. Code, § 354. This being so, the act of the defendant in taking over this lease would not have been ultra vires, since it might upon acquiring the same have proceeded to devote the premises described to uses to which it would have been entitled to put the same under the provisions of its charter and of the banking act. That it did not do this did not render its act in acquiring its leasehold interest in said premises ultra vires. Bissell v. Michigan Southern R. R. Co., 22 N. Y. 262. In the instant case the lease in question was made to the original lessees, who unquestionably were entitled to establish and conduct any lawful business which they saw fit upon the premises. These original lessees transferred this lease to the Blochman Banking Company, a copartnership, which also had the undoubted right to continue to use the premises for the conduct of the business to which it was then being

devoted. This copartnership resolved itself into a banking corporation, of which its two members became the owners of practically all the capital stock, and under the name of said corporation took over all of the assets of the copartnership, including this lease. That this leasehold interest in these premises so acquired by this corporation—which after all is said was merely the former ownership thereof under a corporate name—was taken over in the ordinary course of business seems too plain for argument, and it would seem to be equally clear that this plaintiff, by the mere formal act of consenting to this formal transfer of his perfectly good and valid lease while in the hands of the copartnership, could not be held to have consented away his right to enforce the same because the officials and controlling forces of such corporation continued to put the real estate described in said lease to uses which under the name and form of a copartnership they were entitled to do, but which under the name and form of a banking corporation might be beyond the limited scope of the corporate powers of such corporation. To hold otherwise would put the lessor of real estate at the mercy of their lessees, who by the simple process of casting themselves into the form of a banking corporation, and using the lease for some purpose outside of the scope of the powers of that sort of corporation, could thus avoid their obligation to pay the rent due according to the obligations of their lease. Under section 354, subd. 4, of the Civil Code, as well as under the banking act above cited, this defendant had the power to take and hold this lease for some uses and purposes at least, and this plaintiff, as lessor, had the right to presume that the defendant in taking over said lease was acquiring the same for purposes authorized by its charter and by said banking act, and that whatever proper uses the property was being put to under the former ownership of said lease would, if improper or ultra vires under the corporate organization, be presently discontinued. 1 Morse on Banks and Banking (5th Ed.) § 56. In the early case of Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 30, the court, quoting from the decision of Bissell v. Michigan, etc., R. R. Co., supra, says:

> "An incorporated bank may purchase land, having power to do so for a banking house, but actually intending to speculate in the transaction. This is also ultra vires, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being in pari delicto? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to illegal contracts of private individuals."

In the recent case of James Eva Estate v. Mecca Co., 40 Cal. App. 515, 181 Pac. 415, it was held that, where a corporation had power to do an act for some purposes, and had received and enjoyed the benefit derived from doing the act, it would be estopped to present the plea of ultra vires against the enforcement of the obligation it assumed in the performance of the act.

For the foregoing reasons and upon the authorities cited in support thereof, we conclude that there is no merit in the appellant's contention that it was entitled to plead that the lease upon which the plaintiff sought to recover herein was void because the defendant, in taking over the same, was acting beyond the scope of its powers as a banking corporation. Many more authorities might be cited in support of this conclusion, but we do not deem it necessary to burden the record with further citations to support a proposition which seems so thoroughly in accord with justice.

[2] There is, however, another answer to the appellant's contention which would seem to be complete. It bears upon the action of the defendant in putting the premises in question to uses which were, according to its claim, beyond its charter or statutory powers. Assuming this claim to be correct, it does not follow that it lies within the power of the defendant to complain of its own usurpation of power in a case wherein it has received the full benefit of its unauthorized act. It is for the state of California to restrain the defendant's unauthorized extension of corporate powers in a quo warranto proceeding instituted for that purpose. Natoma W. & M. Co. v. Clarkin, 14 Cal. 544; Becket v. City of Petaluma, 171 Cal. 309, 153 Pac. 20; McCann v. Children's Home Society, 176 Cal. 359, 168 Pac. 355.

The foregoing answers to the main contention of the appellant in this case also answer the appellant's several other contentions as to alleged errors of the trial court in its instructions to the jury, since all of these are predicated upon the appellant's assumption that its act in taking and holding said lease, as well as in operating under the same, was ultra vires, and that it was entitled to urge this plea against the plaintiff and in the instant case. It is not necessary therefore to advert to these alleged errors in further detail.

Judgment affirmed.

We concur: SEAWELL, Presiding Justice pro tem.; KERRIGAN, J.

(51 Cal. App. 226)

SULLIVAN et al. v. SULLIVAN et al.
(Civ. 3535.)

(District Court of Appeal, First District, Division 1, California. Feb. 2, 1921. Hearing Denied by Supreme Court March 31, 1921.)

Trusts ⚿44(2)—Evidence held insufficient to establish oral agreement to convey.

In action by certain children of a decedent against a daughter of decedent and other children to establish a trust, evidence *held* to support finding against the oral promise alleged to have been made by defendant daughter to make conveyances of property conveyed to her by decedent to all the children of decedent immediately upon his death.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Suit by Thomas B. Sullivan and others against Emma Gertrude Sullivan and others to establish a trust. From a judgment for defendants, plaintiffs appeal. Affirmed.

Sullivan, Sullivan & Theo. J. Roche, of San Francisco, for appellants.

Keyes & Erskine, of San Francisco, for respondents.

SEAWELL, Presiding Justice pro tem. All of the parties to this action are children of John J. Sullivan, Sr., deceased, except James A. MacMonnies, who is the husband of defendant Grace E. MacMonnies, and for that reason is made a party. Defendants John J. Sullivan and Grace MacMonnies were made parties because of their refusal to join plaintiffs in the action. James Sullivan, whose name frequently appears in the proceedings, was also a child of said John J. Sullivan, deceased, but died unmarried, without issue and intestate. The parties to the action, including James, deceased, comprised the entire family of children of said John J. Sullivan and Elizabeth M. Sullivan, his wife. The latter died on the 10th day of April, 1904, and her husband remained a widower thereafter.

The record title of the property in suit was conveyed to Emma Gertrude Sullivan by her father, John J. Sullivan, by deeds of conveyance, as will hereafter appear. The deed upon which plaintiffs rely to establish a trust relation, with Emma as trustee for the other children, is dated June 20, 1904. It conveys, upon its face, the title to her absolute.

The purpose of plaintiffs by this action, first, was to establish a trusteeship in Emma, and, next, to compel her to convey to each of said brothers and sisters, six in number, their respective equitable interests in said property. The trust sought to be established rests in parol and consists in an alleged oral promise made by Emma to her father at the time he executed and placed in escrow said deed dated June 20, 1904, that she would hold it as a trustee for the benefit of all of his children and upon his death convey to each child then living an equal interest in and to said property. The appointment of a receiver, an accounting for rents, issues, and profits, and the usual relief incidental to a trusteeship is demanded.

The facts practically conceded or incontestably established are these: The property in litigation constituted the family residence of the elder Sullivan for many years and is generally described as a portion of vara lot number 122, situated on Sacramento street, near Hyde, in the city and county of San Francisco. It has a frontage of 34 feet on Sacramento street and a depth of 137 feet. Mrs. Elizabeth M. Sullivan filed a homestead on said real property in 1887. By proceedings taken in April, 1904, after her death, the homestead was declared vested in the husband, John J. Sullivan. The father's petition to vest the homestead in himself did not receive the approval of John, James, and Harry and perhaps one daughter, who was suspected of being in sympathy with the opposition offered by said three sons. Their antagonism, in fact open hostility, to this proceeding was bitterly resented by the father. The father, however, maintained the old homestead as a family residence to the time of his death, to wit, March 18, 1915. Prior to his death four of the children had married and established homes of their own, while others, especially the three younger male members of the family above named, being given to excesses and dissipations, came and went as their vagarious tendencies inclined them or as necessity impelled them. Emma, however, remained constantly the companion of her father to the end.

On June 20, 1904, John J. Sullivan was the admitted owner of said property in fee simple. On that day he executed a deed of gift absolute in form conveying said property to his daughter, Emma, and delivered the deed to Judge A. F. St. Sure, then a practicing attorney and the drawer thereof. John J. Sullivan and the attorney, Hon. A. F. St. Sure, were brought together by the former's son Thomas B. Sullivan. The considerations recited in the deed are the love and affection that the father bore for his said daughter and "also for the better maintenance, support, protection, and livelihood" of said daughter. With the deed there was also delivered a letter of instructions directing said attorney to deliver said deed to his daughter Emma upon his death. By the letter of instructions he declared that delivery was made "without any reservation of right to recall the same" before death, "and with the absolute and final determination that it shall take effect when the contingency of my death happens." Contemporaneous with these instruments he executed and delivered to said attorney his olographic will by which he gave all the property of which he might die seized or possessed to his said daughter. He mentioned all of his children living by name and stated that he purposely omitted to make any provision for them. By said will full power was given to his daughter Emma, who was made executrix without bonds, to dispose of all or any part of his estate without order of court.

The former family residence occupied the same lot, but was destroyed by the fire of April 18–19, 1906. In 1907 the property was improved by the erection of a building containing six flats. The estimated cost of the improvements was $7,000, and that amount was borrowed from the Humboldt Savings Bank. John J. Sullivan, as owner, gave as security therefor a mortgage on the property. He made the affidavit frequently required of borrowers as to ownership, in which he averred that he was the owner and "had never deeded or transferred said property or any part thereof since affiant acquired it." The officers of the bank, before accepting the property as security, required further of him, that he obtain a deed from his children conveying to him any and all right, title, or interest they might have in said property. Accordingly on May 2, 1907, such a deed was executed, in which all the plaintiffs, except William B. Sullivan, then a minor, and all named defendants except John J. Sullivan, Jr., who did not appear at the trial of the cause and whose presence was and has been unknown the greater portion of time for some years past, joined. James, the other child not joining, is dead.

On October 7, 1907, finding that he had underestimated the cost of said improvements, he obtained an additional loan of $3,000 from said Humboldt Savings Bank. A deed of trust was executed securing said bank for the whole amount of the loan, to wit, $10,000. Again an affidavit was made by him, as owner, similar in all respects to the affidavit made upon obtaining said first loan of $7,000. The building was completed October 24, 1907, and on that day, in a sworn notice of completion, John J. Sullivan again described himself as owner.

On December 31, 1910, acting upon the advice of his attorney, Thomas B. Sullivan, his son, and one of the plaintiffs herein, John J. Sullivan commenced an action under the provisions of the McEnerney Act (Stats. 1906, Extra Session, p. 78), subscribed to and filed the required affidavit in which he averred that he was the owner in fee absolute of said property, and that no conveyance of said property or any part thereof nor any interest therein had been made by him except the deed of trust executed and delivered to the Humboldt Savings Bank to secure said loan of $10,000. The affidavit concludes in the following language:

> "That there are no subsisting mortgages, deeds of trust, or other liens against said property except as hereinbefore described; that affiant does not know and has never been informed of any other person who claims or may claim any interest in or lien upon the said property or any part thereof adversely to plaintiff except as hereinbefore described."

The only deeds of trust, mortgage claims, lien, or incumbrance of any description mentioned in said affidavit is the Humboldt Savings Bank's deed of trust. On January 6, 1913, judgment was entered establishing and quieting plaintiff's title to said property in fee simple absolute except as to the deed of trust held by said bank. The court found that all parties to this action had notice of said proceeding before the entry of judgment.

The improvements thereon were insured in the name of John J. Sullivan as owner. The deed of trust and note securing the bank for said loan were renewed, and an affidavit was again made in which he declared himself the sole owner, etc. He dealt with the property in every respect and at all times as an owner deals with his own. No act showing or tending to show a want of authority over or loss of ownership of said property appears.

On July 11, 1912, said John J. Sullivan executed and delivered his last will and testament, olographic, to his said daughter. In substance and effect it is identical with the will dated June 20, 1904. This will was subsequently admitted to probate.

On May 19, 1913, John J. Sullivan executed and delivered to his daughter, Emma, a deed by which he conveyed to her the property in dispute, reserving to himself a life estate. This deed was recorded March 13, 1915. On the same day and as a consideration therefor Emma bound herself in writing, upon her father's death and thenceforth so long as she should live, to pay to her brother William B. Sullivan for his support not less than $20 nor more than $50 per month, as may be determined by said Emma Gertrude Sullivan. It was further provided that, if the said William should bring any action against said sister then the obligation to pay any sums to said William should immediately cease.

The foregoing recital includes practically all of the material record evidence touching the history of the realty and its disposition or attempted disposal. The amended complaint contains four causes of action. The first count charges the existence of confidential relations between father and daughter; alleges an oral promise made by the daughter to the father on and prior to the execution of the deed of date June 20, 1904, that she would convey to the other children living at the time of his death an equal interest in said property; asserts that said John J. Sullivan upon the alleged delivery of said deed in escrow parted with all dominion over the same, and that the only interest he thereafter held in said property was "the use thereof until his death." The monthly rental value of the property was admitted to be $150. All facts necessary to establish a trust in conformity with plaintiff's theory are pleaded.

The second cause of action alleges that no money or other thing of value was given by John J. Sullivan to his children as a consideration for them to convey to him by said deed dated May 1, 1907, said property, but that said deed was executed because of the demand of said bank made upon their father that they must do so if the loan was to be obtained, and that they executed said instrument for the sole purpose of enabling said John J. Sullivan to obtain said loan of $10,000. It is further alleged that said grantor and grantee fully understood that the trust with which said property had been theretofore impressed would not be affected thereby.

The third cause of action is addressed to the proceedings commenced December 31, 1907, under the provisions of "An act to provide for the establishment and quieting of title to real property in case of loss or destruction of public records," approved June 16, 1906 (St. 1906 [Ex. Sess.] p. 78), by John J. Sullivan against all persons, etc. It is admitted by affirmative allegations that by said proceedings John J. Sullivan was decreed to be the owner in fee simple of said real property and his title thereto established. It is further admitted that the affidavit, as prescribed by section 5 of said act, was made as described in the statement of facts therein. It is alleged that the omission of said father to name his children as having an interest in said real property adversely to himself was not designedly fraudulent, or with a purpose of repudiating the trust arising from the execution and delivery of said deed dated June 20, 1904, but, on the contrary, "such omission was innocently made, and was made with the knowledge and belief on his part that the equitable interest of his children in said real property would not and could not be affected by the judgment in said action so made in furtherance of said trust"; that he was advised by his son Thomas B. Sullivan, attorney at law, who acted for him in said action, that the judgment in said action would not affect or prejudice the rights of said children in the trust arising from the execution and delivery of said deed of June 20, 1904, but would in fact establish their legal title to said real property.

By the fourth cause of action or count it is claimed that the deed dated March 19, 1913, was the product of undue influence exercised by Emma upon her father. The trial court having found the issue of undue influence adversely to plaintiffs, under the admission that a conflict of evidence existed as to said issue, it is not further pressed. Under plaintiffs' present theory it is regarded as an immaterial issue.

Defendant Emma Gertrude Sullivan by her answer denied on information and belief that at any time before March 19, 1915, John J. Sullivan made or executed, or delivered a deed of the real property described in the action to any one; admitted that on June 20, 1904, the document in the form of a deed of gift was handed to said A. F. St. Sure with the written instructions heretofore referred to; alleged, however, that it was the intention of John J. Sullivan that said deed should take effect at the time of his death, and not before. Defendant denied that any other instructions, oral or otherwise, than those contained in said writings, were given to said A. F. St. Sure. On information and belief it is denied that John J. Sullivan by the delivery of said document parted with dominion over the same or placed it beyond his recall.

The theory and claim of defendant is that the deed and letter of instructions of June 20, 1904, were intended to make a testamentary disposition of said property; in other words, there was no intention in the mind of said John J. Sullivan to immediately part with title, but that said deed should become effective at the time of his death. This theory is fortified with such denials, admissions, and affirmative matters as are essential to sustain it. That an oral promise or any promise or agreement or understanding was made to or had with any one at any time to the effect that Emma should hold said real property in trust for the benefit of the children of John J. Sullivan is specifically denied. Said deed of June 20, 1904, is alleged by the answer to have been executed because of the love and affection which the said John J. Sullivan bore for defendant Emma, and for the purpose of vesting in her at the time of the father's death absolute title to said real property, free and clear of any trust whatsoever.

Denial is made that the deed of May 1, 1907, was executed and delivered by said children to their father for any purpose other than to confirm the title of said John J. Sullivan to said property in fee simple, and that it was intended in particular to convey to him any interest which the grantors therein might have had as heirs of their mother, Elizabeth M. Sullivan.

As special defenses to the second count or cause of action the bar of subdivision 4, § 338, and section 243, of the Code of Civil Procedure are pleaded.

In answering the third cause of action it is admitted that in bringing said action to establish and quiet his title the omission by said John J. Sullivan to name his children as having an interest adverse to himself was innocently made and without the purpose of repudiating any trust, but it is denied that such an omission was made with the knowledge or belief that the equitable interest of his children could not be affected by the judgment in said action or was made in furtherance of any trust whatever. The belief of said John J. Sullivan is alleged to have been that said judgment would establish his title to said property against all the world, including his children. That said John J. Sullivan was advised by Thomas B. Sullivan to the contrary, or at all, is denied on information and belief. It is alleged that none of his children have ever acquired any right, title, or interest in or to said real property, except defendant Emma, who became the owner by virtue of said deed from her father, executed and delivered to her March 19, 1913. Subdivision 3, § 328, Code of Civil Procedure, is also pleaded in bar to said third cause of action.

It rested upon plaintiffs to establish primarily two essentials, to wit: First, the execution and delivery of the deed dated June 20, 1904, as a valid escrow; second, that an oral promise or agreement was made on the part of the grantee, Emma, at the time of its execution and delivery that she would convey to each of the children living upon the death of the grantor an equal share or interest in said property; in short, that she held it as a trustee for the purposes alleged in the complaint. If they have failed to establish both or either of said requirements, then their cause must fall.

It is the claim of plaintiffs that the escrow instructions which accomplished the delivery of the deed to A. F. St. Sure in themselves close the door to all attack against the validity of the deed as an escrow. The further claim is made that the weight of the evidence confirms the trust contention. Further, the findings are attacked as being inconsistent in material respects and wholly irreconcilable except on the theory that a valid delivery in escrow was made and a trust relation between father and daughter had been established.

The attack upon the findings, especially II, V, and VII presents the most troublesome question, as an affirmance or reversal of the cause depends upon the sufficiency and consistency of said findings to withstand the assault made upon them. By this we do not mean to say that other findings may not be considered or resorted to to clarify the situation so far as they touch upon the subject-matter contained in said assailed findings. Perhaps time will be gained by reproducing said findings as they appear of record:

Finding II:

"On the 20th day of June, 1904, J. J. Sullivan, the father of the plaintiffs, made and signed an instrument in writing, in form of a deed of gift purporting to convey to defendant Emma Gertrude Sullivan the real property described in plaintiffs' amended complaint. At the time that said J. J. Sullivan signed said instrument he made, signed, and handed to A. F. St. Sure, an attorney at law, an instrument in writing, in the words and figures following, to wit:

"'San Francisco, Cal., June 20, 1904.

"'A. F. St. Sure, Call Building, San Francisco, Cal.—Dear Sir: I herewith deliver to you a deed of gift to my daughter, Emma Gertrude Sullivan, conveying to my said daughter the realty described in said deed, being a portion of 50-vara lot No. 1222, situate, lying and being in the city and county of San Francisco. Said deed was executed by me this 20th day of June, 1904. I hereby deliver said deed to you, to be delivered by you to my said daughter, Emma Gertrude Sullivan, upon my death. This deed is delivered to you to be delivered by you as aforesaid without any reservation of right to recall the same before my death and with the absolute and final determination that it shall take effect when the contingency of my death happens,

"'Yours truly, J. J. Sullivan.'

"At the time said J. J. Sullivan handed to A. F. St. Sure said instrument, a copy of which is above set forth he also handed to said St. Sure said instrument in form of deed of gift signed by him and duly acknowledged by him before a notary public in and for the city and county of San Francisco, purporting to convey to said defendant, Emma Gertrude Sullivan, all the real property described in paragraph I of plaintiffs' amended complaint. At the time said J. J. Sullivan handed said instrument in form of deed to St. Sure he intended said instrument to take effect as a conveyance upon his death, and not before, and no instructions were given by said J. J. Sullivan in respect to said instrument in form of deed or in respect to the real property therein described other than the instructions contained in said instrument, a copy of which is herein set forth, and verbal instructions to have said instrument in form of deed recorded after his, J. J. Sullivan's, death.

"That at the time when the said document, in the form of a deed, dated the 20th day of June, 1904, was handed to the said A. F. St. Sure, the said J. J. Sullivan did not part with all dominion or any dominion over the same, and did not give up all right or any right to recall the same or to alter its provisions or to have or enjoy any other or further interest in the premises in said document described, but, on the contrary, intended that the said document should not take effect until the time of the death of the said J. J. Sullivan."

Finding V:

This finding, after reciting a relation of confidence existing between father and daughter, proceeds:

"On said 20th day of June, 1904, said J. J. Sullivan, being desirous of making a disposition of the real property described in plaintiffs' amended complaint and hereinbefore referred to, and by reason of the great faith and confidence then reposed by him in said defendant Emma Gertrude Sullivan, and believing that said Emma Gertrude Sullivan would faithfully carry out any wishes that might be expressed to her by him, orally proposed to said Emma Gertrude Sullivan that he would make and execute to her a deed of the real property hereinbefore referred to, and deliver the same to said A. F. St. Sure with instructions that he hold the same until the death of said J. J. Sullivan and then deliver the same to said Emma Gertrude Sullivan upon the express oral understanding and agreement that the said Emma Gertrude Sullivan would accept said deed and hold said property and maintain the family home or make other use or disposition of the property for the benefit of herself and the other children of said J. J. Sullivan who might survive him. Said Emma Gertrude Sullivan expressly and orally agreed to this, and in reliance upon her said agreement, and upon the faith and confidence which said J. J. Sullivan had and reposed in said Emma Gertrude Sullivan, and because of the relations of trust and confidence existing between them, and, excepting a desire to avoid the breaking up of the home by a partition of the property in the event of the necessity of probate proceedings, for no other reason said J. J. Sullivan signed and acknowledged said instrument in form of deed and handed the same to said A. F. St. Sure with said written and verbal instructions herein mentioned. At the time said instrument in form of deed was handed to said A. F. St. Sure said Emma Gertrude Sullivan orally agreed to accept said instrument upon the death of J. J. Sullivan as a conveyance to her of the real property therein described upon the understanding and for the purposes above set forth. Said J. J. Sullivan would not have signed said instrument in form of deed or handed the same to A. F. St. Sure unless said Emma Gertrude Sullivan had agreed to the confidence reposed in her substantially as hereinbefore set forth. That there never was any promise by the said Emma Gertrude Sullivan or understanding between her and the said J. J. Sullivan in reference to the said property or in reference to the said instrument in the form of deed, except as hereinbefore set forth."

Finding VII:

"Said instrument in form of deed of gift made and signed by said J. J. Sullivan and handed to said A. F. St. Sure, as aforesaid, was not in fact delivered to A. F. St. Sure, and did not in fact create a trust in favor of the children of said J. J. Sullivan or any of them. The last-mentioned instrument was not intended by said J. J. Sullivan, to be a deed creating a trust for the benefit of any of his children or any one."

Finding II is a direct and positive finding against both the validity of the escrow and the alleged oral promise, upon which plaintiffs rely to establish a trust. It unequivocally holds that the instrument in form a deed absolute was intended to take effect as a conveyance upon the grantor's death, and not before, and was in effect testamentary; further, that the oral promise sought to be established was not made.

Finding V is somewhat confusing. The main thought running through it would seem to be that the father's faith in the daughter's devotion to the best interest of the family persuaded him that she would carry out any wish he might express and sacredly comply with any request he might make. As admittedly she had been the "homemaker" in the past, he believed that she would continue to stand in loco parentis. The finding seems to be constructed on the theory that it was the father's desire that the home should be maintained under proper supervision, and that his daughter Emma was a proper member of the family to intrust with this duty. The statement of fact that the father delivered the deed to A. F. St. Sure upon the understanding and agreement that the daughter would "hold said property and maintain the family home or make other use or disposition of the property for the benefit of herself and the other children" is far from a direction or request that one or all of said children might compel her to make a conveyance to them or compel a sale or partition of the property. If it be conceded that a trust was created by the recitals of finding V, it undoubtedly carried with it the duty of providing a home for herself and the other children. It must be remembered that the time the deed of 1904 was executed there was a minor son, William, under 14 years of age, and a minor daughter, Grace. It was doubtless the anxiety of the father that his minor children at least should not become homeless, and in the event, perhaps, that the stern hand of adversity should lay hold on any one of his children there still would be a shelter for even the wayward, presided over by one who had earned the right to stand in his place. No one can carefully read the record of this case without feeling such a thought pressing upon him. It is not unlikely that such a conviction, produced from a consideration of the entire family history, developed into a concrete fact in the court's mind as firmly fixed as though witnesses had given testimony to the oral agreements found to have been made, but to which in reality no witness directly testified. But, whatever may be said of the finding, it does not conflict with either II or VII in the respect that no oral promise such as is claimed and such as was necessary to create a trust was made. If from the words of said finding a trust could be evolved, it would not be the trust which plaintiffs seek here to establish. The facts found or recitals made are too vague to support any kind of a trust. But as a matter of fact the court did not intimate that a trust has been created by the acts therein related.

Ambiguity, uncertainty, and inaccuracies must be expected to occur in findings as well as in pleadings, and if by the application of the rules of construction they are cured by other findings or rendered immaterial for any reason, the court is not at liberty, for academic reasons merely, to set aside a judgment supported in other respects by the record.

Finding VII, like finding II, is specific and clear on the issue of a trust and again finds the facts to be against it. It also adheres to finding II on the issue that no valid escrow was made. The latter portion of finding V, it will be noted, uses the word "handed" instead of the word "delivery." The distinction, if any, is not important here.

We think that the court's finding against the trust is amply supported by the record. Because of the accusatory nature of the action, the domestic relations of the family are laid bare. It is regrettable that the entire subject may not be dismissed with the above summary statement. It is impossible to state the facts without entering the domestic circle.

Thomas B. Sullivan was the first child and Emma Gertrude the second of the marriage of John J. and Elizabeth M. Sullivan. In 1904 Thomas was 37 and Emma 34 years of age. Thomas received a collegiate education and later became a licensed attorney, but was then engaged as a journalist at a very remunerative salary. His duties called him from the family domicile, and he called at home every evening except on one or two evenings at the close of each week. He was married December 19, 1905. Emma was a graduate of a state normal school and had been engaged in teaching in the city schools of San Francisco for a number of years. Elizabeth F. later became a teacher. William was a youth and Grace E. a young lady of tender years. The others were as already described. John J. Sullivan, the father, was then about 60 years of age. He had been an active man in business affairs. He was evidently a man of positive and determined character and was deeply interested in the education and welfare of his children and took commendable pride in their success.

Thomas B. Sullivan, upon whose advice this action was doubtless commenced, related at great length the family history from a time prior to April, 1904, to the date of his father's death. He went minutely and with much elaboration into family discord. Only a few important features will be adverted to. It appears from his testimony that shortly after the mother's death and the action to vest title to the homestead in the father, which was met with opposition on the part of certain of the children, the father stated to him his desire to dispose of his property at that time so "that none of his children would be in a position to rob any of the others upon his death." In so speaking he made reference to said sons. His desire was to retain possession of the property during his lifetime and to have it distributed to all of his children upon his death. Thomas B. Sullivan urged his father not to leave any of his property to said three sons John, James, and Harry, as they had been wayward and that he considered them to be unworthy sons. The father remarked, according to the testimony of plaintiff Thomas B. Sullivan, that these sons would develop into decent men, and he wished upon his going "to have them all receive share and share alike as his children." Just prior to this incident, however, said three sons had conspired to defeat the father's action to divest the homestead, and were then outcasts from the home and forbidden to return. The father had bitterly denounced their plot as an attempt to "put him out in the street," "to take the roof from over his head," etc. He had expelled them from the home as being practically beyond reformation, and both Thomas and himself had caused their arrest upon numerous occasions. From a period of several years prior to 1904 their conduct had been such as to cause the father much annoyance and trouble. One of them at least had been involved in very serious trouble. After the homestead incident none of these sons seemed to have been received at home by the father except, perhaps, James in his last illness. One never again returned.

At the meeting arranged by Thomas at A. F. St. Sure's office the father suggested that the deed be made in Thomas' name. Thomas declined to accept it and suggested Emma as the proper person. The father rather insisted that Thomas accept it, as did also A. F. St. Sure, the attorney who prepared the instruments. The latter had never met Emma in the transactions and had no personal acquaintance with her. A. F. St. Sure, so Thomas testified, "begged me to trust myself rather than my sister." Thomas stated that Emma was a deeply religious woman; had been the "mainstay" of the household; the "woman of the family" after the mother's death, and did not, so far as he knew from her, intend to marry, and as a matter of sentiment he preferred to have the deed made in her name for the use and benefit of all of the children, etc. This arrangement, it is claimed, was agreed to between the father and Thomas at the law offices of A. F. St. Sure. Emma, it is claimed, was consulted and consented to hold it in trust for all of said children. This is positively denied by her. That she was not present is admitted. The deed, written instructions, and will were accordingly prepared and delivered to A. F. St. Sure.

Thomas' version of the execution of the will is that it was brought about by a discussion of a possible effort on the part of said three sons to disturb the disposition thus made of the property. Judge St. Sure remarked: "This [speaking of the will] will be a double security and will be for the same purpose." Judge St. Sure had no definite recollection as to why the will was made. He surmised that it was to carry the household effects. Thomas stated that the father said in the discussion touching the will he had just executed and by which he gave everything he possessed to Emma that "he would not cut them (the three sons) off from whatever he possessed because of their waywardness"; that "they were entitled to and should receive their share alike with the others, as they would grow into good men and reform."

Thomas and Emma were friendly until October 24, 1908. Both had contributed liberally to the support and education of the younger children. At one time Thomas had given each of his sisters $1,000, which they invested to their profit. Emma, of rather delicate health, was always at home. She was the "mainstay" of the family, and had Thomas' full co-operation until a quarrel occurred which involved the entire family. On this day Thomas, as he contends, in the presence of the father and other members of the family, charged Emma with having set into action a system of "persecution" and "oppression" against all the members of the family. He claims to have protested to the father that she was insidiously poisoning his mind against the rest of his children, and that she had become the bearer of false and evil tales to him against the other members of the family. This is denied by Emma, who asserts that the trouble arose over the fact that she was detained at the schoolroom until quite late one afternoon without knowledge that Thomas and his wife were to be at the father's home for dinner. Thomas became highly offended at her tardiness and claimed that it was intentional and was meant as an affront to his wife. From this event dates the development of Thomas' open hostility to his sister Emma. He did not again speak to her until she visited him six years thereafter at his office in reference to an important family matter. They were never again friendly. Thomas held several meetings with his brother William and two sisters present following October 24, 1908, none of whom had definite prior knowledge of the making of the deed of 1904, and informed them that Emma did not intend to keep a promise she had made to convey to each of them a share of said property upon their father's death. He was absolutely convinced, and so were all the others, from thence on and without any definite statement from Emma on the subject, that she did not intend to comply with her promise. With this conviction in his mind, he failed to mention to the father his distrust of Emma or that she had ever made a promise of any kind to be kept. None of the other children spoke to the father on this important subject.

The testimony of Emma is that she had no knowledge of the execution of the deed dated June 20, 1904, until two days thereafter. She was not present when it was made. The father informed her of it when the two were together in the library. He also reminded her that she could well remember the date, as it was executed on his birthday. Being so advised by the father, she consulted with Thomas about the deed at his office. No mention was made to her of a promise of any kind by either the father or Thomas or any one else.

The father gave to Emma his reasons for giving her the property. Her health was a matter of concern to him and her Christian character deeply impressed him. The record contains evidence showing that she had been dutiful, constant, and affectionate. He had never once lost faith in her. While others had been estranged more or less from him and did not always speak with him because of some administered rebuke or disagreement, Emma was always kind and considerate. If away from home on a short vacation she corresponded with him and expressed great concern for his comfort. A number of her letters appear in the record. A deed of the family domicile cannot, under the circumstances of the family conditions, as related by Emma and her sister Grace, be said to be unreasonable or unnatural. Incidentally it may be related that on the day of the trial the mortgage debt on said property amounted to $7,190. The father unquestionably had abiding confidence in the ability and inclination of the daughter to assume the place of mother. It was the belief of the father, and also of Thomas, that Emma would remain single. Those of the family not married would, as existing conditions indicated, be most likely to marry. The one daughter made the sacrifice and the father gratefully referred to her many sacrifices in a conversation with Grace. The boys, ordinarily, should be able to care for themselves.

Disagreements are most likely to arise in enforcing family discipline. It is a duty, however, that must fall upon some one when the mother is removed. Here it fell upon the eldest daughter.

If it was the intention of John J. Sullivan that title in said property should become vested in all of his children upon his death, his method in devising a plan is not easy to understand. According to Thomas B. Sullivan, the father was anxious that great care be exercised to the end that no child could be robbed by another, and yet the very thing that would have made each child secure in his or her rights was the act that was omitted. Why a trust in parol should have been decided on, if upon the grantor's death the property described in the deed was to be immediately conveyed by the grantee named therein as a trustee, is not altogether understandable. It was the selection of a circuitous and uncertain course as against a direct and certain course. There was no right the trustee could have preserved; no purpose he could have served. The sure, simple method by which fraud or imposition could have been avoided would have been to execute a deed making all the children grantees. Such a deed, delivered as an escrow, would have met the situation perfectly. This, however, would have permitted a sale and the breaking up of the home with two minor children to care for. The very thing certain members of the family had attempted in the lifetime of John J. Sullivan would have been accomplished upon his death with necessities just as pressing. If a trust, why a will? These were some of the questions that doubtless addressed themselves to the consideration of the trial court. The efforts made by John J.

Sullivan to recover the possession of the deed from St. Sure, the will of 1912, the subsequent deed, and, in short, all acts and declarations affecting the property, its management and control by John J. Sullivan, and his statements, made in the presence of third persons, concerning it, were pertinent to the issue of trust relations and were properly before the trial court.

Judge A. F. St. Sure, at whose office the instruments of 1904 were drawn and with whom they were deposited, was called as a witness. A short quotation from his testimony on cross-examination will serve to illustrate the danger of relying upon memory after the passing of many years to establish a trust which must stand or fall accordingly, as meaning, shadings, and qualifications are given to words, phrases, and expressions:

"Q. It was not definitely stated what disposition he was to make? A. Well, not that I remember, not that I remember.

"Q. At the second meeting the father came, did he? A. Yes.

"Q. Did the father suggest to you that he wanted to make a deed? A. That I don't remember.

"Q. Did you suggest to him that he should make a deed? A. I don't remember now. My recollection is I did not. I was opposed to make any such disposition of the property.

"Q. Your recollection is that you disapproved of this method of disposing of the property? A. Yes.

"Q. Do you remember what you said when you said you were opposed to this method of disposing of the property? A. No; I do not.

"Q. But you do remember that you were opposed to this method of disposing of the property? A. Yes.

"Q. Do you remember whether Tom or his father said to you that they wanted to make a deed to Emma in trust to convey to the children? A. I could not remember whether those words were used. I could not.

"Q. But you know now that in 1904 a trust to convey was void? A. If that is the law, I had nothing of that kind in my mind at that time.

"Q. You don't remember whether word 'trust' was used, do you? A. I don't.

"Q. Do you remember whether the father stated at that time that whoever was the grantee of this deed should take it upon a promise to do something with it? A. I don't.

"Q. Do you remember the word 'promise'? A. I do not.

"Q. Do you remember any more than that it was for the benefit of the whole family? A. For the benefit of all of the children, that she was the homemaker and would see that all of them got their share of it—words to that effect. That was the general thought.

"Q. That she was the homemaker? A. That she was the homemaker and they could trust her; that he could trust her; that he wanted all his children to share in this property, and if he deeded it to her that she would see that they all had their share of the property.

"Q. Do you remember that he said he could trust her to do the right thing? A. Oh, he may have said that.

"Q. Well, don't you remember he said that? A. He may have. I don't remember."

The testimony of plaintiffs William B. Sullivan and Mrs. Elizabeth Kelly is also weakened by the same infirmities of uncertainty and indefiniteness as to what was really said in important conversations attempted by them to be reproduced. Thomas and Emma were the principal witnesses in the case. Both testified at great length. Mrs. Grace E. MacMonnies stands with Emma and corroborates her in all material respects as to the relations that existed between Emma and the father and also Emma's relations to other members of the family. James, the youngest child, and Mrs. Kelly, plaintiffs, gave testimony in support of their cause. The situation of the family, the aim and purpose of the father as far as disclosed by the evidence, his relations with other members of the family, as shown by the record evidence and many other matters came to the attention of the trial court for its consideration. It was its duty to weigh the evidence and pass upon the credibility of the witnesses, accepting a part of the testimony of a witness and rejecting other parts as he might be convinced of their truth or falsity. After so doing he found for defendant.

We have made a careful examination of the voluminous record and are fully convinced that the finding against the oral promise alleged to have been made by Emma Gertrude Sullivan to make conveyances of the property in dispute to all the children of John J. Sullivan immediately upon his death finds substantial support in the record. This determination controls the judgment and findings, and all other issues become immaterial. Plaintiffs concede that the deed dated June 20, 1904, constitutes a valid escrow. If, therefore, the trust is not established, it matters not to plaintiffs whether they are concluded by said deed or by the deeds dated May 2, 1907, or by the "all persons" action, or by either of said wills or by the deed executed and delivered May 19, 1913.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(51 Cal. App. 202)

Ex parte BRAUN. (Cr. 749.)

(District Court of Appeal, Second District, Division 2, California. Jan. 28, 1921.)

1. Chattel mortgages 🔑283—Plaintiff in foreclosure held estopped to claim right to further foreclosure.

Plaintiff in action to foreclose a chattel mortgage is estopped to claim the right to a further foreclosure sale, while a deficiency judgment remains a subsisting adjudication of the rights of the parties.

2. Judgment 🔑470—All intendments indulged, in support of judgments of superior courts.

It is an elementary rule that all intendments are indulged in support of judgments of courts of superior jurisdiction, such judgments importing absolute verity.

3. Chattel mortgages 🔑283, 287—No deficiency judgment while property partly unsold; deficiency judgment conclusive that mortgage security exhausted.

Property subject to chattel mortgage is the primary fund out of which the debt is to be paid, and so long as any part of the property remains unsold there can be no deficiency judgment, so that a deficiency judgment is an adjudication that prior to its entry the mortgage security had been wholly exhausted.

Application by J. N. Braun for writ of habeas corpus prayed to be directed to the superior court of San Diego county to secure release of petitioner from custody on an order to show cause for contempt. Petitioner discharged.

Frank C. Dunham, of Pasadena, for petitioner.

E. M. Parker, of San Diego, for respondent.

CRAIG, J. The material facts in this proceeding are as follows: An action was begun in the superior court of San Diego county entitled The First National Bank of San Diego, a Corporation, Plaintiff, v. J. N. Braun and Mrs. M. E. Braun, Defendants, to foreclose a certain chattel mortgage. After the necessary steps had been taken, a decree of foreclosure and order of sale were duly made and entered. A commissioner was appointed to make the sale, which was regularly held, and the commissioner made his report showing that the amount realized therefrom was $325. A deficiency judgment was then entered in the ordinary form for $492.79, the amount remaining due under the decree. Thereafter plaintiff made affidavit that the defendant, J. N. Braun, had certain of the articles covered by the chattel mortgage in his possession, and that he refused to deliver them to the commissioner, and asked that an order to show cause be made directing the defendant, J. N. Braun, to produce said articles before the superior court of the county of San Diego. The order was issued as prayed for, the hearing of which, after continuances from time to time, was finally set for the 11th day of October, 1920. Defendant did not appear; whereupon, on application of the plaintiff, an order was made by the said superior court requiring the defendant, J. N. Braun, to appear in said court and show cause why he should not be punished for contempt for failure to respond to the citation. J. N. Braun is a resident of Los Angeles county, and was arrested in Los Angeles county under a bench warrant in said contempt proceeding.

As authority to sustain the jurisdiction of the superior court of San Diego county to take petitioner from the county in which he resides to another county, under the citation as herein recited, section 187 of the Code of Civil Procedure is relied upon, which reads:

> "When jurisdiction is, by the Constitution or this Code, * * * conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

By its own terms section 187 of the Code of Civil Procedure negatives the proposition that it can be made to apply in this case. A course of proceeding is specifically pointed out by the Code. Our Codes afford ample remedy for the creditor who holds a mortgage upon personal property as security for his debt. After default he may foreclose the mortgagor's equity of redemption by sale of the property as of a pledge (Civ. Code, § 2967), or he may foreclose the mortgage under section 726, Code of Civil Procedure. If the property is in the possession of the mortgagor, it may be recovered by the mortgagee for the purposes of foreclosure and sale through a suit in replevin. In this case the mortgagee began foreclosure of the contract under section 726 of the Code of Civil Procedure. A judgment fixing the amount of the debt, with interest and costs, and directing that the same be paid by the mortgagor, and that he make good any deficiency which might be found to exist after the sale, was rendered. Such a judgment is final and complete, because it leaves nothing to be adjudicated. Only ministerial acts remain to be done. Morris v. Morange, 38 N. Y. 172; Baker v. Lehman, Wright (Ohio) 522. A sale took place, the commissioner made his report, and a deficiency judgment was entered, which has not been vacated and precludes the claim now that the mortgaged property was not sold. The judgment being final, the defendant in the action became a judgment debtor. The jurisdiction of the court to enter a judgment in personam in the foreclosure of a mortgage is statutory, and no authority is given by the statute for the holding a sale by the commissioner after the entry of a deficiency judgment. Upon its entry the mortgagee acquired a right to proceed against the mortgagor personally. Again, the Code is definite as to the remedy, and allows execution to issue against the property, generally, of the judgment debtor. It further provides a means, through supplemental proceedings, of discovering property whose location may be unknown. No opportunity is afforded to invoke the aid of section 187, Code of Civil Procedure.

It is contended that proceedings supplemental to execution could not be resorted to until the resources of the mortgage are first exhausted. This is a mistake. Immediately upon the entry of the deficiency judgment a right accrued to have execution issued, and upon this being returned unsatisfied, in whole or in part, to proceed under section 714 of the Code of Civil Procedure. However, this section expressly provides:

> "But no judgment debtor must be required to attend before a judge or referee out of the county in which he resides, or in which he has a place of business."

The petitioner is therefore entitled to be discharged, and it is so ordered.

FINLAYSON, P. J. I concur in the judgment and in the opinion of Mr. Justice CRAIG, but desire to state somewhat more fully the reason why, in my opinion, the court was without jurisdiction in the proceeding wherein it was sought to bring petitioner from Los Angeles county, the county of his residence and place of business, to submit himself for examination before the superior court of San Diego county.

Respondent expressly disclaims the idea that the proceeding in question is that which is provided by section 714 et seq. of the Code of Civil Procedure. Indeed, if the proceeding wherein petitioner was cited to appear before the superior court for San Diego county were a supplementary proceeding for the examination of a judgment debtor under section 714 et seq., there could be no question as to the invalidity of the order requiring his appearance in San Diego. Section 714 expressly provides that—

> "No judgment debtor must be required to attend before a judge or referee out of the county in which he resides, or in which he has a place of business."

Respondent's contention, as I understand it, is substantially this: After the entry of the deficiency judgment against petitioner, who was one of the two judgment debtors under the foreclosure decree in the suit to foreclose the chattel mortgage, the commissioner appointed by that decree to sell the mortgaged property discovered that certain of the properties covered by the chattel mortgage, and which had not been sold by him at the foreclosure sale, were in petitioner's possession or under his control. It was proper, therefore, so it is argued, to compel petitioner to disclose the whereabouts of those properties; and, since no course of procedure is specifically pointed out by the Code or by statute whereby the judgment debtor in a decree foreclosing a chattel mortgage can be compelled to disclose the whereabouts of the mortgaged property in order that it might be sold at foreclosure sale, the court, under section 187 of the Code of Civil Procedure, was free to adopt any suitable mode of proceeding, such, for example, as that which was adopted by it in the present instance. This argument to support the proceeding in question rests upon the assumption that, notwithstanding the entry of the deficiency judgment, the plaintiff in the foreclosure action had the right, nevertheless, to a further foreclosure sale; that is, the right to a foreclosure sale of such of the mortgaged property as had not previously been sold by the commissioner at the foreclosure sale conducted by him, because it had not been discovered by him in time for that sale.

[1] In my opinion, the plaintiff in that action is estopped to claim the right to such further foreclosure sale while the deficiency judgment remains a subsisting adjudication of the rights of the respective parties.

[2] The rule is elementary that all intendments are indulged in support of judgments of courts of superior jurisdiction. Their judgments import absolute verity.

[3] It also is the settled law of this state that the mortgaged property is the primary fund out of which the debt is to be paid, and that so long as any part of that property remains unsold there can be no deficiency judgment. Woodward v. Brown, 119 Cal. 283, 293, 51 Pac. 2, 542, 63 Am. St. Rep. 108. In effect, therefore, the deficiency judgment is a solemn adjudication that, prior to its entry, the mortgage security had been wholly exhausted. To hold otherwise would countenance a collateral attack upon a judgment that, until set aside, is a final and conclusive determination of all the questions that its entry necessarily implies. For these reasons I am of the opinion that, until the deficiency judgment shall have been vacated (if it may be), the parties to the action are estopped to claim that there is any mortgaged property that was not sold at the foreclosure sale, and that therefore the commissioner appointed by the court in the foreclosure decree, for want of any subject-matter of a further foreclosure sale, is without authority to make such sale, and the superior court is without jurisdiction to aid him in any such attempt.

I concur: WORKS, J.

(51 Cal. App. 163)

BRUNO v. SEVERINI et al. (Civ. 2239.)

(District Court of Appeal, Third District, California. Jan. 26, 1921.)

1. Trial 🔑395(1)—Findings held sufficiently responsive to defendants' cross-demand.

Findings that defendants were indebted to plaintiff in specified amounts, and that "as an offset to the above items of indebtedness this court further finds that the plaintiff above named is indebted to the defendants above named in the sum of," specifying items of indebtedness, *held* responsive to defendants' cross-demand, as against contention that the court failed to find thereon.

2. Appeal and error 🔑931(4) — Board and lodging presumed, in absence of finding, included in compensation for services rendered by plaintiff.

In action for services rendered by plaintiff and his wife to defendants, in which defendants cross-complained for board and lodging furnished to plaintiff and wife, it will be assumed on appeal, in the absence of a finding as to plaintiff's liability for board and lodging, that the compensation which the court found plaintiff and wife were entitled to for the services performed by them included their board and lodging.

3. Animals 🔑27 — Evidence of counterclaim for feed furnished hired horses held insufficient.

In an action for use of team, in which defendant counterclaimed for feed furnished team, testimony that he fed team "while it was and was not working," and that the reasonable value of the feed furnished while horses were not working was a specified amount per day, without specifying the number of days the team was not working, *held* insufficient on which to base finding as to amount due for feed.

4. Appeal and error 🔑1071(6) — Failure to find on cross-demand held not ground for reversal.

Appellate court will not reverse judgment for plaintiff for lower court's failure to find on some of the claims involved in defendants' cross-demand, where the evidence was such that no definite amount could have been found in favor of defendants on such claims, where there was ample evidence to support finding as to defendants' indebtedness to plaintiff.

5. Master and servant 🔑80(10)—Evidence of service insufficient.

In action for services rendered, evidence *held* insufficient to support the finding as to the number of days worked by the plaintiff.

6. Appeal and error 🔑1171(2) — Court will not affirm $516 judgment, $78 too high, on theory of de minimis non curat lex.

In action for services, where the evidence as to the number of days of work and the rate of compensation was insufficient to sustain findings, on which court rendered judgment for $516, and showed that such amount was $78 more than plaintiff was entitled to, appellate court will not affirm the judgment under the doctrine of de minimis non curat lex.

7. Evidence 🔑383(7)—Record evidence as to number of days worked governs over testimony from memory.

Where plaintiff testified from memory as to number of days that he worked for defendants, but stated on cross-examination that the only way in which he could tell how many days he worked was by a record kept by his wife, the wife's testimony as to the number of days based on such record governs over plaintiff's testimony.

8. Appeal and error 🔑995 — Court will not consider weight of testimony.

The appellate court will not consider the weight to be accorded the testimony of a witness; such question being exclusively for the court or for the jury, according to the mode of the trial.

9. Appeal and error 🔑1140(4) — Defendants given benefit of doubt as to amount that should be remitted by plaintiff.

In an action for services, where the proof showed that judgment had been based on plaintiff working 24 more days than he had in fact worked, without showing whether during such 24 days he was to have been compensated according to one rate of compensation or according to another rate of compensation, the appellate court in affirming judgment on plaintiff's filing of remittitur will compute the excess amount at the highest rate of compensation, giving defendants the benefit of the doubt as to the rate of compensation in effect during such time.

10. Appeal and error 🔑1140(4) — Court should affirm judgment, subject to remittitur for amount in excess of sum shown by evidence to be due.

Appellate courts cannot make findings, but where there is absolutely no evidence to support a judgment in the full amount found, court of review, being satisfied that the judgment is supported by a sufficiently buttressed finding for a sum less than amount awarded by the judgment, should order judgment affirmed, on condition that the party in whose favor judgment has passed remit so much of the judgment in excess as shown by the evidence to be due.

11. Assignments 🔑137 — Testimony held to show assignment of wages.

In husband's action for services performed by wife of plaintiff for defendants, wife's testimony that "I authorized my husband to bring suit for the collection of the wages due me" *held* sufficient to show assignment to husband, entitling him to bring action therefor.

12. Appeal and error 🔑1078(4) — Questions not referred to in briefs presumed to have been abandoned.

Objections to rulings upon questions of evidence, not referred to in briefs, presumed to have been abandoned.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Francesco Bruno against Simone Fratelli Severini and others, individually and as copartners. Judgment for plaintiff, and defendants appeal. Affirmed, on condition of filing of remittitur; otherwise reversed and remanded for new trial.

J. E. Ebert, of Marysville (W. E. Davies, of Marysville, of counsel), for appellants.

H. W. Zagoren, of Sacramento, for respondent.

HART, J. The action is to recover the sum of $985.75, alleged in the complaint to be due plaintiff for labor performed, for the hire of a team of horses, and for a certain sum of money paid out by plaintiff for defendants for certain merchandise at the latter's instance and request, and for services as a cook performed for defendants by plaintiff's wife; the latter having for the purposes of collection assigned her claim for said services against defendants to plaintiff. The complaint is in three counts, and further pleads the several claims referred to as upon an express contract, and also for the alleged services performed in the form of a common count, upon a quantum meruit.

The answer specifically denies all the averments of the complaint, and, by way of a "counterclaim and cross-complaint," sets up a demand against plaintiff for the sum of $615.55, "for the balance of a book account for goods, wares, and merchandise sold and delivered by defendants to plaintiff, for board and feed furnished to horses of plaintiff, and for board and lodging furnished by defendants to and for the use and benefit of plaintiff, and for moneys paid out by defendants for plaintiff, at the special instance and request of plaintiff, between the ——— day of ———, 1916, and about the 1st day of February, 1919; that the last item in said account was incurred during the month of January, 1919."

The court found: (1) That plaintiff was employed by defendants for a period of 32 days at the rate of $2.50 per day; (2) that plaintiff was likewise employed for the period of 150 days at the rate of $3.25; (3) that defendants were indebted to plaintiff for use of "teams and horses" for 100 days at the rate of $1.25 per day, aggregating the sum of $125; (4) that defendants became indebted to plaintiff for goods, wares, and merchandise, bought by plaintiff for said defendants, in the sum of $23.50; (5) that defendants were indebted to the wife of plaintiff for services rendered and performed as a cook for a period of 6 months, at the rate of $50 per month, aggregating the sum of $300; (6) that said Adelaide Bruno, said wife of plaintiff, had assigned "all her right, title, and interest in and to said claim to the plaintiff above named and the plaintiff is now the owner and holder thereof"; (7) that "as an offset to the above items of indebtedness this court further finds that the plaintiff above named is indebted to the defendants above named in the sum of $75 for three tons of grapes, $3 for boxes, $1.75 for freight, $420 moneys received," totaling the sum of $499.75, which sum, the court further finds, should be and is "deducted from the amount due from the defendants to this plaintiff." Judgment was, as before stated, rendered and entered accordingly for the plaintiff in the sum of $516.25, from which judgment the defendants prosecute this appeal.

It will be noted that the court found that the total number of days on which the plaintiff rendered services for the defendants was 182, and it is contended that there is no evidence to support that finding. It is further claimed that there is no evidence which supports the finding that the plaintiff's wife assigned to him her claim against the defendants for services rendered by her as a cook. A third point is that the court failed to find on the cross-demand set up in the so-called cross-complaint. These three constitute all the points pressed in the briefs for a reversal.

[1-3] The point last stated may first be disposed of, and as to it we express the opinion that the findings whereby the court allowed a total deduction of $499.75 from the total amount found in a preceding finding to be due the plaintiff is responsive to the pleaded cross-demand. It will be noted that the court found that the plaintiff was indebted to the defendants for grapes, boxes, and freight in the total sum of $79.75, the balance of the $499.75 found to be due from plaintiff to defendants being for moneys paid by the latter to the former. The "cross-complaint," it will be observed, is in general language, so far as the claim thus made involves goods, wares, and merchandise furnished by defendants to plaintiff, and as to that general item of the cross-demand, the finding is sufficient, and, indeed, is more specific than is the purported cross-complaint itself. It is true that the cross-demand also includes "feed for horses and board and lodging furnished by defendants to and for the use and benefit of plaintiff"; but, in support of the judgment, it is to be assumed, as the findings naturally imply, that the compensation which the court found that plaintiff and his wife were entitled to for the services performed by them included their board and lodging. With respect to the feed with which defendants claim to have provided plaintiff's horses, it is to be observed that the testimony upon that proposition is so unsatisfactory that a definite finding could hardly be founded thereon. The only testimony directed to that question was that of Simone Severini, one of the defendants, and this is the testimony:

> "I fed Mr. Bruno's team all the time they were on my ranch, whether they worked or not, and on the 1st of November, 1919, he sold the team. The reasonable value of the feed furnished to the team while they were not

working is from 75 cents to $1 a day. Feed was very high."

[4] It is plainly manifest that the court could not have made a just or satisfactory finding on such testimony. It does not appear therefrom how much of the time or how many days the team "were not working," whether one or two days only or for a much longer period; but, without further considering in detail the point now under review, we state it to be our conclusion that, while the findings should have been more direct and specific upon some of the claims involved in the cross-demand, the evidence is such that no definite amount could have been found in favor of defendants for the feed alleged to have been furnished by them for plaintiff's horses, and therefore, since there is ample support for a finding that defendants are indebted to plaintiff in some amount, we do not feel that we would be justified in reversing the judgment for the reason now being considered.

[5] The point first stated above, viz. that there is no evidence to sustain the finding of the number of days during which the plaintiff rendered services for the defendants, is well taken. It will be noted that the court found that plaintiff "was employed by the above-named defendants for a period of 32 days at the rate of $2.50 per day, and for the period of 150 days at $3.25 per day." Thus the court, as pointed out above, found that the aggregate number of days during which the plaintiff performed labor for the defendants was 182. That there is ample evidence that the plaintiff rendered services for the defendants, for which the latter have not recompensed him, is a fact as to which the record furnishes no ground for controversy; but we have searched and researched the record in vain for any evidence, even the slightest, to support the finding that he so performed labor for the period of 182 days.

The plaintiff testified that he worked for the defendants 112 days with his team and 60 days without the team, which, it will be noted, total 172 days only; that he was to receive $6 per day when he worked with the team; and that, without the team, they would pay him for his labor the sum of $3 per day, the wage they were paying other employees for like services. At no time, in his testimony, did plaintiff say that he worked for defendants a greater number of days than the number last above mentioned. On cross-examination, however, he admitted that he could not from memory state how many days he worked for the defendants; that "the only way in which I can tell how many days I worked is through the book, in which my wife marked down one line when I worked with the team and a cross when I worked without the team." He could not remember how many days he worked in any one of the several months during which he was employed by the defendants.

The wife of plaintiff, called by the latter as a witness, testifying from the book to which the plaintiff referred in his testimony, stated that the latter worked a certain specified number of days in certain named months of the year 1918; said book having been admitted in evidence and marked as "Plaintiff's Exhibit A." The witness testified that all she knew as to the number of days plaintiff worked was from information given her by the latter; that when he told her from time to time of the days he worked she would note the fact in the book by marking opposite the respective months specified in the book a cross to indicate the days he worked with the team and a vertical line to indicate the days he worked without the team. The book shows that there were 100 days indicated by a cross and 58 days by a vertical line.

[6] Thus it will be observed that, if we accept the testimony of the plaintiff, given on his direct examination, that he worked 112 days with the team and 60 days without the team, we have 172 days only that he rendered services for the defendants, or 10 days less than the court found that he had so performed work; but, if the testimony of his wife is to be taken, then he worked 24 days less than as found by the court. In either case, obviously, the court's finding as to the number of days the plaintiff worked for the defendants is, as counsel for the latter maintain, without evidential support; and in either case the difference between the amount awarded and that to which the plaintiff is entitled, viewed in the light of the amount of the judgment, which includes the item of $300 for services as a cook performed by the plaintiff's wife, is substantial, and, therefore, the situation so presented is not one to which the doctrine de minimis non curat lex, may justly be applied. And this is so whether the number of days improperly included in the findings is to be reckoned among those days for which the court found that he was entitled to $2.50 per day only or those for which he was to be paid at the rate of $3.25. If the basis of the calculation is to be 10 days at $2.50 per day, then, obviously, the court awarded him $25 more than he was justly entitled to, and if on the basis of $3.25 per day, then he would receive by the judgment the sum of $32.50 more than he should have been awarded. If the testimony of the wife is to be accepted as to the number of days he worked, then, figuring his compensation at $2.50 per day he received $50 more than should have been awarded him, and at $3.25 per day, he was given by the judgment $78 in excess of the amount to which he was entitled. But, after a critical examination of the case as it is disclosed to us by the record, we have concluded that (as above stated), inasmuch as it appears very clear that both

the plaintiff and his wife rendered for the defendants services for which they received no compensation, the cause should not, because of the excessiveness of the amount awarded by the judgment, be remanded for a new trial, whereby the parties would be put to the expense necessarily incident thereto. We think, therefore, that a just disposition of this appeal may be made as follows: That, upon a remission by the plaintiff of the amount of the judgment, to be hereinafter specified, within 30 days after the filing of this opinion, the judgment, with the said amount deducted therefrom, will stand affirmed, but that, if plaintiff fails within the time above designated to remit the portion of the judgment so to be stated, the judgment will stand as reversed.

The only question now to be determined is how much of the amount awarded by the judgment ought, under the evidence, to be remitted by plaintiff and deducted therefrom. In determining this question it will be necessary to make a careful survey and analysis of the testimony. In the first place, we are constrained to observe that we have found no direct evidentiary reason for the distinction made in the findings for the wage rates for different days during which the plaintiff performed work for defendants—that is, that the plaintiff was entitled to $2.50 per day only for his services on certain days and $3.25 per day for certain other days. In other words, we are in the dark for a reason, if there was a substantial or any reason therefor, why the court should have found that the plaintiff's services were worth but $2.50 for a given number of days, while for another number of days his services were of the value of $3.25 per day. Neither in the evidence nor in the findings have we been able to find a ground or reason for the difference. It is shown by neither that there was any difference in the nature or character of the services rendered or any difference in the number of the hours of the working days. The difference was evidently not based upon the fact of the use and employment of plaintiff's team on the days for which he was allowed a wage rate of $3.25 per day, for the court, as seen, made specific allowance for the employment and use of the team in another finding, separate and distinct from the finding covering his own services and the compensation therefor; the allowance for the team being for 100 days at the rate of $1.25 per day. There is, however, some testimony from which the court could find that the reasonable value of the plaintiff's services was from $2.50 to $3 per day, the testimony being that the defendants paid some men $2.50 and others $3 per day for services rendered on their ranch, and it may be that, in view of this testimony, the finding of the court, upon the aggregate wage rate allowed the plaintiff, is not beyond what a straight allowance of $3 per day would have amounted to; but this proposition is not of such importance in the decision of this case as to require us to stop and throw ourselves into what might prove to be a maze of arithmetical figuring to clear it up. The question now is, as stated, upon what basis should there justly be a deduction from the judgment.

[7, 8] It will be noted that the plaintiff, on his direct examination, stated that he worked for the defendants 172 days, on 112 of which he also worked his team. In so testifying he made no attempt from his own memory to specify the days or even the month during which he so worked. On cross-examination, it is further to be noted, he stated that the "only way" in which he could tell how many days he worked was by means of the book kept by his wife for the purpose of preserving a record of the days he worked. It is evident from this admission that, when he stated on his direct examination that he worked 172 days, he was not relying upon his own independent and unaided memory as to the number of days he was employed, but upon his memory of what the said book showed was the number of days. His testimony upon this matter is obviously unsatisfactory, and, indeed, so indefinite as to render it a very frail foundation for a satisfactory finding in accordance with his general statement on direct as to how many days he worked for the defendants.

It is plain that, in considering plaintiff's testimony we are not dealing with the question of the weight to be accorded a witness' testimony, which is the exclusive function of the court or the jury, according to the mode of the trial, but a case where the face value of the testimony constitutes the full measure of its evidentiary force. In other words, the frank admission of the plaintiff that there was one way only in which he would be able to give the correct number of days he performed services for the defendants shows that upon its face his testimony, when given its full credit and weight, can go no further than to corroborate the testimony of his wife as to the number of days he actively rendered services for the defendants, and his wife's testimony was, as seen, based solely on the book in which she noted the number of days the plaintiff worked as the latter, from time to time, reported the number of days to her. Thus it is to be seen that, in the last analysis, we find that the only reliable testimony presented by the plaintiff as to the number of days the latter performed labor for the defendants was in the book referred to. This being so, the record of the extent of plaintiff's services as preserved in said book should have been taken by the trial court as the basis of its finding as to the number of days he performed labor for the defendants and so have found that the former rendered services for the latter for the period of 158 days.

It follows from this view and conclusion that the court by its findings allowed plaintiff credit for 24 days in excess of the number of days on which he was by the evidence shown to have actually worked for defendants. These findings, in their entirety, cannot, of course, be upheld.

[9] But there is still another proposition in connection with this matter which must be determined, to wit: Whether the excess number of days allowed the plaintiff by the judgment should be reckoned as among those days for which the court allowed plaintiff $2.50, or those days for which it was found that he was entitled to receive compensation at the rate of $3.25 per day. As stated, neither the evidence nor the findings reflect any light upon the question whether there was at times a difference in the character of the work or in the number of hours in the days put in performing the services. Thus necessarily, from such a situation, we are left in doubt upon the question of the wage rate which should be the basis of reckoning the amount that should be remitted by the plaintiff from the judgment for the 24 days during which the court erroneously found that plaintiff had performed labor for the defendants; but we think that the very fact that we are so in doubt should inure to the benefit of the defendants. In other words, we think the defendants should be given the benefit of the doubt thus arising, and that therefore the 24 days in excess of the number upon which the evidence shows that the plaintiff worked should be reckoned among those for which the court allowed plaintiff a wage rate of $3.25 per day, which would amount, in the aggregate, to the sum of $78. And this sum, we conclude, should be remitted by the plaintiff.

[10] It is to be understood, of course, that we are not here attempting to make a finding. This appellate courts cannot do. But, where it is made conclusively to appear that there is absolutely no evidence whatever in the record supporting a finding in the full amount found in a case in which a money judgment is entered, then such finding, to the extent that it authorizes judgment for a sum in excess of that which the evidence shows is actually due, is a nullity, and is to be treated as such and in such case a court of review, being satisfied that the judgment is supported by a sufficiently buttressed finding for a sum less than the amount awarded by the judgment, may and should, in the interest of justice, order the judgment affirmed on the condition that the party in whose favor such judgment has passed remit so much of the judgment debt as may be in excess of the sum which is actually shown by the evidence to be due. Such is the case here. If the court had found, as only the evidence warrants, that plaintiff was entitled to be credited for services for 158 days, we should affirm the judgment. Indeed, it would in that case be our duty to do so. Then why reverse the cause for a new trial when, without that expense, both the plaintiff and the defendants may receive their just rights, respectively, by the course which we here adopt? We can see no just reason for the adoption of any other course by this court.

[11] The third point made by the appellants that there is no evidence that the plaintiff's wife assigned to him her claim against the defendants for services as a cook is devoid of substantial merit. The only testimony as to the execution of the assignment was by the plaintiff's wife, and is as follows: "I authorized my husband to bring suit for the collection of the wages due me." This testimony was sufficient, we think, to justify the inference that she intended to and did assign her claim to the plaintiff for the purposes of collection. It has been held that a mere verbal or oral request by one party to his debtor that the latter shall pay money due the former to a third party is sufficient to constitute an equitable assignment of the debt, and that to constitute such an assignment no express words are necessary, if from the entire transaction it clearly appears that it was the intention of the parties to pass the title. Puterbaugh v. McCray, 25 Cal. App. 469, 471, 144 Pac. 149, and cases therein cited. "Assignments for such purposes (of collection) are of frequent occurrence, and the defendant in an action by an assignee of a claim against him is only concerned to know that the assignment is of such a character as to bind the assignor." Leitch v. Marx, 21 Cal. App. 208, 213, 131 Pac. 328, 330. That the assignor in this case will be bound by the assignment, and by the judgment establishing its validity, is a proposition clearly maintainable by the testimony that she turned the claim over to the plaintiff to sue in his own name for its enforcement.

[12] Some assignments as to certain rulings upon questions of evidence are set forth in the transcript, but the absence of reference thereto in the briefs raises the presumption that they have been abandoned.

In accordance with the views herein set forth, the following order or judgment is hereby rendered: That if the plaintiff, within 30 days from the filing of this opinion, remits in due and proper form the sum of $78 of the amount awarded him by the judgment, the said judgment shall stand as affirmed, but that, if the plaintiff fails or refuses within said time to remit said sum ($78) from said judgment, then the judgment appealed from will stand as reversed, and the cause remanded for a new trial.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

(51 Cal. App. 182)

PEOPLE v. DAD. (Cr. 537.)

(District Court of Appeal, Third District, California. Jan. 26, 1921.)

1. Witnesses 🔑246(1) — Court's examination of witness held not improper.

Court's examination of witness in murder prosecution, in effort to elicit material facts affecting the credibility of the leading witness for the people, *held* not improper.

2. Criminal law 🔑1144(10)—Trial court's attitude in examining witness presumed to have been not offensive.

It will be assumed on appeal that there was nothing offensive in the manner of the lower court in examining one of the witnesses, and that his attitude was such as to inspire the belief that he simply sought the truth.

3. Criminal law 🔑656(3) — Court's remark while trying to confine witness to question held not error.

Trial court's statement to witness while trying to confine witness to questions propounded to him, "Well, cut that out," *held* not error, since the remark could not have been understood to mean anything except "Strike that out."

4. Criminal law 🔑696(2)—Court may strike irresponsive answers without waiting for motion of prosecuting attorney.

The trial judge has a right to try to confine a witness to the questions propounded to him, and is not required to await the motion of the district attorney to have the irresponsive answers stricken out.

5. Criminal law 🔑1166½(12) — Court's remark to defendant's counsel held not ground for reversal.

Court's remark to defendant's attorney after ruling on objection to evidence, "Please don't make any remarks afterwards. Let the court's ruling stand. Of course, you are an old practitioner, and it is second nature, perhaps. However, please leave out the after remarks"—*held* not ground for reversal, being a comparatively trifling circumstance.

6. Criminal law 🔑656(9)—Judge should not throw weight of judicial position either for or against defendant.

A judge should never throw the weight of his judicial position into a case, either for or against the defendant, unless satisfied that the evidence is insufficient to justify any conviction, in which case it is his duty so to advise the jury.

7. Criminal law 🔑1170(4)—Exclusion of answer harmless in view of other answers of witness as to same facts.

The exclusion of answer to question, if error, was harmless, where the answer was fully covered by other answers of the witness which were not stricken out.

8. Criminal law 🔑364(6)—Declarations of defendant admissible as res gestæ must be so related to main event as to appear spontaneous.

Declarations of the defendant, to be shown as part of the res gestæ, must have been so closely connected with the main event as to appear wholly unpremeditated and spontaneous.

9. Criminal law 🔑364(6)—Declaration of defendant held not admissible as part of res gestæ.

In a homicide prosecution, testimony as to defendant's statement after the killing that he had sought to protect himself *held* not admissible as part of the res gestæ, where he had had ample time in which to contemplate a possible defense after the killing.

10. Criminal law 🔑1170(2)—Exclusion of answer held harmless in view of other answers as to same facts.

Exclusion of answer to question, if error, was harmless, where the ground embraced in question was sufficiently covered in other answers.

11. Homicide 🔑339—Exclusion of testimony as to unimportant matter held harmless.

In homicide prosecution, court's refusal to permit witness, who had testified that he was about to drink a cup of coffee and was in the act of stirring it when the first shot was fired, to answer question as to "how long did that continue while the shooting was going on," held harmless; the matter being insufficient to justify serious consideration.

12. Homicide 🔑191—Testimony that deceased had robbed and violently assaulted defendant admissible on issue of self-defense.

In homicide prosecution, defended on the ground of self-defense, defendant's testimony that the deceased had on a prior occasion violently assaulted him and robbed him of a large sum of money *held* admissible as a circumstance tending to justify a belief that his life was in danger at the time of the homicide.

13. Witnesses 🔑277(2) — Cross-examination of defendant as to whether deceased had been convicted of robbery of defendant held improper.

In homicide prosecution, where defendant had testified that deceased had on a prior occasion violently assaulted and had robbed him, cross-examination as to whether the deceased was ever convicted on the charge of robbing or attempting to rob defendant *held* improper.

14. Criminal law 🔑1170½(5)—Cross-examination of defendant held harmless in view of other testimony.

In homicide prosecution, where defendant had testified that deceased had assaulted and robbed him, the admission of testimony that deceased had never been convicted on the charge of robbery *held* harmless, in view of testimony by defendant's witnesses that there had been a mistrial and that the parties had been present to attend the second trial of the case.

15. Criminal law 🔑1170½(5)—Cross-examination as to how many times defendant's witness had visited defendant's attorney held not prejudicial.

Cross-examination of a witness for the defense as to the number of times he had visited the office of one of defendant's lawyers *held* not prejudicial to defendant.

16. Criminal law 🔑1171(1)—Prosecuting attorney's argument as to counsel's participation in other prosecution held harmless.

Prosecuting attorney's reference in argument to jury as to defendant's counsel's participation in the prosecution of another trial *held* harmless.

17. Criminal law 🔑824(3)—Homicide 🔑309 (5)—Failure to instruct on manslaughter held not error.

In homicide prosecution, failure to instruct on the subject of manslaughter *held* not error, where there was no request for such instruction, and where the killing, under the evidence, was either murder or justifiable homicide.

Appeal from Superior Court, Sacramento County; Malcolm E. Glenn, Judge.

Jim Dad, true name Jam Dad, was convicted of murder in the first degree, and from judgment of conviction and from an order denying new trial he appeals. Affirmed.

Will J. Carraghar, of Sacramento, F. J. Burke, of Petaluma, and W. H. Carlin, of Marysville, for appellant.

U. S. Webb, Atty. Gen., J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. From the judgment following the verdict of conviction of murder in the first degree, with penalty fixed at life imprisonment, and from the order denying his motion for a new trial, defendant brings this appeal. It is not disputed that at the time and place alleged in the indictment defendant shot to death two of his countrymen, including one Said Achmed, whose murder was charged in the present proceeding. There can be no doubt that the evidence is sufficient to support the verdict, and that the finding of the jury represents a fair and reasonable inference from the facts and circumstances that are disclosed by the record. Indeed, with commendable frankness counsel for appellant admit that—

> "The evidence upon the vital points involved was necessarily conflicting, and there isn't a particle of use of arguing the question as to whether or not the verdict is sustained by the evidence."

Whether the evidence "was necessarily conflicting" we are not prepared to say, but we agree with the statement that it was and is sufficient to sustain the verdict, and since that admission has been made, we are relieved from the duty or necessity of reciting the details of the gruesome affair as it was portrayed by the various witnesses. We proceed, therefore, immediately to the consideration of the alleged errors committed by the trial court.

The first of these in the order of their presentation relates to the conduct of the trial judge in questioning certain witnesses and making certain remarks during the progress of the trial. The general criticism is made that he interrogated the witnesses "from the standpoint of the prosecution," and as to that appellant complains "that at no time did the learned judge of the court take a witness from us and carry on a cross-examination or any examination." However, this may be regarded as a just compliment to the leading counsel of appellant for the thoroughness with which he conducted the defense. As we might suspect from his well-known ability and long and successful experience at the bar, he seems to have needed no aid in the examination of the witnesses, and his sufficiency for the task was no doubt recognized by the trial judge.

[1] The attitude that should be maintained throughout the trial by the presiding judge does not admit of doubt, and it has been so frequently the subject of comment by our appellate courts that further suggestion is not called for. In the light of the established principles by which he should be guided, we cannot say, after a careful examination of the record, that appellant has any just ground for complaint in consequence of the questions addressed to the witnesses by the trial judge. We cannot hold that he had any other purpose than to elicit a statement of material facts, or that he thereby invaded any right of the defendant or prejudiced him in the eyes of the jury. Special objection is made to the following questions and answers:

> "The Court: Well, let me ask you: What he is asking you is whether she went through the door into the kitchen, or just went to the door. A. Your honor, she's going over there for the door, and I can't say whether she's gone inside or—
>
> "The Court: Well, what did you see her do? A. Well, she's going over there for the door.
>
> "The Court: Well, where was the last point you saw her? A. In door. She's open door.
>
> "Q. You saw her open the door? A. Yes, sir.
>
> "Q. Then, you didn't see her going inside? A. Yes, sir, your honor, she's going in.
>
> "Q. I am not asking what she is doing; did you see her go in? A. When she's going in, I can't see; she's back there.
>
> "Q. Well, where is the last point you saw her? A. Open door; she's going this way (indicating).
>
> "Q. Did you see her go into the kitchen? A. Yes, sir; I see she's going in kitchen.
>
> "Q. Well, did you see her go into the kitchen? A. Yes; she's walking.
>
> "Q. Where was the last point; did she open the door? A. She opened door, yes, sir; she never come back.
>
> "Q. Well did you see her go beyond that, yourself? A. Your honor, when door shut, I can't see.
>
> "Q. Well, she went in and closed the door? A. Yes, sir; that's right, what I think.
>
> "Q. Well, what you saw; you saw her open the door? A. Yes, sir.
>
> "Q. Go into the kitchen? A. Yes, sir.

"Q. And close the door behind her? A. Well, I never notice whether door close or not, but, at same time, the trouble start.

"Q. Well, how much did you see? A. Well, I see she's going in kitchen.

"Q. You saw her go in the kitchen? A. Yes, sir.

"Q. Open the door? A. Yes, sir.

"Q. Well, then, did you see the door slam back of her? A. Well, I can't see. When she's going in, the trouble start.

"Q. Well, how much did you see? A. I see her open door, and she's walking this way, and I can't see anything else. She never stop though.

"Q. Well, how do you know she didn't stop? A. Well, when she's open the door, she can't stop. When she open door, she's walking in, I think.

"Q. Well, then, I gather from your testimony that she walked down, opened the door, and that is as far as you saw her? A. Yes, sir.

"Q. You never saw her after that? A. No, sir.

"Q. You didn't see her after? A. I didn't see her after; no, sir."

[2] The point to which the questions of the trial judge were addressed was important, since it affected the credibility of Mrs. Mohamed, the leading witness for the people, who had testified that she was in the dining room while the shooting was going on. It was entirely proper to search the knowledge and recollection of this witness as to the movements of said Mrs. Mohamed, and we can see nothing objectionable in the efforts to have the witness state clearly what he saw. We must assume that there was nothing offensive in the manner of the judge, and that his attitude was such as to inspire the belief that he simply sought the truth.

[3, 4] While another witness was on the stand and had made certain statements the following occurred:

"The Court: Well, never mind all this. A. All right. I go and I know I am more stronger than R. Dad—

"The Court: Well, cut that out. A. And I go up to him and get knife from him—

"The Court: Strike that out. You had better ask him some questions."

The trial judge was apparently trying to confine the witness to the questions propounded to him. This he had a right to do, nor was he required to await the motion of the district attorney to have the irresponsive answers stricken out. It must be remembered that the counsel are officers of the court to assist the trial judge in conducting the proceedings regularly and expeditiously, but the responsibility of so conducting the trial rests ultimately upon the judge. There was nothing herein objectionable, unless possibly in the use of the expression "Cut that out." That, however, involved a question of taste rather than of error. Indeed, the expression is so common that it might be regarded as in accordance with reputable usage. At any rate, it could have been understood to mean nothing else than "Strike that out."

[5] The leading counsel for appellant has apparently some excuse for a personal grievance that he was unjustifiably rebuked by the trial judge. He had asked a question of one of the witnesses to which an objection had been sustained; then the following appears:

"Mr. Carlin: Well—

"The Court: Mr. Carlin, please don't make any remarks afterwards. Let the court's ruling stand. Of course, you are an old practitioner, and it is second nature, perhaps. However, please leave out the after remarks."

The record does not justify said statement of the court, but, of course, it could not have prejudiced the defendant in the mind of any fair juror. The trial judge probably misunderstood counsel, but, at any rate, a judgment should not be reversed for such a comparatively trifling circumstance.

[6] It cannot be too earnestly asserted that a judge "should never throw the weight of his judicial position into a case either for or against the defendant, unless satisfied that the evidence is insufficient to justify any conviction, in which case it is his duty so to advise the jury" (People v. Conboy, 15 Cal. App. 97, 113 Pac. 703), but it cannot be said that herein was there any violation of this just and wholesome rule.

[7] Appellant in his cross-examination of Mrs. Mohamed asked this question: "What were they doing when they were not sitting at the table?" This referred to the movements of said Achmed and Gool after they had come into the restaurant. An objection to the question was overruled, and the witness answered: "Why, first they came in, they goes into the kitchen. They were talking to my husband." A motion was made to strike out the answer on the ground it was not responsive and not cross-examination, which was granted. Appellant claims that he had the right to go fully into the conduct of these two men to show that they were lying in wait for the defendant. But, conceding that the answer may have had such tendency, it is sufficient to say that it was fully covered by other answers of the witness which were not stricken out. It may be added that the witness testified that she saw no weapon in the hands of either of said men, and that the conversation she heard between them and her husband was in the Afghan language, which she did not understand. In connection with this it may be said that the husband testified that said conversation was in relation to the weather and to the fact that the men desired to warm themselves by the kitchen fire.

[8, 9] The witness Mrs. Mohamed on cross-examination was asked this question, "What did he [defendant] say when he passed out?" and she answered: "Well, he just told me

about the shooting; he says, 'You see, they started to shoot first;' so he says, 'I protect myself.'" On motion of the district attorney this answer was stricken out "as self-serving." It is claimed by appellant that it was a part of the res gestæ and was therefore proper evidence. The rule is familiar and permits the declarations of the defendant to be shown where they are so closely connected with the main event as to appear wholly unpremeditated and spontaneous. Manifestly, it is often difficult to determine whether the situation meets the requirement of the rule. But a reading of the previous testimony of the witness shows that some little time must have elapsed after the killing, and we think it cannot be said that the ruling was erroneous. It may be true that "the smoke of the battle was still in the restaurant," but the defendant had ample time to contemplate a possible defense.

[10] The proprietor of the restaurant on cross-examination was asked this question: "You and Said Achmed and John Gool belonged to the same crowd, to the same people, or used to take up money together, didn't you?" An objection to the form of the question was sustained. It is quite apparent that the ruling was correct. The question involved several different matters, and it may be added that in response to other questions the witness fully covered the ground embraced in said interrogatory. So that the ruling, if erroneous, was manifestly without prejudice.

[11] One Pedro Lara, a witness for the people, claimed to have been at the lunch counter in said restaurant at the time of the shooting. He testified that he was about to drink a cup of coffee and was in the act of stirring it when the first shot was fired. On the ground that it was immaterial, an objection was sustained to this question: "How long did that continue while the shooting was going on?" The court might well have permitted the answer, but appellant frankly admits that it is "a small matter." We are satisfied that it is too small to justify serious consideration. We may add that the witness had substantially answered the question by stating that it continued during the entire period of the firing of the shots.

[12-14] Appellant calls attention to the fact that he testified that deceased Gool on a prior occasion had violently assaulted him and taken from his person a large sum of money. He claims—and justly so—that this was admissible as a circumstance tending to justify a belief that his life was in danger at the time of the said homicide. However, he complains that on cross-examination his objection was overruled to the following question: "By the way, Mr. Gool never was convicted on a charge of robbing you, or attempting to rob you?" The witness could not be impeached by the failure of a jury to convict his supposed assailant, and the question was improper. But it was without prejudice, as a witness for the defendant testified without objection that there was a mistrial of the charge, and it fully appears otherwise in the record that the parties were present in Sacramento to attend the second trial of the case to begin the next day.

[15] One of the witnesses for the defendant was interrogated by the prosecution as to the number of times he had visited the office of one of the counsel for the defense. The inquiry might well have been omitted, but the defendant could not have been prejudiced by the question and answer.

[16] Fault is found with the conduct of the special counsel for the people while delivering the closing argument to the jury in referring to the fact that Mr. Carlin had assisted the district attorney of Yuba county in the prosecution of a certain criminal charge against one Wilson. This was said apparently in response to a criticism of Mr. Howe for appearing in the prosecution of this case. The argument at best might be characterized as ad captandum vulgus. Neither attorney was to be censured for his said appearance, as we must assume that he believed his cause to be just. It should not have been made the subject of animadversion, but no intelligent person would be misled by such reference to a not unusual practice. In fact, appellant admits that it probably did him no particular harm. We think it should be said that it is quite improbable that it resulted in his injury.

[17] As to the instructions, appellant complains that the court failed to give one upon the subject of manslaughter. But appellant did not request such instruction, and, besides, there was nothing in the evidence to warrant it. The case was either murder or justifiable homicide. An instruction as to manslaughter could have afforded only a pretense for a compromise verdict.

In reference to the instructions requested by the defendant and refused by the court, we have carefully examined the record and find that they were fully covered by the fair and comprehensive instructions which were given.

We find no error in the record to justify an interference with the verdict, and the judgment and order are therefore affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

(51 Cal. App. 179)

PEOPLE v. DODINI. (Cr. 547.)

(District Court of Appeal, Third District, California. Jan. 26, 1921.)

1. Assault and battery 🔑56, 84—Facts showing assault with a deadly weapon; reason for defendants desisting after pointing gun material only as to intent.

Where the defendant angrily pointed a gun at another, conceding that it was loaded, there existed every element of assault with a deadly weapon, and whether defendant's desisting was caused by the screams of a woman or some obstruction intervening between him and his intended victim, or because he believed the distance too great, or was seized with remorse, is material only to throw light on his original intent.

2. Assault and battery 🔑92—In a prosecution for assault with a deadly weapon, evidence held sufficient to show felonious intent.

In a prosecution for assault with a deadly weapon, evidence *held* sufficient to show that, when the defendant pointed a gun at the complaining witness, his intent was felonious.

3. Assault and battery 🔑92—In prosecution for assault with deadly weapon, evidence held to show that the gun was loaded.

In a prosecution for assault with a deadly weapon, evidence *held* sufficient to show that the gun which defendant pointed at another was loaded.

4. Criminal law 🔑1037(2)—Objection to remarks of prosecutor, without asking instruction that the jury disregard them, is insufficient.

If remarks of the prosecuting attorney were objectionable, where defendant merely objected to the remarks, but did not ask to have the jury instructed to disregard them, he cannot avail himself of the point on appeal.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Frank Dodini was convicted of assault with a deadly weapon, and he appeals. Affirmed.

Charles H. Braynard, of Redding, for appellant.

U. S. Webb, Atty. Gen., J. Chas. Jones, Deputy Atty. Gen., for the People.

PREWETT, Presiding Justice pro tem. [1, 2] The defendant was convicted of the crime of an assault with a deadly weapon, and he brings this appeal upon the grounds of misconduct of the district attorney and insufficiency of the evidence to justify the verdict. At the time of the assault the defendant and the complaining witness were neighbors, living about half a mile apart. At the time in question certain cattle, the property of the defendant, strayed into and upon the premises of the complaining witness. The latter, assisted by several other persons, was making an effort to drive the cattle away, when the defendant, armed with a rifle, appeared on the scene, and commenced vigorously to abuse the members of the party. He was very angry. When about 100 yards distant, he raised his gun as though to shoot. At that moment the wife of the complainant screamed, and he lowered the gun. He thereupon ran toward the party, and when within seven or eight feet from the complainant he pointed the gun at the latter's stomach. In arriving at a conclusion as to the sufficiency of the evidence to justify the verdict, this court will accord full value, reasonably considered, to the evidence against the defendant. Primarily, it is the function of the jury to weigh the evidence and determine its credibility, and this court will interpose its corrective powers only when it affirmatively appears that the jury has committed an error. It is true that the defendant did not shoot, but his failure to do so is only one circumstance in a chain necessary to establish the conclusion that he did not intend to do so. In the instant case the defendant angrily presented the gun in a threatening attitude. The wife of the complainant says:

> "I heard the click and saw him give the side movement and then raise the gun like that, and then point it right at Mr. McMartin's back. * * * He didn't have it clear to his shoulder—he didn't raise it clear to his shoulder, but just like he was going to take aim, and I hollered."

Conceding that the gun was loaded, there is no room for controversy that his acts, up to this point, furnish every element of an assault with a deadly weapon. Whether his motive in desisting arose from the screams of the woman, or some obstruction intervening between him and his intended victim, or because he believed the distance too great, or because he was seized with remorse or fear, is material only in so far as it may throw light on his original intent. But the jury upon sufficient evidence has found that his intent was felonious.

[3] The defendant insists that the evidence does not show that the gun was loaded. The testimony above quoted is quite sufficient, even if standing alone, to show that it was loaded. Another witness says:

> "He throwed the lever down and brought it up as though he had loaded a gun; and I am very familiar with the various rifles, the carbine rifles, and I am almost positive a cartridge went in it, but I couldn't see the cartridge go in the gun."

[4] The remaining point made by the appellant is such misconduct on the part of the district attorney as prevented the appellant from having a fair and impartial trial. The district attorney in the course of his argument to the jury said:

"Another thing. They say this gun was unloaded, and there wasn't any shells on the place. Who owned this gun? Jack Mardley owned the gun, a man who worked for Dodini. Why haven't they brought him here to testify in this case? Why haven't they brought him here? Because he would have told you, if he had been brought here by them, that there was loads in the gun. It was loaded on that day. * * *"

These remarks were objected to by the attorney for the appellant, but he did not in any way nor to any extent invoke the aid of the court to have the jury instructed to disregard them. Conceding, without deciding, that the remarks were objectionable, the appellant is not in a position to avail himself of the point. In People v. Ye Foo, 4 Cal. App. 743, 89 Pac. 454, a case strikingly like this, the court says:

"The record merely shows that the language of the district attorney 'is excepted to as unsupported by any evidence, and as prejudicial to the substantial rights of the defendant.' The court was not asked to strike out the objectionable remark, nor does it appear that the court ruled upon the exception. It is but fair to require defendant's attorney, in case of objectionable remarks by the district attorney, to call the court's attention to them then and there, and invoke the aid of the court to prevent the remarks from injuring the defendant, before he will be allowed to urge the matter as error in this court."

Upon the whole case we are constrained to hold that the appellant had a fair trial, that he was properly convicted, and that he should suffer the penalty imposed.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(49 Cal. App. 484)

WALLERICH v. BLOCK. (Civ. 3288.)

(District Court of Appeal, First District, Division 1, California. Oct. 5, 1920.)

1. Appeal and error ⚷1011(1)—Finding on conflicting evidence not disturbed.

A finding based on the conflicting testimony of plaintiff and defendant alone will not be disturbed.

2. Appeal and error ⚷204(1)—Admission of testimony not reversible where not objected to.

Where testimony was received without objection appellant cannot urge on appeal that it should have been rejected.

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by Clarence W. Wallerich against Emil Block. From judgment for plaintiff, defendant appeals. Affirmed.

Samuel T. Bush and William Sea, Jr., both of San Francisco, for appellant.

Greeley & Greeley and Hugh F. Keon, Jr., of San Francisco, for respondent.

WASTE, P. J. Plaintiff seeks to recover certain commissions which he alleges he earned by assisting the defendant in selling merchandise in Vladivostok, Siberia. Plaintiff had judgment. Defendant made a motion for a new trial, which was denied, and he now appeals. In support of his motion for a new trial, defendant urged, as one ground, the insufficiency of the evidence to justify the decision of the court and that it is against law.

The cause of action is based upon a letter written by the appellant to the respondent while both of them were at Kobe, Japan, which, in part, is as follows:

"Confirming your letter of January 17th, 1919, relative to taking a trip with me to Vladivostok and Harbin for the purpose of assisting in selling such commodities as piece goods, dry goods and shoes, it is understood and agreed that the two per cent. (2%) commission for such services is payable only on such orders which may be accepted by the firms in America and shipped by them and paid for by the buyers. Commissions are to be paid you as soon as I receive my commissions from the shippers.

"Any other transactions during the above trip, that is, outside of the dry goods and shoe lines, which may be put through in connection with Messrs. Sterling, Foster Co., San Francisco, it is understood that the profits derived thereof will be divided a third each, viz., one-third to yourself, one-third to Messrs. Sterling, Foster Co., San Francisco, and one-third to myself."

As was well said by the trial judge:

"The contract is not explicit in setting forth the work which the plaintiff was to do in connection with the selling of merchandise described in the contract. * * * When such a condition arises as a result of ambiguity in the language of a contract, you can't better resolve the matter than by applying to the case the practical constructions which the parties themselves would seem to have given to the contract."

After entering into their arrangenemt, the parties went to Vladivostok and remained there 17 days. They secured a place in which to exhibit defendant's samples. Plaintiff testified that he had charge at the sample room, remaining there until 10 or 11, and, upon one occasion, until 1 o'clock at night. He wrote out the orders received by the defendant, sorting out, and marking down the numbers of the samples, and attended to the correspondence. He solicited business for the

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

defendant, during the noon hour, and when he was at lunch. He knew various people in Vladivostok whom he told what the defendant and he were doing there, and endeavored to arrange meetings with the defendant and prospective purchasers, but the defendant was too busy to see them, and left the place after securing a few orders.

[1] Defendant testified that plaintiff told him that he had been in Siberia before; that he knew the customs of the Russian people and how to handle them, and that if any sales could be made he was the one to do it, but that plaintiff did nothing beyond copying some orders on his typewriter; that he did nothing at all to assist him, and that he saw him on only a few occasions. No other witnesses testified as to those matters. On such testimony we will not disturb the finding of the trial court that the plaintiff assisted the defendant in accordance with the terms of his contract.

[2] The trial court admitted testimony of negotiations between the parties, to the effect that they attempted to reach a settlement of their differences, and that an effort of compromise was made by the appellant before this suit was brought. Appellant assigns the admission of this evidence as error, claiming that the testimony may have influenced the court in reaching its decision. We are unable to say that it did or did not. The testimony was received without objection and the appellant cannot now urge that it should have been rejected.

The judgment is affirmed.

We concur: RICHARDS, J.; BEASLY, Justice pro tem.

(51 Cal. App. 191)

LAPIQUE v. WALSH. (Civ. 3748.)

(District Court of Appeal, First District, Division 1, California. Jan. 27, 1921. Hearing Denied by Supreme Court March 28, 1921.)

Appeal and error ⚷1180(2)—Supreme Court order for new trial vacates judgment.

Where a judgment was affirmed by the Supreme Court on defendant's appeal, but plaintiff's motion for a new trial, denied by trial court, was granted by the Supreme Court in proceedings prior to the amendment (St. 1915, p. 201) of Code Civ. Proc. § 659, so that they were entirely independent of the entry of the judgment, and a new trial could have been granted even by the lower court after the judgment was affirmed on appeal, the new trial vacated the judgment, so that it cannot thereafter be enforced by an assignee of the judgment creditor.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by John Lapique, as successor in interest of Maria Espiritu Chijulla de Leonis, deceased, against Frank E. Walsh, administrator of the estate of Laurent Etchepare, deceased. From an order denying plaintiff's motion to enforce a judgment in favor of his assignor, plaintiff appeals. Affirmed.

John Lapique, of Orange, in pro. per.

H. L. Dunnigan, of Los Angeles, for respondent.

WASTE, P. J. Alleging himself to be the successor in interest of Maria Espiritu Chijulla de Leonis in a certain judgment rendered in the superior court of Los Angeles county June 3, 1901, against Frank E. Walsh, administrator of the estate of Laurent Etchepare, deceased, appellant sought to enforce the judgment and to have it carried into execution, under the provisions of section 685 of the Code of Civil Procedure. His motion was denied, and he has appealed from the order denying him the relief sought.

Appellant's presentation of his case on appeal in propria persona has been vague and ambiguous and the record unsatisfactory. We have not had the assistance of any respondent's brief in the case. Neither parties nor counsel protecting their interests appear here to support the action of the lower court. Counsel for the respondent, by reason of their great familiarity with this matter, could have saved the court much of the work imposed by this appeal had they filed here a short, concise statement of the case with a brief citation of authorities. Their neglect and failure to do so is inexcusable. Enough appears, however, from the record of the proceedings, and from the briefs of appellant, to enable us to reach the conclusion that the ruling of the lower court was correct. We are also enabled, by reference to the reports of the Supreme Court of this state, to more clearly understand the present angle of this ancient litigation.

Appellant's alleged predecessor in interest brought an action against Laurent Etchepare to recover certain money alleged to have been received by him as her agent, and to obtain a decree requiring him to convey to her certain real property alleged to have been conveyed by her to Etchepare, upon his false representations that she was indebted to him for money advanced, and for the purpose of securing the repayment of the same. She obtained judgment decreeing a reconveyance upon the payment by her to Etchepare of a specified sum of money with interest. On appeal, taken by Walsh, as Etchepare's administrator, the judgment was affirmed. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813. The plaintiff in the action, Mrs. de Leonis, not being satisfied with the extent of her recovery, moved for a new trial, which being denied, she also appealed. The order was reversed, and the cause was remanded for a new trial. De Leonis v. Walsh, 145 Cal. 199, 78 Pac. 637. The action was thereupon retried. The parties stipulated that the first judgment—the one affirmed on the appeal of the defendant in the action—be vacated and set aside and another judgment be entered. The deed executed by Mrs. de Leonis was again ordered set aside, and she was awarded a greater sum of money than was included in the first recovery. No appeal was taken from this judgment.

Some years later, Mrs. de Leonis having died, her son, the executor of her last will and testament, Juan J. Mendendez, was substituted as plaintiff in the action. He almost immediately sold and transferred to this appellant all the rights that he might have in the first decree and judgment, docketed in 1901. It is under this assignment that the appellant is here seeking to carry that judgment into execution.

There is no merit in his contentions. The fact that on the appeal of the original defendant the judgment against him was affirmed did not serve to alter the situation of the parties, which at once arose upon a new trial being ordered by the Supreme Court on the appeal of the plaintiff. The proceedings for a new trial were taken prior to the amendment (St. 1915, p. 201) of section 659 of the Code of Civil Procedure. They were therefore entirely independent of the entry of the judgment, and were properly instituted while the appeal from the judgment was pending. A new trial could have been granted by the lower court, even after the judgment was affirmed on appeal. The decision of the court would then have been vacated, and the judgment dependent upon it would have fallen with it. Brison v. Brison, 90 Cal. 323, 327, 27 Pac. 186; Houser & Haines Mfg. Co. v. Hargrove, 129 Cal. 90, 91, 61 Pac. 660; Kaltschmidt v. Weber, 136 Cal. 675, 677, 69 Pac. 497. We see no reason for holding that the same result did not follow upon a new trial being granted by the Supreme Court. Consequently appellant's claim, under his purported assignment, gives him neither right, nor color of right, to revive a judgment which is legally dead.

The order appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(185 Cal. 280)

BEEMAN v. RICHARDSON et al.

(L. A. 4858.)

(Supreme Court of California. March 11, 1921.)

1. Fraud 🔑49—Finding of fraudulent representations sustained by evidence as to one.

If a finding of fraudulent representations is sustained by evidence as to one material fraudulent representation, it is sufficient.

2. Fraud 🔑11(1)—Representations to buyer of corporate stock held actionable.

A representation that a corporation was prosperous, with a surplus of $40,000, when it was hard pushed for money and had a book surplus of but $6,000, was not a mere statement of opinion, on which a buyer of stock had no right to rely, but was a false representation of fact, and therefore actionable.

3. Conspiracy 🔑19—Evidence held to sustain a finding of conspiracy to defraud purchaser of corporate stock.

Evidence showing that the sale to plaintiff of corporate stock was pursuant to an agreement among the defendants, making it a joint undertaking, and justifying the inference that the defendants, other than the one making the representations, either knew of them or that some kind of imposition was being practiced without informing themselves, is sufficient to sustain a finding of conspiracy without direct evidence that the other parties knew of the representations made.

4. Fraud 🔑58(1) — Evidence held to prove damages to buyer of corporate stock.

Evidence that plaintiff was induced by fraudulent representations to buy corporate stock, in the belief that the company was a prosperous concern, with a substantial surplus, when in fact it was on the verge of bankruptcy, is sufficient to prove damages.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by George H. Beeman against J. C. Richardson and others. Judgment for plaintiff, and defendants appeal. Affirmed. Superseding opinion 189 Pac. 790.

Oliver O. Clark and George M. Pierson, both of Los Angeles, for appellants.

Moote & Patterson, of Los Angeles, for respondent.

OLNEY, J. The plaintiff brought suit to recover from the defendants the sum of $5,500, which he had paid a corporation known as the Richardson, Holmes & Lamb Company for 50 shares of its capital stock. The cause of action as set out in the complaint was that the defendants were the stockholders and officers of the corporation; that the plaintiff had been induced to purchase the stock by their fraudulent representations made to him, pursuant to a conspiracy between them to defraud him; and that the stock had proven worthless. After trial the lower court made findings in substantial accord with the averments of the complaint, and gave judgment for the plaintiff. The defendants appeal, and the sole grounds urged for reversal are that there is no evidence to sustain the findings as to (1) fraudulent representations; (2) conspiracy; and (3) damage to the plaintiff.

[1] As to the finding of fraudulent representations, it is not necessary to detail all the representations which are alleged and found to have been made, and the evidence concerning each. If the finding is sustained as to one material fraudulent representation, it is enough. That there was evidence of one representation of this character is certain. The complaint alleged, the plaintiff testified, and the court found that, to induce the plaintiff to make the purchase, it was represented to him that the company was a prosperous one, with a surplus of $40,000 and a rapidly growing business, which required more capital, and that the stock was being sold for the purpose of obtaining it. The facts of the matter, practically uncontroverted, were that the corporation was in straitened circumstances, so straitened that it failed five months later and paid its creditors but 70 cents on the dollar and its stockholders nothing; that, instead of a surplus of $40,000, it had, according to its own books, a surplus of only a little over $6,000; that the stock was sold the plaintiff, not solely for the purpose of securing more capital for the company, but also for the purpose of securing funds to meet pressing personal obligations of the defendants, and that the plaintiff's money was in part so used.

[2] With this contrast between the representation and the facts, it would seem well nigh beyond argument that the representation was false, fraudulent, and material. The representation that the company was prosperous and had a surplus of $40,000, when the fact was that it was hard pushed for money and had a book surplus of but $6,000, was more than a mere statement of opinion, upon which the buyer had no right to rely. The statement that the sale was to secure more capital for the company was made when it was the intention that some, at least, of the plaintiff's money, in case he purchased, should not be so used. The plaintiff conceived, and it was in effect represented to him, that he was buying treasury stock, the purchase price of which would go to strengthen the company, when it was the intention to sell him, and there was sold him in fact, stock already issued, so that a part of his purchase price was diverted from the company to the defendants.

[3] The point in connection with the finding as to a conspiracy is that the representations were made by the defendant Richardson alone, and that there is no direct evidence that the other defendants agreed that they should be made, or knew at the time that they were being made. But direct evidence of that character could hardly be had in the very nature of things, unless one of the defendants should confess, and the fact must be determined by the inference naturally and properly to be drawn from those matters which can be and are directly proven. The inference of a joint fraud is, of course, not one to be lightly drawn, and can only be drawn in case the facts in evidence are sufficient to overcome the presumption against wrongdoing. But in this case the evidence showed directly that the sale to the plaintiff was made pursuant to an agreement among the defendants in advance, that is, that the making of the sale was a joint undertaking, and also showed a situation such as to justify the inference that the defendants other than Richardson either knew of the representations which the latter was employing to effectuate their common purpose, or, what is the same thing in legal effect, knew that some kind of imposition was being practiced by him for that purpose without informing themselves as to exactly what it was.

The arrangement for the purchase by the plaintiff was made in March, 1914, and finally consummated a month or so later. At the first of that year the company's business had not been going any too well, and the defendants agreed that it was advisable to sell some stock to raise further capital. Nothing was actually done in that behalf, apparently, until February, when business conditions were worse rather than better, and a bank holding the defendants' personal obligations began to press for their payment. It was then agreed to employ a broker, one Dowell, to secure a purchaser, if possible, for some stock. It is a fair inference that at this time a sale was desired for the purpose of using a part of the proceeds, at least, to reduce the defendants' personal obligations to the bank. Nevertheless, in the advertisement for a purchaser which he caused to be made, Dowell represented that the object of the sale was to obtain capital for an expanding business. This advertisement was itself a fraud if known to the defendants. They deny knowing of it, but the court was at liberty to disbelieve them. The plaintiff responded to this advertisement, and was put in touch with Richardson, who, after some negotiations, succeeded in making the sale. The other defendants knew of these negotiations and also knew immediately of their final success. In the meantime, the affairs of the company and the defendants had continued to grow worse. It was a situation in which no one of ordinary intelligence who was aware of the real condition of the company and of those interested in it would purchase stock for par plus 10 per cent., as the plaintiff did, particularly if he knew that some part of his money would not go to strengthen the company but to certain stockholders individually. Furthermore, it was a case in which any one contemplating a purchase would almost certainly make inquiry as to the condition of the company, and would not purchase unless satisfied in regard to it. In brief, the situation was such that the defendants other than Richardson must have known that the latter could hardly by any possibility make a sale on the terms of that to the plaintiff without the practice of imposition upon the purchaser. When, knowing this, they permitted Richardson to go ahead and negotiate and make a sale in their common interest and pursuant to their common arrangement, they made themselves joint parties with Richardson to whatever imposition he might choose to practice.

[4] As to the finding of damage, the point which appellants make would not seem to be concerned with the amount of the damage proven; that is, with the measure of damages, and there is no occasion for discussing that matter. The point advanced is that there is no proof that the plaintiff was damaged at all by the fraudulent representations. The only statements by appellants' counsel of the point which they desire to make are "that there is no evidence to support the finding that plaintiff has been damaged in any sum whatsoever by any representations made to him in connection with this purchase of this stock," and again that "the record wholly fails to prove any relation of cause and effect between the representations made and the loss by plaintiff of his $5,500." Upon these assertions, without any reference to the testimony or discussion, the point is permitted to rest. It is rather difficult to reply to such bald assertions otherwise than by saying that as a matter of logic it seems fairly clear to us that when the plaintiff was induced by fraudulent representations to buy stock in a company in the belief that it was a prosperous concern with a substantial surplus, when in fact it was on the verge of bankruptcy and actually went into bankruptcy a few months later, the plaintiff was damaged, and damaged by means of the fraudulent representations.

There are no other points advanced for reversal. Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

185 Cal. 317

MILLS et al. v. BRADY et al. (L. A. 5970.)

(Supreme Court of California. March 17, 1921. Rehearing Denied April 14, 1921.)

1. Corporations 🔑228—Stockholders not full paid liable to judgment creditor of corporation unable to collect from it.

Holders of stock but partially paid up are liable to a judgment creditor, unable to collect from it, for the unpaid balance of the par value of the stock.

2. Appeal and error 🔑694(1)—Bill of exceptions must specify particulars in which evidence insufficient.

Under Code Civ. Proc. § 648, where the record is presented on appeal in the form of a bill of exceptions, and it is sought to review the sufficiency of the evidence, the bill must specify the particulars in which the evidence is insufficient.

3. Appeal and error 🔑694(1)—General specification evidence does not support findings not compliance with Code requirement.

Where there are specific findings, Code Civ. Proc. § 648, requires in the bill of exceptions only a specification of the particular finding or findings which it claimed are not supported by the evidence, but so much at least must be done, and general specification that the evidence does not support the findings is not a compliance with the Code requirement that the particulars wherein it does not support them must be stated.

4. Appeal and error 🔑528(1)—Order denying motion for new trial can be brought up only by bill of exceptions.

Though motion for new trial must now be made on the minutes of the court, and no bill of exceptions is necessary or can be used for the purposes of the motion in the lower court, where the motion is denied, and it is sought to review the order denying it on appeal, and the record is not brought up as prescribed by Code Civ. Proc. § 953a, it can only be brought up by a bill of exceptions prepared and settled after the order denying the motion is made in conformity with the practice which has always prevailed in connection with motions for new trial made on the minutes; section 648, requiring specification of the particulars in which the findings are not supported by the judgment, applying.

In Bank.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Consolidated actions by George E. Mills and by one Bergman against Emily E. Brady and others. From judgments for plaintiffs, defendants appeal. Affirmed.

Geo. E. Whitaker, of Bakersfield, and Davis, Kemp & Post and Kemp & Clewett, all of Los Angeles, for appellants.

Heney & Carr, George E. Mills, Frank F. Oster, George J. Stoneman, and Alfred H. McAdoo, all of Los Angeles (Pillsbury, Madison & Sutro, of San Francisco, amicus curiæ), for respondents.

OLNEY, J. Two actions were brought, one by a plaintiff named Mills and the other by a plaintiff named Bergman, against a number of persons as defendants. The two actions were consolidated and tried together, and judgment was given in favor of each plaintiff. The defendants appeal. The two actions are identical as to all matters pertinent to our discussion, and we may treat them as a single action.

The complaint alleges that the plaintiff is a judgment creditor of the El Dorado Oil Company, a corporation, and has been unable to collect his judgment on execution; that the defendants respectively were the subscribers, owners, and holders of shares in the company in certain specified amounts; that there had been paid in on the shares of the defendants only 15 per cent. of their par value, and the defendants had agreed with the corporation when they acquired their stock to pay the balance of its par value when legally called on so to do. Upon these facts the complaint asks judgment against each defendant for enough of the amount unpaid upon his stock to satisfy the plaintiff's judgment against the company.

The answer of the defendants admits the existence of the plaintiff's judgment, and that the defendants were subscribers, owners, and holders of stock, as alleged in the complaint, but denies that their stock was but partially paid stock, or that they had agreed to pay in anything more upon it. It also sets up as a separate defense that their stock was issued in consideration for property transferred to the corporation, which was believed to be of a value equal to the par value of the stock, and that the plaintiff, or rather his assignor, for the plaintiff held his judgment by assignment, had been aware of the fact just mentioned when he became a creditor of the company. It will be noted, however, that this so-called separate defense is but the affirmative averment of facts showing the defendants' stock to be fully paid stock, so that it is really but a denial, in another form, of the averment of the complaint that the stock was but partially paid.

Upon the issues so made the parties went to trial and, except for immaterial variances, the court found in substance that the averments of the complaint were true and the denials and averments of the answer were not, and, as we have said, gave judgment for the plaintiff.

[1] Now, it is evident that the complaint states a good cause of action. It avers, in substance, that the plaintiff is a creditor of the company and has been unable to collect his judgment against it, and that the defendants are subscribers to and holders of stock in the company which is but partially paid-up stock. That the holders of stock of this character are responsible to the corporation upon call, and to creditors of the corporation, for the unpaid balance of the par value of their stock, is not open to question. Geary, etc., Co. v. Bradbury, etc., Co., 179 Cal. 46, 175 Pac. 457; Rhode v. Dock-Hop Co., 194 Pac. 11. It is likewise evident that, since the findings conform to the averments of the complaint, the judgment against the defendants is supported by both the pleadings and the findings. That this is true is in fact not controverted. The attack made upon the judgment is that it was not justified upon the evidence in the case. It is said that there is no conflict in the evidence and that upon the facts, as shown by it, judgment should have gone for the defendants. This may or may not be true, but it is a question which is not open to us for examination upon the record before us.

[2, 3] The judgment is based on the findings and not on the evidence, and the contention that the judgment is not supported by the evidence is at best nothing else than a contention that the findings are not supported by the evidence. But in the present case the record of the proceedings at the trial and upon motion for a new trial is presented in the form of a bill of exceptions, and it is the rule of the Code (section 648, Code Civ. Proc.), enforced by numerous decisions, that where the record is presented on appeal in this form, and it is sought to review the sufficiency of the evidence, the bill must specify the particulars in which the evidence is insufficient. This was not done. The only pertinent specifications are the general ones that the evidence is insufficient to support the judgment and the judgment is contrary to it, and that it "is insufficient to justify the findings" and "the findings of the court are contrary to the evidence." Where, as here, there are specific findings, the Code has been construed to require no more than a specification of the particular finding or findings which it is claimed are not supported, but this at least must be done, and a general specification that the evidence does not support "the findings" is not a compliance with the Code requirement that the particulars wherein it does not support them must be stated, and is wholly insufficient. Swift v. Occidental Mining Co., 141 Cal. 161, 74 Pac. 700; Bell v. Staacke, 141 Cal. 186, 74 Pac. 774; Harris v. Duarte, 141 Cal. 497, 70 Pac.

298, 75 Pac. 58; Millar v. Millar, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184.

[4] The reply of the appellants to the point so made against them is that a specification of particulars was not necessary, since a motion for new trial was made and denied, the order denying it, as well as the judgment itself, is under review on the appeal from the judgment, and the motion for a new trial was made upon the minutes of the court, as must now be done, and not upon a bill of exceptions, as might have been done previous to the amendment in 1915 of the Code provisions governing proceedings for a new trial. But, even though a motion for a new trial must now be made upon the minutes of the court, and no bill of exceptions is necessary or can be used for the purposes of the motion in the lower court, yet where the motion is denied, and it is sought to review the order denying it on appeal, and the record is not brought up in the manner prescribed by section 953a, Code of Civil Procedure, the so-called new method, it can only be brought up by a bill of exceptions prepared and settled after the order denying the motion is made in conformity with the practice which has always prevailed in connection with motions for a new trial made upon the minutes. Such a bill of exceptions we have before us, and to it section 648, Code of Civil Procedure, requiring a specification of the particulars in which the findings are not supported by the judgment, applies. Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177; Carter v. Canty, 186 Pac. 346; Martin v. Hildebrand, 191 Pac. 676.

The respondent makes and insists upon the point that because of the lack of the bill of exceptions in this respect it is not open to us to examine the merits of the appellants' contentions, and we can but concede the point. It is determinative of the appeal.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.

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51 Cal. App. 359

POLAKOFF v. POLAKOFF. (Civ. 3675.)

(District Court of Appeal, First District, Division 1, California. Feb. 11, 1921.)

1. Divorce 🔑150(2)—Findings as to cruelty sufficient.

Where the court found that the husband rudely and violently entered the wife's home and without cause called her abusive names, struck her several times, and dragged her out of the house down the steps, inflicting great mental anguish and suffering, the contentions were without merit that the finding did not show mental cruelty for want of a finding that plaintiff was a refined and sensitive woman, or physical cruelty because showing a single act of cruelty.

2. Divorce 🔑150(2)—Finding held to warrant no other inference, but that wife was caused mental suffering by husband's acts.

In a wife's divorce suit, where the court found that in a former suit by the husband he falsely accused the wife of wrongful conduct, and that he had attempted to kidnap their child, the only inference to be drawn therefrom was that such facts caused the wife mental suffering.

3. Divorce 🔑184(5)—Court has discretion as to what constitutes cruelty and finding will stand unless discretion abused.

The trial court has some discretion in a divorce suit in determining what constitutes extreme cruelty, and in the absence of an abuse of discretion its finding will stand.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Suit for divorce by Clara Polakoff against Max Polakoff. From a decree for plaintiff, defendant appeals. Affirmed.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for appellant.

E. F. Gerech and W. S. Baird, both of Los Angeles, for respondent.

KERRIGAN, J. Plaintiff obtained a decree of divorce from defendant on the ground of extreme cruelty, and was awarded the custody of their minor daughter, together with an allowance of $5 a week for her maintenance and support.

Defendant appeals from the judgment and assigns as grounds therefor that the evidence is insufficient to sustain the findings and judgment.

The appeal is without merit.

[1, 2] The evidence reveals a somewhat sordid tale, and no useful purpose would be subserved by a general review thereof. The trial court found, among other facts that on a certain day defendant entered the home of plaintiff in a rude and violent manner, and without any cause or reason therefor called plaintiff abusive names and struck her violently several times in the face and other parts of her body, and dragged her out of the house down the steps, thereby inflicting upon her great pain and mental anguish and suffering. Appellant attacks this finding as being insufficient to support the judgment for two reasons: It is first contended that, as the term "extreme cruelty" is a relative one, the absence of any finding that plaintiff was a refined and sensitive woman makes the finding insufficient to establish mental cruelty; and, second, that it is insufficient to establish physical cruelty for the reason that evidence of a single act of cruelty does not

constitute this offense—citing Hockerston v. Hockerston, 182 Pac. 325.

There is no merit in either contention, but a discussion thereof becomes unnecessary, for the court further found that the defendant had in a former action brought by him for divorce against the plaintiff herein falsely accused her of wrongful conduct, and also had attempted to kidnap their child, and, while these particular findings do not directly recite that such facts caused plaintiff mental suffering, the only inference to be drawn threfrom is that they did. MacDonald v. MacDonald, 155 Cal. 665, 672, 102 Pac. 927, 25 L. R. A. (N. S.) 45. The findings are fully supported by the evidence.

[3] Some latitude for the exercise of discretion is permitted to the trial court in determining what constitutes extreme cruelty, and in the absence of abuse of discretion a finding will stand. Hockerston v. Hockerston, supra.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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51 Cal. App. 299

HOFF v. LODI CANNING CO. (Civ. 2175.)

(District Court of Appeal, Third District, California. Feb. 5, 1921.)

1. Appeal and error ⚿1011(1)—Finding on conflicting evidence conclusive.

A finding of the trial court on conflicting evidence is binding on the appellate court.

2. Contracts ⚿155 — Ambiguity resolvable against party using words.

Where any ambiguity exists in a contract, it should be resolved against the party preparing the same.

3. Sales ⚿77(1)—Contract held to require purchaser to pay price paid for tomatoes by canneries in named cities.

Where a contract for the sale and purchase of tomatoes at $12 a ton concluded with a clause that, if the Sacramento or Stockton price was more, the buyer agreed to pay same advance, and the seller testified that officers of the buyer told him that, if other canneries paid $20, they would pay him the same, the contract should be construed as requiring the buyer to pay the same price as paid by canneries in the designated cities.

4. Sales ⚿87(3)—Evidence held to warrant finding that market price in other cities which buyer agreed to meet was $20.

In an action by seller of tomatoes under a contract providing that, if the price in designated cities advanced, the buyer would pay the same, evidence *held* to warrant finding that the market price of tomatoes in the designated cities was $20; it appearing that canneries in such cities voluntarily advanced contracts at a lower price to $20.

5. Sales ⚿365—In action by seller who claimed additional sum, finding as to "market price" governing not open to attack; "going price;" "current price."

Where the court found that the price to be paid for merchantable tomatoes was a sum equal to the going price that should be paid at Sacramento and Stockton, and that the price and value of merchantable tomatoes in those cities was $20 a ton, and that defendant agreed to pay plaintiff the sum of $20 a ton, the finding is not open to attack on the theory that the market value was not declared, for "market price," "current price," and "going price" imply the same thing and mean the market value.

[Ed. Note.—For other definitions, see Words and Phrases, Current Price; Going Prices; First and Second Series, Market Price.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Fred Hoff against the Lodi Canning Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Nutter, Hancock & Rutherford, of Stockton, for appellant.

Miller & Channell, of Stockton, for respondent.

BURNETT, J. [1] The action was to recover $2,704.73, the balance claimed to be due for a quantity of tomatoes sold by plaintiff to defendant. On February 11, 1918, the parties entered into a written contract providing for the sale and purchase of all the tomatoes to be grown that year by plaintiff and fixing the price at $12 per ton, but the concluding clause of said agreement was: "If Stockton or Sacramento price is more than $12 buyer agrees to pay same advance." Defendant in its answer claimed that prior to any delivery an oral agreement was entered into under the terms of which the purchase price was changed from $12 to $15 per ton. This was disputed by plaintiff, and it is admitted by appellant that, as to this issue, the evidence was conflicting, and, since the court found in favor of respondent, the finding is binding upon this court. Appellant declares that "this leaves only one question to be determined, which is a construction of the last paragraph in the contract" quoted above, and that the appeal is based upon three propositions:

"First, that the price referred to in the contract meant 'market price,' and it was so understood by the parties to the agreement.

"Second, that the court should have found as a fact what the 'market price' of tomatoes was in Sacramento or Stockton in the season of 1918.

"Third, that no 'market price' in either of said cities was proven by plaintiff."

[2, 3] It is apparent that the said contract was somewhat uncertain in the reference to

"Stockton or Sacramento price." As the sale of a large quantity of tomatoes was contemplated and as the canneries were the only purchasers under such circumstances, it is quite probable, though, that the parties referred to the price that canneries in said cities would pay for tomatoes at any time within the season of 1918. There is no evidence of any parol agreement or understanding at the time of the execution of this contract as to the meaning of said expression, although subsequently, according to plaintiff's testimony, the officers of the company told him "that if any of the other canneries pays $20 they will pay me $20." Other witnesses testified to the same effect. This may be regarded as some evidence, in addition to the language of the written instrument, that the parties contemplated the highest price that might be paid by the canneries in said cities. We may add that, if any ambiguity exists in the use of said expression, it should be resolved in favor of respondent, since the contract was prepared by appellant.

That $20 a ton were paid by canneries in Stockton and Sacramento in the course of the season cannot be, and in fact is not, disputed. But, granting that the parties contemplated the highest market price in said cities, then that situation is met by the evidence.

[4] A. E. Davis, buyer for the California Packing Company, testified:

> That he bought tomatoes in the market in Stockton. "All that I bought in the open market, or contracted, were paid for at the same price; but it may be possible I have been— I have been informed since there was one person that sold some to the cannery here at a less price, but I don't believe they were growers. Now, I don't know anything about that, I didn't buy them; all I bought was to be $20. I am the buyer and usually buy all those things."

Mr. C. E. Gibbs, Jr., buyer for the same corporation, at Sacramento, testified that $20 a ton was the price they were paying in Sacramento during the season of 1918.

Mr. Kay Bellew, buyer for Libby, McNeil & Libby, testified that said firm also paid $20 at Sacramento.

It is true that these corporations had contracts at a lower price, but they voluntarily advanced them to $20. Assuredly the payment of that price by these large dealers was evidence of the market value and was sufficient to justify the court's conclusion:

> "That the price to be paid for merchantable tomatoes as provided by said contract and intended by the parties thereto was a sum equal to the going price that should be paid at Sacramento and Stockton canning companies engaged in the same general business of canning tomatoes in said places, it being the practice of companies engaged in the business of canning tomatoes in said places to contract for tomatoes in a similar manner, and that the price and value of merchantable tomatoes in the cities of Sacramento and Stockton * * * on and after the 3d day of September, 1918, up to and including the 9th day of November, 1918, was $20 per ton of 2,000 pounds, and that defendant agreed to pay to plaintiff for said tomatoes the sum of $20 per ton."

[5] The form of this finding is criticized by appellant in that it is claimed the "market value" is not declared. As to this, the "price and value" would imply the value in the market. Moreover, the finding must be construed as a whole, and by reference to an earlier clause we observe that the price had in view by the court is the going price. This is the same as the market price. The terms "market price," "current price," and "going price" mean substantially the same thing. It is simply a question of the choice of expressions by various authorities. Kelsea v. Haines, 41 N. H. 246; Sloan v. Baird, 162 N. Y. 327, 56 N. E. 752; Barrett v. Schooner Wacousta, 1 Flip. [U. S.] 517, Fed. Cas. No. 1050.

The whole contest herein is really reducible to a question simply involving a conflict of evidence, and there is no warrant for us to interfere with the conclusion of the trial court.

The judgment is therefore affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

51 Cal. App. 261

LINGREN et ux. v. NICHOLAS. (Civ. 3718.)

(District Court of Appeal, First District, Division 2, California. Feb. 4, 1921.)

Appeal and error 🔑932(1)—Presumed to uphold amount of recovery that court found no injury to foot as alleged.

In an action for damages caused by an alleged malicious unlawful assault, where plaintiff appealed under provision of Code Civ. Proc. § 953a, being dissatisfied with amount of judgment, the trial court had power to determine that condition of foot was not caused by any injury received in the assault, and where, in support of the judgment, assuming that the trial court did so determine, there is nothing tending to show abuse of discretion, the judgment will be affirmed.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Konsta Lingren and wife against D. M. Nicholas. From a judgment in their favor, with which they were dissatisfied, plaintiffs appeal. Affirmed.

Frank J. Murphy, of San Francisco, for appellants.

D. M. Nicholas, in pro. per.

STURTEVANT, J. The plaintiffs sued the defendant for damages caused by an alleged malicious unlawful assault and recovered a judgment for $250. Being dissatisfied with the amount thereof, the plaintiffs appealed, under section 953a, Code of Civil Procedure. In their brief the appellants make only one point—the award was insufficient. In making this point they claim they should have been awarded exemplary damages. We think it may be said that the judgment of the trial court included exemplary damages and that the contention of the appellants is not well founded.

The appellants, in their complaint, pleaded an unlawful assault by the respondent upon Mrs. Lingren, and they pleaded that such assault was oppressive and malicious. The trial court found on all of the issues in favor of the appellants and fixed the damages in the sum of $250. The evidence was quite evenly balanced on the questions: (1) As to whether the assault was made by Mr. Nicholas or Mrs. Lingren; (2) as to the injury, if any, caused to Mrs. Lingren; and (3) as to her expenses incurred by reason of such injuries. It is clear that after the assault Mrs. Lingren became sick and disabled; but it is not at all clear that such sickness or disability was caused by, or resulted from, the alleged assault. The principal disability from which she subsequently suffered was an infected sore on one of her feet. The assault occurred July 14, 1917. She consulted her physician July 17, 1917. It was not until July 28, 1917, that she complained to him, according to his testimony, of any soreness on the foot. He further testified that the condition of the foot could or could not be the result of an injury to the foot received at the time of the assault. As to whether the injury was so caused was a question for the determination of the trial court. That court had the power under the facts to determine that the condition of the foot was not caused by any injury received in the assault July 14, 1917. In support of the judgment, assuming that the trial court did so determine, there is nothing in the record tending in the least to show that that court abused its discretion.

The judgment should be affirmed; and it is so ordered.

We concur: LANGDON, P. J.; NOURSE, J.

51 Cal. App. 361

KIMBALL v. SWENSON et al. (Civ. 3446.)

(District Court of Appeal, First District, Division 2, California. Feb. 11, 1921. Hearing Denied by Supreme Court April 7, 1921.)

1. Pleading ⟹237(1)—Request to amend at trial held not supported by proof.

In an action for the conversion of corn purchased by plaintiff from defendant partnership and thereafter delivered by the partnership to the defendant creditor of the partnership under a bill of sale reciting consideration, and sold by the creditor, it was not error to refuse leave to amend the answer at trial to allege that the creditor took possession for the benefit of the partnership creditors, where that was contrary to the testimony introduced as to the nature of the transaction.

2. Sales ⟹226(10)—Buyer held to have better title than sellers' agent for the sale of corn delivered to him.

One who purchased a portion of a crop of corn while it was growing, completed the payment therefor, and demanded possession of the corn both from the sellers and from one to whom they had delivered it for sale for them, has a better title to the corn, regardless of when the transfer of title occurred, than the one to whom it was delivered, who was merely the agent of the partnership and therefore chargeable with notice of the sale.

3. Judgment ⟹253(1) — Judgment for damages for conversion allowed though exceeding amount claimed.

In an action for conversion of corn, it was not error to give judgment for the highest market value of the property between the date of the conversion and of the verdict under Civ. Code, § 3336, though that amount exceeded the amount claimed, where the answer joined issue on the amount of damages and the case was tried on the theory that the Code measure of damages should apply, in view of Code Civ. Proc. § 580, providing that, except in case where there is no answer, the court may grant plaintiff any relief consistent with the case made by the complaint.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by E. B. Kimball against Lyda N. Swenson and others for damages for conversion. Judgment for plaintiff, and defendants appeal. Affirmed.

Peck, Bunker & Cole and C. D. Dethlefsen, all of Oakland, for appellants.

Gillogley, Crofton & Payne, of San Francisco, for respondent.

NOURSE, J. This is an appeal from judgment after verdict in favor of plaintiff for $1,677.50 as damages for the conversion of 25 tons of corn. The facts material to the opinion are that for some time prior to May 23, 1918, Henry F. Pierce, Lyda N. Swenson, and N. L. Pierce were partners for the purpose of raising a crop of corn planted by them on the Bradley ranch in Contra Costa county. On the said day while the corn was planted, but not yet harvested, one of the partners, Henry F. Pierce, entered into an agreement in writing to sell to the plaintiff 25 tons of the corn from said crop for $1,000. This agreement was made with the knowledge and consent of the two other partners, and payments were made in accordance with its terms to the said Henry F. Pierce. The final payment was made by check mailed by the plaintiff from some place in Texas. A few weeks after the payment was made, plaintiff met Henry F. Pierce and asked him if the check had been received. Pierce replied in the affirmative and told plaintiff then that "the corn was his." Thereafter and in the month of January, 1919, plaintiff asked the said Pierce about the corn he had purchased, and Pierce replied that it would not be advisable to shell it at that time, as there was a good deal of wet corn in the market and it would be better to let this corn stand awhile. Again, in March of the same year, similar inquiry was made. During this time the corn was in the cribs on the ranch but had not yet been shelled nor had plaintiff's portion been segregated. On December 26, 1918, the defendant Swenson, desiring to raise additional funds for the harvesting of the corn, entered into an agreement with Henry F. Pierce whereby the said Pierce sold to the defendant Swenson all his interest in the corn crop remaining over and above the 25 tons of corn belonging to E. B. Kimball. In this agreement the defendant Swenson expressly agreed that the plaintiff was the owner of the 25 tons of corn and that he was entitled to have the same delivered to him in the manner provided in the written agreement made between him and Henry F. Pierce on the 23d day of May, 1918. The corn was shelled in the latter part of May, 1919, and on the 6th of June of the same year the defendants Swenson and N. L. Pierce delivered the entire crop, consisting of 70½ tons, and including that belonging to plaintiff, to the defendant C. S. Webber. This delivery was accompanied by a bill of sale in which a consideration of $4,200 was recited. It was, however, admitted by the parties concerned that no consideration passed for the transfer, but that the defendant Webber took possession of the corn at the instance and request of Mrs. Swenson and with the consent of the remaining partner N. L. Pierce for the purpose of disposing of the entire crop and paying off certain creditors. At the time the transfer was made it is claimed that a list of these creditors was presented to the defendant Webber by Mrs. Swenson. It is admitted, however, that in any list so presented the claim of plaintiff was not included. Soon after the transfer to Webber was made, he shipped the entire crop to a warehouse in the city of Stockton, where he caused it to be sold for $68.50 a ton, which was $28.50 a ton in excess of the price paid by Kimball for the 25 tons purchased by him. At the time of the trial he still retained the proceeds of this sale. Prior to the trial and prior to the time of the sale, demand was made upon both the defendants Swenson and Webber for the delivery of the 25 tons belonging to plaintiff. In answer to the demand made upon him the defendant Webber replied that he could not make delivery without the consent of Mrs. Swenson, and in answer to the demand made upon her Mrs. Swenson replied that she would not make delivery because the corn crop had been much smaller than they had anticipated. Neither of the defendants at the time demand was made upon them denied plaintiff's title. Upon the stand the defendant Webber disclaimed any interest as to any portion of the corn except as to his claim as one of the creditors of the partnership, while the defendant Swenson not only expressly confirmed plaintiff's title by the paper dated December 26, 1918, but admitted his ownership while on the stand.

Briefly the record discloses an executory contract to sell a growing crop, a subsequent payment in full of the purchase price, an indefinite attempt to transfer title followed by a definite confirmation of title in writing, accepted by all parties concerned as meeting all the requirements for a complete vesting of title in the plaintiff. Thereafter it appears that the crop did not come up to expectations, but that the market price of the corn had greatly increased over that paid by plaintiff. These conditions, unforeseen at the time of the sale, brought about an attempted repudiation and are no doubt the cause of the entire controversy.

[1] Appellant has presented a number of highly technical objections all of which avoid the real issue of the case as disclosed by the foregoing statement of facts. An effort is made to present the issue of the trusteeship of the defendant Webber for the benefit of certain creditors; but the issue, if triable in a case of this nature, was not properly raised in defendant's answer. The allegation therein was made upon information and belief to the effect that the copartnership "is indebted" for debts incurred in said copartnership to certain parties named. There was no allegation or proof that any of the parties named as creditors were such at the time any of the transactions between plaintiff and defendants were had. An attempt was made to amend the answer for the purpose of alleging that the defendant Webber took possession of the entire crop at the instance and for the benefit of the creditors of the copartnership. The request for this amendment was made upon the ground that it was to conform to the proof made at the trial. The request for leave to amend in this partiuclar was properly denied by the court because the evidence was directly contrary to the allegations of the proposed amendment.

There are but two other points raised by appellants which require consideration: (1) The question of title, and (2) the amount of recovery. As to the question of title, it is significant that Mrs. Swenson did not in her answer or at any stage of the proceedings assert title in herself to the 25 tons of corn in question. On the other hand, she had knowledge of the agreement to sell to Kimball either before or immediately after the written agreement of May 23, 1918, was executed. Thereafter and on December 26, 1918, she expressly consented to the sale, confirmed the transaction, acknowledged Kimball's ownership, and consented to make delivery according to the terms of the agreement of May 23d. The issue presented by her answer is that on June 6, 1919, she executed and delivered to the Webbers a bill of sale to enable them "to care for and hold the property and its proceeds for those entitled thereto against the said copartnership and as between said copartners and their successors." It is then expressly alleged that the Webbers "make no claim whatever, except as herein stated, to the ownership of said corn as against the said creditors of said copartnership, nor as to 25 tons of said corn as against E. B. Kimball." The claim of Kimball is then alleged to rest upon a transfer to him by Henry F. Pierce "of all of said Henry F. Pierce's interest in said 25 tons of corn, which said transfer by said Henry F. Pierce to E. B. Kimball was made in the spring of 1918." An identical answer was filed by the appellant Webber, wherein he also waived all claim to the ownership of 25 tons of corn except as to his claim as a creditor of the copartnership and for costs of transportation, storage, and insurance upon the corn after it had been taken into his possession. As to the issue raised in the answers relating to the effect of the "transfer" by Pierce to Kimball made in the spring of 1918, it was wholly unsupported by any evidence and directly contradicted by the agreement of December 26, 1918, signed by Mrs. Swenson and made a part of her answer by reference.

[2] It is immaterial to determine when title to the corn passed to Kimball—whether upon payment in full of the purchase price or through the oral statement of Pierce made prior to the written agreement of December 26th, by the demands for delivery made in January and March of 1919, which would constitute an acceptance by the purchaser, or by the demand made by Pierce as agent for Kimball, or by the demand made by Crofton before the corn was sold by Webber, or by the combination of all these acts with the written acknowledgment of ownership made by Mrs. Swenson. Manifestly, as between Kimball and Mrs. Swenson the former had the better title, and as to Webber, he could not obtain from Mrs. Swenson any better title than she had to convey. He was not an innocent purchaser for value; in fact, he was not a purchaser at all. Holding the corn solely as Mrs. Swenson's agent, and at her instance and request, he was charged with the knowledge of his principal. Demand for delivery was made upon him while the corn was still in his possession, and, by the terms of the agreement of May 23d, which was expressly agreed to by Mrs. Swenson, delivery should have been made within one week thereafter.

[3] As to the matter of damages, the complaint, which was filed on June 30, 1919, alleged that the corn was of the value of $1,500 and prayed for damages in that amount. The jury rendered a verdict in the sum of $1,677.50, which was the stipulated market price of 25 tons on the basis of $67.10 per ton at the ranch. The measure of damages for the wrongful conversion of personal property is presumed to be the value of the property at the time of the conversion, with interest, or the highest market value of the property at any time between conversion and the verdict, without interest, at the option of the injured party. Section 3336, Civ. Code. The defendants answered denying the conversion. They thus put in issue the question of damages, not merely as alleged in the complaint, but according to the measure specified in the Code. The case was tried upon the theory that respondent was entitled to recover upon whichever basis the jury should determine, and at one stage of the proceedings counsel agreed that the measure fixed by the Code applied to the case at issue. This is such a case as that contemplated by section 580, Code of Civil Procedure, which provides:

> "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

The relief "embraced within the issue" was the damage for defendants' conversion. The answer having joined issue on this point, the judgment properly followed the measure of damages prescribed by the Code for such cases. O'Donnell v. Kramer, 65 Cal. 353, 4 Pac. 204; Johnson v. Polhemus, 99 Cal. 240, 244, 33 Pac. 908; Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 480, 111 Pac. 360.

The judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

51 Cal. App. 303

MALVICH v. MALVICH. (Civ. 3727.)

(District Court of Appeal, First District, Division 1, California. Feb. 7, 1921.)

Divorce 🔑309—Though final decree made no provision for support of children, court could modify it.

Though final decree for divorce made no provision for the support of the children of the marriage, the court which rendered it was empowered to modify it six years later by placing such burden on defendant husband by providing he should pay plaintiff wife $20 a month for each of the two minor children.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action for divorce by Josephine Malvich against James Malvich. From an order modifying final decree of divorce, defendant appeals on the judgment roll alone. Order affirmed.

W. Ernest Dickson and Henry L. Ford, both of Eureka, for appellant.

H. C. Nelson, of Eureka, for respondent.

KERRIGAN, J. This is an appeal from an order modifying the final decree in an action for divorce, and is taken on the judgment roll alone.

Both the interlocutory and final decrees awarded all the community property of the parties to the plaintiff, and made no provision or reservation for the support of the two minor children of the marriage. Six years after the entry of the final decree the court modified it by providing that the defendant should pay to the plaintiff the sum of $20 per month for the maintenance and support of each of said children during minority.

Defendant, in support of his appeal from such order, contends that, the final decree having made no provision for the support of the children of the marriage, the court was without power to so modify it by placing this burden upon the defendant. We are unable to uphold this contention. In thus modifying the decree the court was acting within its power, according to the settled law in this state. There was formerly some conflict in the decisions upon this point, but in the case of Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32, the cases were reviewed, and the question put at rest in an able opinion. Since that decision "there can be no doubt of the power of the court which has granted a divorce to modify its judgment, at any time during the minority of children of the marriage, by providing for the custody, education, and support of such children, even though the judgment may have contained no provision on the subject. No reservation in the decree itself is necessary to the exercise of this power. The authority of the court rests upon the express provisions of section 138 of the Civil Code, and was ample even before the amendment of 1905 to that section." Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42. See, also, Davies v. Fisher, 34 Cal. App. 137, 166 Pac. 833.

The order is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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51 Cal. App. 331

RIVER FARMS CO. OF CALIFORNIA v. BORGES et al. (Civ. 2265.)

(District Court of Appeal, Third District, California. Feb. 8, 1921. Hearing Denied by Supreme Court. April 7, 1921.)

1. Appeal and error 🔑931(1)—Presumptions in favor of judgment.

Where defendant appellant averred that a prior action had been commenced on a certain date, but the court failed to find on the point the appellate court would assume in support of the judgment that appellant submitted no proofs in support of the allegation.

2. Vendor and purchaser 🔑95(1)—Suing for installment less than whole price not election to affirm contract.

The vendor's bringing of an action for an installment less than the whole price does not operate as an election to affirm the contract precluding him from claiming the property.

3. Vendor and purchaser 🔑299(1)—In vendor's ejectment suit, defense of contract to purchase not available without offer to perform.

In ejectment by grantee of vendors, against alleged purchasers in possession, defendants cannot set up the equitable defense of their outstanding contract to purchase, where they do not offer to perform the contract by paying the amount due upon such contract.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by the River Farms Company of California against John Borges and another. From judgment for plaintiff, defendants appeal. Affirmed.

J. R. Cunnyingham and McPike & Murray, all of San Francisco, for appellants.

Thomas Rutledge, of Colusa, and Chickering & Gregory, of San Francisco, for respondent.

PREWETT, Presiding Justice pro tem. Action in ejectment. Judgment in favor of plaintiff and respondent. The defendants appeal. The plaintiff claims title as grantee of the Yolo Land Company. The appellants claim right of possession by virtue of a certain contract of purchase entered into between said Yolo Land Company and appellant John Borges on October 1, 1913, whereby the latter was to pay $24,000 for the property in dispute. The sum of $4,800 was then and there paid in money and no other or further payment, except a little interest, has ever been made by Borges or in his behalf. The balance of the purchase price was agreed to be paid as follows: The sum of $3,840 on the 1st day of October in each of the years 1914, 1915, 1916, 1917, and 1918, together with interest. In order to understand the point of this appeal it is necessary to quote a number of provisions of the contract under which the property was purchased. The provisions in question follow:

> 01. "If any of said installments are not so paid, then at the option of the owner, the whole of said principal sum and interest shall become immediately due and payable or all rights of the purchaser under this contract be deemed terminated as mentioned hereinafter."
>
> 5. "It is also, expressly understood and agreed between the parties hereto that in all matters and things hereunder to be done, and all payments hereunder to be made, time is and shall be of the very essence of this agreement."
>
> 6. "The waiver by the owner, of any breach of covenant or agreement on the part of the said purchaser shall not be deemed or held a waiver of the terms of this contract making time of the essence thereof as to other payments thereafter falling due."
>
> 7. "In the event that any payment remains unpaid for thirty days after the same becomes due according to the terms of this agreement, the owner shall be released from all liability hereunder at law or in equity either to convey the above-described real estate or to repay all or any part of the payments made by the purchaser; but in that event all payments made shall be deemed and considered as rent paid for the period before such default and shall be retained by the owner, and all further rights of purchaser under this contract to the payments made or to a conveyance or possession of the real estate shall thereupon terminate and cease; * * * provided, however, that the owner on purchaser's default, may at his option bring an action to foreclose the rights of the purchaser or to recover installments due, according to this clause, either for installments delinquent or for the whole balance of the contract price unpaid."
>
> 8. "That each and all of the terms hereof shall inure to the benefit of and be binding upon, the heirs, executors, administrators, successors and assigns of both parties to this contract."

The defense to the action is not based upon any claim that the defendant Borges has complied with the terms of his contract, for it is admitted that he has never paid a cent upon the principal of said purchase price except the $4,800, paid at the date of the contract or a few days thereafter.

The defense is that the Yolo Land Company, by an election of inconsistent remedies, has estopped itself to claim a recovery of the land, and is relegated to other remedies. The outstanding fact in the case then is that the defendant Borges is claiming the land and withholding the money. It would be a woeful injustice if he could do this, and we are not prepared to say that the law either sanctions or permits such a result. To appreciate fully this defense of election of remedies, it is necessary that we examine in detail the several acts relied upon to establish the election and the several alternatives reserved to the seller in the contract of sale.

The installment of October 1, 1914, remaining unpaid, the Yolo Land Company, on August 24, 1915, commenced an action against defendant Borges to recover the same, but the action was dismissed without trial. If, however, the commencement of this action constituted an election, then the subsequent dismissal thereof did not operate as a revocation of the election.

Another installment ripened on October 1, 1915, and on November 9, 1915—more than 30 days after it became due—the Yolo Land Company, in an action brought against it by said Borges, filed an answer and cross-demand, setting up said contract and the default as to said two payments that became due, respectively, on October 1, 1914, and October 1, 1915, and praying judgment in said sums. Thereafter certain persons purporting to be trustees of the creditors and stockholders of said Yolo Land Company filed amended answers, setting up the default of defendant Borges as to said two payments, and praying judgment accordingly.

On or about the 23d day of February, 1918, said trustees filed in said last-mentioned action their amended answer to supplemental complaint therein, alleging, among other things, that said Yolo Land Company, on or about November 6, 1916, conveyed the premises in question to the plaintiff herein, and praying for judgment in the sum of $14,360, but without any statement as to what that sum represented. Said answers and amended answers averred that said Yolo Land Company was dissolved on May 1, 1917, by a decree of court.

It will be noted that the fact and date of the dissolution and the fact and date of the conveyance to the plaintiff are not found by the court and they get into the record only by way of recital in an answer filed in another action. We have no proof that they took place. This appeal is based wholly upon the judgment roll, and we look to that alone for our facts.

It is found by the court that "prior to the commencement of the above-entitled action the said John Borges refused, upon tender of a good and sufficient deed to said premises, to pay the balance of said purchase price or to deliver up and surrender the possession of said premises, and has never at any time offered to complete said contract"; and it is, of course, presumed in aid of the unwritten defense to the allegations of the answer that such finding is properly supported by an implied allegation to like effect. This action was commenced on January 13, 1919, or more than three months after the maturity of the last of the deferred payments. In other words, at the time of the commencement of this action, the defendant Borges was completely in default on all his payments and interest save the initial payment and a small sum by way of interest.

[1] At no time was there ever a suit brought for the whole of the purchase price, nor for any part of it except for the first two installments. Much stress is placed by appellant upon the fact that the Yolo Land Company, on November 9, 1915, filed an answer in a suit brought against it by said defendant Borges, wherein it set up the default as to the installment that became due on October 1, 1914, and also the installment that became due on October 1, 1915, claiming that the action itself has been commenced some months earlier and before the maturity of said last-mentioned installment. However, the installment was more than 30 days overdue at the time the answer was filed, and this is sufficient But if it were otherwise, we are without light as to the date of the commencement of the suit. It is true that the defendant Borges, in the third paragraph of his third defense, avers that it was commenced on August 31, 1915, but the court failed to find on the point. We must assume in support of the judgment that the appellant submitted no proofs in support of this allegation. Mohr v. North Rawhide Mining Co., 177 Cal. 264, 170 Pac. 600. The position of the appellants is that the inclusion of an installment not then due could be done only under the forfeiture clauses of the contract permitting the owner to bring an action for the entire purchase price in case any installment was overdue. In view of the state of the record as above outlined, it becomes unnecessary to examine their contention that such inclusion constituted an election of inconsistent remedies.

We have stated that there exists in the record no proof that the Yolo Land Company was ever dissolved. In making this statement we are not unmindful of the fact that the court found, in finding 14, as follows:

> "That on or about the 25th day of February 1918, H. C. Morris, Charles Sutro, E. L. Dow, J. F. Humburg, and H. A. Kunz, as trustees of the creditors and stockholders of the Yolo Land Company, filed," etc.

But this finding falls far short of a finding that the Yolo Land Company was dissolved. In support of the judgment we may assume that it is yet a subsisting corporation, if such an assumption is necessary.

The court found that defendant Borges had refused upon tender of a deed to pay the balance of the purchase price. In support of the judgment the court will presume that this deed was executed by the proper parties; that the demand was made by the proper parties and in the proper sum, and that these facts were established by competent evidence. Upon this state of the record the judgment must be affirmed, unless the acts of the Yolo Land Company in bringing the first mentioned action and in filing the answers in the second mentioned action constituted such an election as estops it and its vendees from claiming the property.

[2] But bringing an action for an installment less than the whole purchase price cannot operate as such an election. The installments were due, and the payee had a right to proceed to collect them. This has been held even in an action to recover an installment on the purchase price of personal property. In Silverstin v. Kohler & Chase, 183 Pac. 451, 9 A. L. R. 1177, the court, speaking through Wilbur, Justice, says:

> "There is no difference in principle, in favor of the purchaser, between such recovery of the installments due and the payment of those installments by the purchaser without suit. The seller was not therefore put to his election between two inconsistent remedies."

We are not called upon to determine what would have been the effect had the vendor obtained a judgment for the entire purchase price, for no such judgment was either given or sought.

[3] But even if the findings as to various allegations contained in answers in other actions could be regarded as findings that the matters so alleged are facts, still the appellants would not be entitled to prevail. The defense of the appellants is an alleged equity arising out of the contract in question. In no event can they be heard to assert this defense until they, or at least until Borges, shall have offered to perform. Not only has he not offered to perform; he even affects to show that circumstances have relieved him from the obligation to perform, thus placing himself in the grossly inequitable position of claiming both the land and the price. But, as above shown, these alleged circumstances are supported only by his allegations that the pleadings in another action aver them to be true.

Courts will not tolerate a principle at once so gross and so at variance with fair dealing. If any authority in support of so obvious a principle were needed, it is found in the case of Connolly v. Hingley, 82 Cal. 642, 23 Pac. 273, where the court, in an action in ejectment against a vendee in possession, says:

> "The burden was clearly upon the defendant to sustain the allegations of his equitable defense, and, having failed to do so, the finding was properly against him. * * * The plaintiff claims under a deed from Chapman. * * * It is apparent that the defendant can have no greater right against the plaintiff than he had against Chapman. And so far as the possession is concerned, he has no equity against Chapman, because he was in default

> under his contract, without excuse. As was said in Hannan v. McNickle, ante, p. 122, which is similar in principle: 'The performance of his contract is an essential feature of any equitable defense on his part.' * * * The conveyance to the plaintiff did not relieve [him] from his obligation to comply with his contract. * * * He was bound to pay some one, and he has not paid any one, or offered to do so. This prevents him from having any right to equitable relief."

A demand upon Borges was found by the trial court, but, since the answer shows that a demand would have been unavailing, it was not necessary to perform the vain act of making one. The claim of appellants that the alleged dissolution of the Yolo Land Company relieved Borges of the duty of performing his contract is scarcely specious. Even if the dissolution had been found by the court, such dissolution would not have worked an extinguishment of the obligation. He would still have owed some one and he made no offer to pay any one.

The point urged by the appellants that there is no finding as to the value of the use and occupation of the premises arises through inadvertence. The court in finding 4 expressly covers this point.

It does not appear to be necessary for this court to speculate as to the method whereby the plaintiff acquired the title. The court, in finding No. 6, determines that at the date of the contract the Yolo Land Company was the owner of the property. In finding 2 it is shown that the plaintiff, at the time of the commencement of this action, was and ever since has been the owner thereof. There is no inconsistency in these findings. The evidence in the case is not before us, and we are required to assume such a state of the evidence as would justify the findings of the court. Whether the plaintiff acquired the property by mortgage sale, tax title, direct conveyance from the Yolo Land Company or otherwise cannot affect the result.

The appellants plead the statute of limitations, but they have affirmatively shown that they never claimed by an independent and hostile title, but only as vendees under a contract of purchase which they have not performed nor offered to perform.

That the Yolo Land Company or its assignee of its rights under the contract could, if vested with the legal title, eject the appellants, would seem to be too plain for discussion, and its grantee stands in at least as good a position. It has been noted, however, that the court has not found that the Yolo Land Company ever conveyed the property to the plaintiff. But it has found, in support of the allegations of the complaint, that the plaintiff was, at the commencement of this action, the owner and entitled to the possession thereof and this, as we have shown above, is sufficient, and the court will presume such conveyance as may be necessary to support the finding.

The court was under no duty to fix a period within which appellant Borges might perform his contract. He asked no such relief, and he did not offer to perform. We find no error that would justify a reversal.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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51 Cal. App. 353

BANK OF CORONADO v. SHREVE.
(Civ. 3672.)

(District Court of Appeal, First District, Division 1, California. Feb. 10, 1921. Hearing Denied by Supreme Court April 7, 1921.)

1. Arbitration and award 🔑50—Construction by parties held to show award was filed in time.

Defendant, who signed an arbitration agreement requiring the award to be made within 30 days from the date of submission, and who participated at hearings before the arbitrators held more than 30 days after the date of the agreement, and signed two stipulations empowering the arbitrators to perform certain duties after that period, is precluded by the construction placed on the agreement by the parties themselves from contending that the agreement required the arbitrators to make their award within 30 days after the agreement was signed.

2. Arbitration and award 🔑50—Court can direct clerk to change entry to conform to parties' construction of agreement.

Where the parties to an arbitration agreement by their acts construed the agreement as not requiring the arbitrators to make their award within 30 days from the date of the agreement, it was not error for the trial court to order its clerk to amend the entry in the register, made under Code Civ. Proc. § 1283, so as to conform with the terms of the agreement of submission as construed by the parties.

3. Arbitration and award 🔑57—Agreement held not to require findings on each item.

Arbitration agreement and subsequent stipulations of the parties, requiring arbitrators to determine all matters in controversy submitted to them, does not require the arbitrators to make specific findings upon each item claimed by a party.

4. Arbitration and award 🔑76—Assignor of interest in award cannot request vacation of it.

Where plaintiff, who had agreed with defendant to submit their controversy to arbitrators, assigned his interest in the award to a bank which notified defendant of the assignment, and was substituted for plaintiff as the party of record, and thereafter gave orders to the bank, which the latter accepted, for the disposition of part of the proceeds of the award, the original plaintiff could not, after the award, make settlement with defendant and entitle the latter to a vacation of the award at the request of the original plaintiff.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Proceedings for the arbitration of differences between William Hoyte Colgate and J. H. Shreve, in which the Bank of Coronado, as assignee, was substituted for Colgate. From an order denying the motion of defendant Shreve to vacate the award of the arbitrators, the defendant appeals. Affirmed.

J. T. Reed, of Calexico, George H. Shreve, of Los Angeles (Jerome H. Kann, of Los Angeles, of counsel), for appellant.

Horton L. Titus and Frank J. Macomber, both of San Diego, for respondent.

RICHARDS, J. This is an appeal from an order of the superior court of the county of San Diego denying the appellant's motion to vacate an award made and filed therein in the course of an arbitration proceeding had between certain parties under the provisions of the Code of Civil Procedure relating to such proceedings.

The facts of the case are these: On April 21, 1919, J. H. Shreve, the appellant herein, and one William Hoyte Colgate entered into an agreement in writing to submit certain matters in controversy between them to arbitration. Three arbitrators were named in said agreement, and it was further therein provided that the award of said arbitrators "be made in writing by said arbitrators or any two of them and be delivered to the said parties or their attorneys within thirty days from the date within which said submission is made to said arbitrators." The arbitrators so chosen qualified on the 10th day of May, 1919, and thereupon and on May 11, 1919, filed with the clerk of the superior court, pursuant to the provisions of section 1283 of the Code of Civil Procedure, the agreement of arbitration, with their qualification attached thereto, and thereupon proceeded to hear the allegations and take the evidence of the parties, and for that purpose met and adjourned from time to time until the 14th day of June, 1919, when they made and filed their award, wherein, after a detailed report of the proceedings before said arbitrators, it was found and adjudged by them that J. H. Shreve was indebted to the said William Hoyte Colgate in the sum of $16,307.02. On July 15, 1919, the said J. H. Shreve filed a motion in writing in said court to vacate and set aside said award upon a number of designated grounds. Said motion came on for hearing, and was heard on July 3, 1919, whereupon the court denied said motion, and from the order of the court denying the same this appeal has been taken.

[1] The first contention urged by the appellant is that the award of said arbitrators was void because the same was not made or filed by said arbitrators within 30 days from the date of submission to them. This contention is based upon the language of the agreement of arbitration above set forth, and which, according to the construction which the appellant insists should be placed upon its terms, required the making of said award within 30 days from the date of the agreement itself. From an inspection of the record herein we are satisfied that the appellant was not entitled to urge this contention before the trial court, nor to make the same upon this appeal. The record herein discloses that the arbitrators selected by the parties qualified as such on May 10, 1919, and thereafter up to June 14, 1919, held their several hearings in pursuance of their functions as such arbitrators, at all of which the appellant herein appeared without any objection to the prolongation of such hearing beyond the period of 30 days after the date of the agreement in question. It further appears that on the 14th day of June, 1919, that being the last day of the sessions of said arbitrators, and being also Saturday, the afternoon of which was a half holiday, the parties entered into a stipulation in writing to the effect that the arbitrators might continue to act as such during the afternoon of said day with the same effect as though it were a judicial day, and in addition the parties further stipulated in writing—

> "That the original award of the board of arbitrators herein shall be retained by a member of said board for the period prescribed in the agreement submitting the matter to arbitration, at the expiration of which time the said original award shall be filed by said members of said board in the above-entitled matter. * * * That all exhibits introduced in evidence in this matter shall be retained by a member of the board of arbitrators during a period of thirty days from and after giving said award, and at the time of filing the original award in the above-entitled court said exhibits shall be delivered to the clerk of said court."

We are clearly of the opinion that the appellant by his acts and conduct in consenting to and participating in the sessions of said board of arbitrators, which were being held after the date when, as he now claims, they had no further jurisdiction to act, has concluded himself from claiming that the provision of the arbitration agreement above quoted is to be given a different interpretation than that which the parties themselves gave it while the matter was pending before the board of arbitration, and that the appellant is particularly so concluded by the two stipulations which he entered into on June 14, 1919, granting said board express authority to act as such after the period which, as he now claims, marked the limit of the jurisdiction of said board had expired. We find no merit, therefore, in the appellant's contention in this regard.

[2] And this disposes, also, of his next contention that the action of the trial court in ordering its clerk to insert in the register of actions a memorandum as to the time within which the award should be made was void. The court had jurisdiction to direct its clerk to amend the entry in the register made under section 1283 of the Code of Civil Procedure so as to conform to the requirements of that section and with the terms of the agreement of submission (Cal. Academy of Sciences v. Fletcher, 99 Cal. 207, 33 Pac. 855), and the amendment to the register entry, which the clerk so made pursuant to such direction, caused it to conform to the terms of the agreement of arbitration as the same had been interpreted by the parties themselves.

[3] The appellant's next contention is that the arbitrators failed to determine all of the matters submitted to them, and that their award was in that respect defective, and hence in violation of the agreement for arbitration and of the later stipulation of the parties made while the matter in controversy was in the hands of the arbitrators. We do not think this contention is maintainable upon the record before us, nor that it can be fairly predicated upon the language of the written agreement or later stipulation of the parties. The appellant fails, we think, to show that the arbitrators did not consider all of the controverted matters, and that they did not include them all in their final determination of the balance due between Shreve and Colgate. The gravamen of the appellant's complaint is that the board of arbitrators did not make specific findings upon each item of the disbursements of Shreve, and which he claimed were chargeable against Colgate, but we do not find that either the original agreement of arbitration nor the later stipulations of the parties requires such itemization. They merely require a "determination" by the board of the matters in controversy, and we are satisfied that the board's determination, as embraced in its conclusions, include them all.

The next point urged by the appellant is that the trial court erred in refusing to permit him to introduce in evidence upon his motion to vacate the award a copy of certain reporter's notes of the proceedings before the board of arbitration. We are satisfied that no proper foundation was laid for the introduction of these notes, and that the objection to their introduction was properly sustained.

[4] The final contention of the appellant is that the trial court was in error in refusing to vacate the award in question upon the affidavit and showing of William Hoyte Colgate that he had settled all matters in dispute between himself and the appellant, and upon his request contained in said affidavit that said award should be vacated. The facts germane to this particular inquiry, as shown by the record, are these: On the 12th day of June, 1919, William Hoyte Colgate made, executed, and delivered to the Bank of Coronado an assignment in writing of the judgment or award to be given, rendered, or entered in the matter under submission to arbitration, and in and to all moneys due or to become due thereunder. Notice of this assignment was immediately given by the Bank of Coronado to this appellant, and thereafter and on July 31, 1919, the said Bank of Coronado was, upon its motion, substituted in the matter then pending in the superior court in the place and stead of William Hoyte Colgate as the party in interest of record therein. The assignment above referred to was general in its terms, but there was also executed on even date therewith an agreement between said William Hoyte Colgate and the two gentlemen who had been acting as his attorneys in the matter of the arbitration, by the terms of which they became entitled to receive in payment for their services performed and to be performed in said matter a certain percentage of the amount recovered by said Colgate by virtue of said impending award. This agreement was transmitted to the Bank of Coronado, which admitted receipt of the same, and agreed on its part to disburse whatever funds it should receive by virtue of said award and its assignment, in accordance with said agreement. It further appears that about June 20, 1919, said Colgate gave a written order to said Bank of Coronado to pay to one Gertrude M. Colgate the sum of $2,800 out of any moneys received by it from said award. After these several transactions it appeared that Colgate and the appellant herein got together, and, regardless of these assignments and orders, undertook to make a settlement of the matters theretofore in controversy between them, and in pursuance thereof to bring about the vacation of the award. It was this attempted settlement which formed the subject and substance of the affidavit of Colgate which was presented upon the appellant's motion to vacate the award, and which the trial court is charged with having disregarded. Clearly, the trial court was not in error in disregarding this portion of the settlement between the appellant and said Colgate, and also was not in error in refusing to vacate said award upon Colgate's request. Colgate has ceased to be a party to the proceeding before the court. By his assignment he had conveyed the whole legal title in and to said award and to all moneys receivable thereunder to the Bank of Coronado, and had further transferred by his agreements and orders, above referred to, definite interests to his said attorneys and to Gertrude M. Colgate in the subject-matter of said award. His subsequent attempted settlement with the appellant was sought to be made without the presence, knowledge, or consent of these several parties to whom he had thus transferred definite and valuable in-

terests in said award, and his attempted action in seeking and requesting the vacation of said award would, if permitted to succeed, have the effect of destroying, or at least seriously imperiling, these interests and rights. This being so, the trial court very properly exercised its discretion in disregarding the affidavit of Colgate and in refusing to accede to his request for the vacation of said award after the transfer by him, both in fact and of record, of a considerable part of his interest therein.

Finding no error in this record, the order is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

51 Cal. App. 325

In re KAFITZ'S ESTATE. (Civ. 3421.)

(District Court of Appeal, Second District, Division 1, California. Feb. 8, 1921.)

1. Executors and administrators ⚷122(2), 500—Special administrator chargeable with personalty and not entitled to compensation until return.

A special administrator, who without authority and without right parted with personal property belonging to the estate, should be charged therewith, and his estate should not be permitted to retain as compensation for his services any part of the funds of the estate administered upon until the property is returned to the executors, or, in lieu of such return, until the value of the property has been paid the estate administered upon.

2. Executors and administrators ⚷500—Special administrator not to be deprived of compensation for aid to claimant of interest in estate.

A special administrator who cared for and accounted for substantially all of a large and valuable estate *held* not to be deprived of compensation for his services because at the same time, with a strong partisan bias, and by all means in his power he was aiding one of the claimants to an interest in the estate in her efforts to establish the claim; the representative's compensation should not be reduced for any cause other than misconduct directly affecting the care of the property in his charge.

3. Attorney and client ⚷130—Attorney for special administrator not to be deprived of fees because also acting for claimant in will contest.

An attorney need not be totally deprived of fees for services rendered a special administrator because he was at the same time acting as attorney for one of the claimants in a contest over the will of the deceased person whose property was in possession of the special administrator.

4. Executors and administrators ⚷216(2)—Fee of attorney for administrator may be allowed to him directly.

In view of Code Civ. Proc. § 1616, an attorney's fee for services rendered special administrator may be allowed directly to the attorney, and need not be allowed to the special administrator as an expense incurred by him.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of William Kafitz, deceased. From an order settling the first and final account of Charles H. McGwire as special administrator, certain parties who appeared as persons interested in the estate as heirs at law and residuary legatees, appeal. Order reversed, with directions.

J. L. Murphy and Oscar Lawler, both of Los Angeles, for appellants.

Joseph Scott and Willedd Andrews, both of Los Angeles (A. G. Ritter, of Los Angeles, of counsel), for respondent.

CONREY, P. J. Appeal from an order settling the first and final account of Charles H. McGwire as special administrator. Appellants appeared as persons interested in the estate as heirs at law and residuary legatees, and also as executors of the last will and testament of decedent, and filed their exceptions in writing to the account. They personally have taken this appeal.

On November 27, 1918, special letters of administration were issued to McGwire. On November 29th appellants filed their petition for probate of the will of decedent. The will was contested by Maud M. Kafitz, surviving wife of the decedent. In an action for divorce, wherein William Kafitz was plaintiff and Maud M. Kafitz defendant, an interlocutory decree had been entered less than one year before the death of William Kafitz, and, therefore, a final decree of divorce had not been entered. After trial the will was admitted to probate in May, 1919, and appellants were appointed executors thereof. On December 2, 1918, appellants filed a petition for removal of the special administrator, which petition, after hearing, was, on the 27th day of December, 1918, denied. On April 25, 1919, petitioners filed a second petition for removal of the special administrator. This was set down for hearing on July 16th and thereafter continued until September 11, 1919. Prior to September 11th and while under arrest and charged with the commission of a crime, McGwire came to his death by suicide. His estate was represented at the hearing on said account and on the exceptions thereto, and the order of settlement of the account was made December 12, 1919. The value of the property accounted for by the special administrator was about $88,000.

The exceptions to the account were based upon the stated ground that the special administrator failed to account for all of the property received by him, and in particular that he allowed Mrs. Kafitz to take and appropriate to her own use certain items of said property. It was further objected that the claim of the special administrator for an allowance of $1,000 for his services and for an allowance of $1,000 as fees for his attorney were exorbitant, and that no allowances for those purposes should be made. The court, in its order, decided that the special administrator has turned over to the executors all of the property of the estate except the sum of $2,500; that it was necessary for the special administrator to seek frequent advice of his attorney in connection with his administration; that the sum of $750 each is a reasonable fee for the special administrator and his attorney. Thereupon the court provided that out of the moneys remaining in the hands of the special administrator, or his successors, "$750 shall be allowed as attorney's fees to Joseph Scott, and said special administrator shall retain as his commission allowed by law for his services $750" and directed the distribution of the remaining $1,000 to the executors.

Appellants claim that the evidence was insufficient to support the court's decision that the special administrator has turned over to the executors all of the property except $2,500 in this, that the evidence showed, without substantial conflict, that the special administrator had in his possession, belonging to the estate, certain personal property of the proved value of $113.50, for which he has failed and refused to account. It is also contended that the court erred in making any allowance for compensation for services of the special administrator or his attorney.

Counsel for appellants say:

> "Our contention is that the special administration was conceived and carried on, not in the interest of the estate and whoever might be ultimately adjudged entitled thereto, but as a means whereby a part of the property of the estate might be, and was, unlawfully passed to Maud M. Kafitz, as an instrumentality for assisting the latter and the special administrator in attempts to intimidate and corrupt prospective witnesses in the contest between said Maud M. Kafitz and the executors and the beneficiaries under the will which she was contesting."

Then follows a résumé of the facts, which they claim appear by the record herein affecting the conduct of the special administrator.

[1] Concerning the amount of property not accounted for, appellants contend that the undisputed facts show willful and wrongful disposition thereof. The evidence does show, without conflict, that this property belonged to the estate of William Kafitz, deceased, and not to his wife. But assuming this to be the fact, and further assuming that Mrs. Kafitz's conduct and the conduct of McGwire in his methods of assisting her in her contest against the will of decedent deserves the most severe criticism, this is not alone sufficient to have compelled the court to find bad faith on the part of the special administrator in allowing her to take possession of these small items of personal property which were claimed by her. Nevertheless, having, without authority and without right, parted with personal property belonging to the estate, the special administrator should be charged therewith, and his estate should not be permitted to retain as compensation for his services any part of the funds of the estate until said property is returned to the executors; or, in lieu of such return, the allowed compensation should not be permitted to be paid until the estate has received the value of said property. We do not overlook the fact that appellants claim that there was other property of the estate not accounted for by the special administrator. As to such other property, however, the evidence was not conclusive, and this court must therefore assume that said items, amounting to $113.50, constituted all of the property not accounted for.

Referring now to the more general charge that throughout his administration the special administrator acted in fraud of the law, in antagonism to the beneficiaries of the trust, and for the advantage of himself and Maud M. Kafitz, it appears from the evidence that in the contest which ended in the admission of the will to probate, Joseph Scott appeared and acted as attorney for the contestant, and at the same time he appeared and acted as attorney for the special administrator throughout the proceedings relating to the special administration. It further appears that McGwire, while acting as special administrator, was also actively aiding Mrs. Kafitz in her contest of the will. While many of the facts charged against McGwire and against Mrs. Kafitz in the affidavits in this proceeding are disputed, enough appears to show beyond controversy that McGwire was a strong partisan of Mrs. Kafitz in the will contest, and the evidence strongly tends to show the use by him of unjustifiable and wicked methods in his actions concerning said contest. From these facts two questions of law arise: First, may a special administrator who has cared for and accounts for substantially all of a large and valuable estate be totally deprived of compensation for the services thus rendered because he was at the same time, with strong partisan bias and by the use of all means in his power, aiding one of the claimants to an interest in the estate in her efforts to maintain and establish that claim? Second, must an attorney be totally deprived of fees for services rendered to a special administrator when and because he also and at the same time was acting as attorney for one of the claimants in a contest over the will of the deceased person whose property was then in possession of the special administrator? A third and minor question incidentally arises.

May an attorney's fee for services rendered to a special administrator be allowed directly to the attorney, or must such allowance be made to the special administrator as an expense incurred by him, on showing that it was necessary for him to employ an attorney to assist him in the performance of his official duties?

[2] On the first question it is our opinion that under the circumstances stated the special administrator remains entitled to just compensation for the services rendered by him. It is to be presumed that in fixing the amount of such compensation the court confined itself to the value of the services of the special administrator in his official capacity, and did not allow him for other services rendered to a party to the will contest. Since, in fact, the administrator was not removed by the court, the amount of his compensation should not be reduced for any cause other than misconduct directly affecting his care of the property in his charge.

[3, 4] The second question is answered by the decision of the Supreme Court in Estate of Healy, 137 Cal. 474, 478, 70 Pac. 455, 456:

> "In a controversy between the heirs of a decedent upon a matter in which the administrator has no interest, and which does not affect his relation to the estate in his hands, the attorney for the administrator violates no obligation to his client by acting as attorney for one of the heirs as against the others. See Jones v. Lamont, 118 Cal. 499. Correlatively, and for the same reason, the administrator violates no obligation to his trust by continuing to retain such attorney in his service."

Formerly it was the rule in this state that whatever allowance is to be made from the estate for the services of the attorney of an executor or administrator must be made to the executor or administrator, and cannot be made to the attorney. Estate of Kruger, 143 Cal. 141, 76 Pac. 891. Since that decision, and others there cited, statutory amendments have been made which indicate a change in the policy of the law. Section 1616 of the Code of Civil Procedure now provides that an attorney who has rendered services to an executor or administrator may, upon notice and during the administration, apply for, and upon appropriate showing obtain, an order requiring the executor or administrator to pay to him, out of the estate, compensation on account of services rendered by him. Section 1619, Code of Civil Procedure, provides for payment to be made directly out of the estate to attorneys for executors and administrators. Since the law concerning the payment of fees of attorneys for executors and administrators has thus been changed, we perceive no reason why allowance to attorneys for special administrators should not now be made in the same manner.

Applying to this case the law as hereinbefore stated, we are unable to sustain the contention of appellants that the court below erred in allowing compensation to the special administrator and to his attorney, or that the amounts fixed by the court are exorbitant. The determination of the sums thus to be allowed is vested in the superior court, and should not be interfered with on appeal unless there appears to have been a manifest abuse of discretion.

Solely upon the ground that the evidence proved, without contradiction, that personal property of the estate to the value of $113.50 has not been accounted for by the special administrator, the order is reversed, with directions that the superior court proceed to settle the account in accordance with this decision.

We concur: SHAW, J.; JAMES, J.

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51 Cal. App. 339

In re O'CONNOR'S ESTATE.

HOLOHAN et al. v. McADAM et al.

(Civ. 3763.)

(District Court of Appeal, First District, Division 1, California. Feb. 9, 1921. Hearing Denied by Supreme Court April 7, 1921.)

1. Wills 🔑386—Verdict on conflicting testimony as to unsoundness of mind not disturbed.

Judgment refusing to admit a will to probate, based on a jury's verdict on sharply conflicting testimony that at time of execution of the purported will testatrix was of unsound mind, will not be reversed.

2. Wills 🔑53(2)—Evidence as to condition of testatrix's mind before and after testamentary act relevant.

In proceedings to probate a will contested for testamentary incapacity of testatrix, evidence to show the condition of testatrix's mind before and after the date of her testamentary act was relevant and important for its bearing on the condition of her mind when the will was executed.

3. Wills 🔑55(1)—Evidence on issue of mental unsoundness sufficient to sustain verdict adverse to will.

In proceedings to probate a will contested for testatrix's incapacity and mental unsoundness, conflicting testimony on the issue *held* sufficient to justify verdict adverse to the will.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Application of Maud McAdam and others for the probate of the alleged will of Annie O'Connor, contested by James B. Holohan and others. From judgment refusing to admit the will to probate, proponents appeal. Affirmed.

Rea, Cassin & Caldwell, of San Jose, for appellants.

John W. Preston, of Ukiah, Chas. B. Younger, of Santa Cruz, and Robert Duncan, of Ukiah, for respondents.

WASTE, P. J. This is an appeal by the proponents from a judgment of the lower court refusing to admit to probate a document dated April 25, 1919, purporting to be the last will and testament of Annie O'Connor, deceased. The contest was tried before a jury, which found that while the purported will was not procured through the undue influence of certain of the proponents, as charged by the contestants, Annie O'Connor was not of sound and disposing mind at the time the document was signed by her. This appeal presents the question of the sufficiency of the evidence to support the verdict of unsoundness of mind.

In the lower court, the contestants, who are the respondents here, offered evidence tending to support their contention that Annie O'Connor, by reason of an advanced state of arteriosclerosis, produced by various causes, had been for several months prior to April 21, 1919, seriously impaired mentally. On that day she suffered a severe stroke of paralysis, producing a state of coma, which, the respondents contend, lasted until Mrs. O'Connor's death, and resulted in a condition of complete incompetency, which prevented any normal action on the part of the testatrix during that entire period. The proceedings had and the testimony taken at the trial are presented in a voluminous record. It will be impossible for us to do more than briefly summarize portions of the evidence relied upon by the respective parties to sustain their opposing contentions, and which, in our opinion, not only presents a conflict of testimony, but strongly preponderates in favor of the contestants.

The document which was refused probate was dated the 25th day of April, 1919, four days after Annie O'Connor suffered a cerebral hemorrhage, from which she died at her home in Watsonville, Santa Cruz county, on the 2d day of July, following. She was then in her sixty-eighth year. Some four years before the testatrix had executed a will, by the terms of which she devised to James B. Holohan $14,000; to Alice Holohan Kelly the sum of $5,000; to Mrs. Mary Jackson, an elderly lady who lived with her, $800; to Margaret Nash $800; to Frances and Gertrude Zills her house and lot in Watsonville; to her cousins, sons and daughters of her uncle, Thomas Pearson, of East Twenty-Seventh street, New York City, $10,000; to the Pajaro Valley Orphan Asylum $500; and to the superior of the Valley Church, Watsonville, $500 for masses for herself and family. She named H. S. Fletcher as executor of this will. These provisions appear to have been dictated by the mandates of affection and justice. The relations between the testatrix and the legatees named in the will of 1915 appear to have continued after its execution, just as in the past. In the document of April 1919, offered for probate by the proponents, a number of changes were made. Some of the former legacies were omitted entirely. Others were enlarged or decreased. New devises and bequests were inserted. We do not think it material to our consideration of the appeal to dwell at length on the situation in which Mrs. O'Connor was placed in the last months of her life, or the circumstances under which the purported will was executed. The issues of unsoundness of mind, and of undue influence, were submitted to the jury with an offer on the part of the contestants that if the jury reached a verdict of unsoundness of mind, the second issue could be answered in the negative. That was done. As we think the evidence amply supports the finding of the jury that Mrs. O'Connor was of unsound mind at the time of the making of the second will, any reference to changes in the terms of the two wills, or the circumstances of the execution of the questioned instrument, will be only incidental to our consideration of the question presented by this appeal.

Dr. Koepke, who had been Mrs. O'Connor's personal physician for several years preceding her death, testified that during that time she was variously afflicted, having, as the doctor described it, "a complication of troubles which continued all the time." When her physician first treated her in 1912, she complained of a heart lesion or "leaky heart" resulting from an insufficiency of the mitral valve. There was a perceptible arteriosclerosis or hardening of the arteries, which progressed to the time of Mrs. O'Connor's death. The doctor discovered that she was permanently subject to Bright's disease, and suffered from an incontinence of urine. Feeling unable to relieve his patient, Dr. Koepke ceased visiting her in February, 1919. On April 21st, following, Mrs. O'Connor suffered a cerebral hemorrhage caused by the bursting of a blood vessel in the brain. Dr. Koepke was at once called, and for the next two months saw her almost daily. She was unable during that time to use her left arm and limb, and there was a marked drawing of one side of her face. After the stroke the patient had no power of control of her bowels and bladder, and their natural functions. From that time also, so far as the doctor observed, she did not initiate conversation on any subject. She paid little, or no attention to anything, merely lying quietly and answering "Yes" to any questions asked her. The doctor testified that from the 21st of April, 1919, the day on which Mrs. O'Connor was stricken by the cerebral hemorrhage, until the time he ceased to treat her, on June 25th following, her condition did not vary, and he gave as his opinion that Mrs. O'Connor was not of sound mind during that time, He was very firm also in his opinion that she could not have appreciated, known, or understood the contents, or the full import and meaning, of the document she signed.

There is other testimony that, following the stroke of paralysis, Mrs. O'Connor's condition remained almost unchanged; that from that time until her death, two months later, she was irrational, took no interest in any affairs, did not talk. and did not recognize friends whom she had known for many years. This condition, the witness testified, gradually grew worse. Mrs. Kate West, the nurse who took care of the old lady during a part of this period, testified, by deposition, that the patient's mouth was drawn to one side. Sometimes Mrs. O'Connor did not know where she was. She talked very thick, did not articulate well, and could not carry on a connected conversation. Frequently the nurse had to stop the patient from tearing the quilts to pieces. At times also, Mrs. O'Connor seemed to be trying to sew without a needle. Mrs. Margaret Fahey, an entirely disinterested witness, was called on behalf of the proponents. She had known the deceased for 15 years. She testified that upon the occasion of a visit she made to Mrs. O'Connor after the stroke, the old lady did not know her, and the witness had to tell her her name. She appeared dazed and "stared off into space" when the witness attempted to engage her in conversation. In her opinion, Mrs. O'Connor was not of sound mind at that time. Mr. F. A. Kilburn was one of the subscribing witnesses to the will. He was called by the proponents. He testified that Mrs. O'Connor did not initiate any conversation while he was in the house, and answered all questions by "Yes" or "No." He made no test of her mentality. He went there to see her sign her name, which she did "rationally." After having testified that, in his opinion, Mrs. O'Connor was "capable" at the time she signed her name to the document, on cross-examination he "was not prepared to say that she was of sound mind at that time."

Mrs. Mary Atteridge, who had known Annie O'Connor for about 40 years, visited her on the day, and just prior to the time, the purported will was signed. At that time the old lady was tearing at the quilts on the bed; she did not speak to the witness, and made no reply to the questions she asked. In Mrs. Atteridge's opinion, the old lady was not of sound mind at that time, and was in the same mental condition when next visited by her, in May, following. Mary Jackson, a friend of the deceased for 37 years, lived in the same house with, and assisted, Mrs. O'Connor for the 8 or 9 years preceding the latter's death. Even prior to the stroke, according to this witness, Mrs. O'Connor's mind was failing continually. By the terms of the first will she was left $800. In the document of 1919 she was given $1000, but she was greatly incensed at the circumstances attending the execution of the latter document at a time when, as she testified, "Mrs. O'Connor could do no business at all," and "when she wasn't of sound mind." She at once reported the occurrence to Mrs. O'Connor's confidential agent and adviser, Mr. Fletcher. Mrs. Momand, next door neighbor and old friend, testified that Mrs. O'Connor was acting irrationally before the final stroke. Two days after the hemorrhage she visited the sickroom. In her opinion, at that time, the deceased was of unsound mind. She did not recognize the witness, and did not remember the visit of friends who had been with her the night before. The symptoms described by this witness continued until Mrs. O'Connor's death. Rev. Wm. J. Clancy, the assistant pastor of the church in which the deceased had her membership, saw her a number of times before and after the stroke. He anointed her according to the rites of the church, in preparation for death, a ceremony which the decedent did not, in his opinion, appreciate. Before the hemorrhage, according to Father Clancy, the decedent's memory had almost completely gone, and she was not normal mentally. She remained passively in this condition until she died.

There is much more evidence to the same effect. Edward E. Kelly, husband of one of the contestants, an old acquaintance, attended to the payment of Mrs. O'Connor's monthly bills for her for several years prior to her death. He testified that during the latter months of her life her mind was failing. About two weeks before the stroke he found her on the street in a dazed condition and unable to recognize him or to appreciate what he said to her. He found her in a stupor on the morning of the stroke and visited her some 15 times before she died. In his opinion she was "out of her mind" during the time. Elizabeth Holohan, George W. Holohan, Stasia Speckens, Louise Schroeder, and Carrie Burke, testified, the effect of their evidence being that before the stroke Mrs. O'Connor's mind was failing and she was at times irrational, a condition which was aggravated by and gradually grew worse after that occurrence.

The contestants who testified in their own behalf were: James B. Holohan, who seems to have stood in almost the relationship of a son to Mrs. O'Connor, and who was one of the principal legatees under the will of

1915, but who was omitted entirely from the 1919 instrument; H. S. Fletcher, for many years the confidential business agent of Mrs. O'Connor; Alice Holohan Kelly; Frances Zills; and Gertrude Zills—all close and intimate friends of Mrs. O'Connor, and for whom she entertained the warmest personal regard. All of these witnesses testified to facts tending to show that Mrs. O'Connor was irrational, and of lapsing memory prior to the stroke, and of unsound mind thereafter. In their opinion, after April 21, 1919, her mental condition was such that she was incapable of doing any business.

The force and effect of the foregoing testimony is assailed by the appellants. They depend upon an analysis of portions of the evidence favorable to themselves, and the assertion that upon cross-examination statements were elicited from some of the witnesses at variance with their more direct testimony. But the fact remains that the witnesses testified as we have briefly narrated. On the other hand, there is evidence on the part of the proponents, the effect of which is directly to the contrary from that adduced by the contestants. It would serve no useful purpose to present as long a résumé of this testimony as we have done in discussing the case of the contestants, for the result would be merely to emphasize the direct conflict, the burden of resolving which in favor of one side or the other rested upon the jury. There is evidence, which, if it had been accepted by the jury, would be sufficient to support a verdict upholding the validity of the will. For instance, the attorney who drew the will testified that when he visited Mrs. O'Connor on the morning of April 21st, she was weaker than normal and spoke in a rather low voice, but expressed herself plainly on what she wanted. She gave him instructions relative to making a will, which he jotted down and took to his office, where he prepared the document in question. He then took it back to Mrs. O'Connor's home, where she signed it in the presence of himself, Dr. Koepke, and Mr. Kilburn. She was, in his judgment, at that time of sound mind. When Miss Helen Phelan, an old friend of Mrs. O'Connor, called on the 7th or 8th day of May, she had a conversation with the deceased, at which time she appeared rational. Rev. Florian Zettel, the Catholic priest who received $1,000 under the will of April 25th, Caroline McAdam, Maud McAdam, each a legatee under the will, and Ida McAdam, testified to conversations and actions of the decedent, before and after the final stroke, to show her competency. The weight to be given to their testimony, and whether or not its effect had been destroyed on cross-examination, or overcome by the evidence on the other side, were all matters for the jury, as in the case of the witnesses for the contestants. The testimony of Dr. Koepke, and Mr. Kilburn, the other subscribing witness to the will, has already been alluded to. The effect of the direct examination of Mrs. West and Mrs. Gay, nurses who cared for Mrs. O'Connor after April 21st, to the effect that the deceased at times possessed sufficient mentality to execute a will, was somewhat destroyed by the evidence of Laura Falkenberg, another nurse, who was also a witness for the proponents. She testified that during the time she was with the patient, she was "absolutely without mentality."

[1-3] From the foregoing it is at once apparent that the jury reached its verdict that, at the time of the execution of the purported will, on April 25, 1919, Mrs. O'Connor was of unsound mind, on sharply conflicting testimony. In the absence of substantial error of law occurring at the trial, and none is claimed here by the appellants, a judgment based upon such a verdict will not be reversed. Estate of Ross, 179 Cal. 630, 632, 178 Pac. 510. Appellants attempted to discredit the evidence of Dr. Koepke, who testified that when Mrs. O'Connor signed the purported will, on April 25th, she was not mentally able to comprehend or understand its contents, and thus claim that Mr. Wyckoff's positive testimony, and the less satisfactory evidence of Mr. Kilburn, stand uncontradicted. But the jury, apparently, did not think Dr. Koepke discredited, or his testimony unworthy of credence. Even had it done so, we would still be unable to set aside their verdict on the grounds advanced by appellants. Much evidence was admitted on both sides to show the condition of Mrs. O'Connor's mind before and after the date of her testamentary act. Such evidence was relevant and important for its bearing upon the condition of her mind when the will was executed. In re Wilson, 117 Cal. 262, 49 Pac. 172, 711; In re Estate of Purcell, 164 Cal. 300, 128 Pac. 932. This evidence was entitled to such weight and consideration as the jury thought it deserved. Dunphy v. Dunphy, 161 Cal. 385, 119 Pac. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230. It tended on the part of the contestants, to show that Mrs. O'Connor was afflicted with a gradually increasing unsoundness of mind, which became complete after the cerebral stroke, and which was always manifest and ever present, affecting her mental capacity, particularly in the months preceding and during her last illness, when she made the questioned will. Other evidence, mostly that in behalf of the proponents, tended to show that her incompetency was of a form that manifested itself by frequent attacks, with lucid intervals in between. With the testimony of Dr. Koepke disposed of, as appellants would have us hold, they insist that the only evidence relating to Mrs. O'Connor's condition when she was actually signing her

will was to the effect that she was then in a lucid interval. But from this entire evidence the jury could have concluded, either that Mrs. O'Connor had no testamentary capacity during her last illness, or that the will was not executed during a lucid interval of her mind. In this condition of the case upon the testimony the decision of the jury cannot be disturbed upon the ground that it is contrary to the evidence. Estate of Jones, 166 Cal. 110, 135 Pac. 288; Estate of Martin, 170 Cal. 663, 151 Pac. 138.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(51 Cal. App. 246)

EASTON v. BOSTON INV. CO. et al.
(Civ. 3667.)

(District Court of Appeal, First District, Division 1, California. Feb. 3, 1921. Hearing Denied by Supreme Court April 4, 1921.)

1. Principal and surety 🔑180—Deed of trust for protection of surety can be foreclosed before payment of claim.

Where deed of trust was executed as counter security to protect the surety on a bond not only against loss and damage, but also against liability, it was not necessary for the surety to pay a claim against it before it could maintain an action to foreclose the deed of trust.

2. Principal and surety 🔑123(3), 149—Conditions as to notice and commencement of action must be complied with.

Conditions in a bond requiring written notice of the default and limiting the time within which an action may be brought thereon are material, and compliance therewith is a condition precedent to the right of recovery thereon.

3. Principal and surety 🔑86 — Filing claim against bankrupt surety is "commencement of action."

Where bankruptcy proceedings were pending against the surety, the filing of the claim on the bond, and the allowance and confirmation thereof as a claim against the surety by the master in chancery within the time specified for commencement of action on bond within provision of bond requiring commencement of action within such time as a condition precedent to recovery thereon, *held* a sufficient compliance with such condition, since the institution of an action would have been an idle and useless act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commencement of Action.]

4. Principal and surety 🔑180—Surety's waiver of condition precedent precludes recovery against counter surety.

Surety could not waive compliance with conditions precedent to the right to recover on the bond and thereafter recover against counter surety by foreclosure of a deed of trust executed to protect the surety from liability on the bond.

5. Principal and surety 🔑190(7)—Surety's assignee must show that surety urged defenses available to it.

Surety's assignee suing to foreclose deed of trust executed to protect surety from liability on bond had burden of showing that surety availed itself of defense which had been available to defeat recovery on bond.

6. Judgment 🔑707 — Conclusive only as to parties or their privies.

Generally judgments are conclusive and binding on parties and their privies, but are not either prima facie or conclusively binding as to others.

7. Indemnity 🔑14 — Allowance of claim in bankruptcy against surety not conclusive of right to enforce indemnity.

Where deed of trust was executed to indemnify surety against loss or liability arising under the bond, order in bankruptcy proceedings against surety allowing claim on the bond *held* not conclusive against grantor of deed of trust, in action to foreclose deed of trust by surety's assignee.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Ansel M. Easton against the Boston Investment Company and others. Judgment against plaintiff in favor of named defendant, and plaintiff appeals. Affirmed.

George Clark Sargent, of San Francisco, for appellant.

Randolph V. Whiting, of San Francisco, for respondent.

KERRIGAN, J. This was an action to foreclose a deed of trust given by the respondent, Boston Investment Company, as counter security to protect the Pacific Coast Casualty Company on a bond issued by it. Plaintiff is the assignee of the obligee in the bond. Judgment went in favor of the defendant, Boston Investment Company, denied to plaintiff the relief sought, and decreed that he had no right, title or interest, lien or claim in the subject of his attempted foreclosure. He appeals from this judgment.

The case was submitted to the trial court upon an agreed statement of facts, which showed that on December 2, 1912, one J. D. Gibbs was about to enter into a lease with Hale Bros., Incorporated, affecting certain premises in San Francisco, in order to obtain which lease he was required to give to the lessor a bond in the sum of $5,000. To consummate the transaction four instruments were executed, all bearing the same date.

The first was an agreement between the investment company and Gibbs, wherein it was recited that Gibbs was about to enter into the lease, and in order to secure the performance thereof the casualty company was about to execute its bond to the lessor; that it was agreed that the investment company should execute a deed of trust of the real property involved in this action to a trustee to indemnify the casualty company against loss or liability on its said bond.

Second. Thereupon the lease was executed.

Third. Immediately thereafter the casualty company executed its bond, whereon Gibbs, the lessee, was principal, the casualty company was surety, and the lessor was the obligee. This instrument recited the execution of the lease and the amount of the rent to be paid, and also provided that, if the lessee should perform the covenants of the lease and pay the rent, the obligation thereof should be void; otherwise to remain in full force and effect.

Fourth. Thereupon the investment company executed the deed of trust mentioned in said agreement to a trustee for the casualty company, reciting therein that it was executed for the purpose of indemnifying the casualty company against "loss, liability, or damage" which it might sustain by reason of the bond.

After the execution of these instruments, and on June 3, 1915, the plaintiff became the owner of the premises leased to J. D. Gibbs and the assignee of the bonds of the casualty company; and at that time by mesne conveyances one F. M. Gibbs had become the tenant of the premises. On June 1, 1917, default was made in the payment of rent, and said tenant was progressively in default from that time until the end of the lease, December 31, 1917.

On November 17, 1916, the casualty company was insolvent, and upon that day suit was commenced in the United States District Court for the purpose of marshaling its assets. In due time a receiver was appointed, notice to creditors was published, and in August, 1917, plaintiff filed his claim in the sum of $5,000, which, upon reference to the master in chancery, was allowed for the sum of $2,925, appellant being ordered to elect either: First, to take as a general creditor of the insolvent casualty company, or, second, to dismiss his claim without prejudice and be allowed to join the receiver and the respondent in a proper proceeding to realize upon the deed of trust by foreclosure. This report was thereafter confirmed by the court.

On August 11, 1919, the court in which the bankruptcy proceedings were pending directed the receiver to execute to the plaintiff an assignment transferring to him all the rights of the casualty company under the deed of trust and against the respondent in relation to the lease. These assignments were delivered to plaintiff on August 20, 1919, and he is now the owner and holder of all rights of the casualty company in relation to the lease.

[1] The contention of the appellant that, as the deed of trust for the benefit of the casualty company protected it not only against loss and damage, but also against liability, it was not necessary to pay appellant's claim before it could maintain an action to foreclose the deed of trust executed by the investment company, we think must be sustained.

In McBeth v. McIntyre, 57 Cal. 49, an indemnity bond to a constable, protecting him "against all damage, expense, cost, and charges, and against all loss and liability," was held to be an indemnity bond not only as against actual damage, etc., "but also against all liability therefor." So in Showers v. Wadsworth, 81 Cal. 270, 22 Pac. 663, it was said:

> "The indemnity was against liability, and hence there was a right of recovery upon the contract as soon as the liability was incurred."

[2] That this is the law is not disputed, but the respondent contends: (1) That no notice was given to the casualty company or its receiver of default in payment of the rent; and (2) that no action on the bond of the casualty company was commenced against the surety on or prior to March 31, 1918, and therefore the appellant may not recover in this action. It is true that conditions in a bond requiring written notice of default, and limiting the time within which an action may be brought thereon, are material, and compliance therewith is a condition precedent to the right of recovery thereon. Cal. Sav. Bank of San Diego v. Am. Surety Co. (C. C.) 87 Fed. 118. See, also, Riddlesbarger v. Insurance Co., 7 Wall. 386, 19 L. Ed. 257; Nat. Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623.

[3] No separate or independent action on the bond was in fact commenced against the casualty company prior to March 31, 1918, or at any time; but it appears from the statement of facts that prior to that time all the necessary steps had been taken to have the claim of the casualty company allowed, and that it was allowed and confirmed as a claim against the bankrupt by the master in chancery of the United States District Court. No action against the casualty company upon the bond could have been commenced without the permission of the court in which the bankrupty proceedings were pending, and, as such action would have availed the plaintiff no further or better relief than was obtainable in the bankruptcy proceeding, its institution would have been an idle and useless act, which the law never requires. We think the filing of the claim and the proceedings thereon in the bankrupt's estate constituted all that was contemplated or could be reasonably required by the provision of the bond under discussion.

The other point made by the respondent in this behalf, namely, that the record fails to show that the casualty company was served with written notice of default in the payment of rent, and hence was not liable on its bond, for which reason the plaintiff may not prevail in this action, raises a more serious question.

[4, 5] The condition reads:

> "Provided, however, and upon the following express conditions: First, * * * that in the event of any failure upon the part of the lessee to pay any installment of the rent provided for in said lease, written notice thereof shall within five days after such monthly installment of rent becomes payable, be delivered to the said surety (the casualty company) at its office in the city of San Francisco, state of California."

Compliance with this condition of the bond constituted a condition essential to recovery thereunder (Cal. Sav. Bank of San Diego v. Am. Surety Co., supra; Riddlesbarger v. Insurance Co., supra; National Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623); and it is a provision which could not be waived by the casualty company so far as the contingent liability of this respondent to the casualty company is concerned. The respondent undertook to indemnify the casualty company against loss or liability suffered by it under the terms and conditions of its contract of suretyship; and if the casualty company failed to avail itself of a complete defense to the proceeding against it, certainly neither it nor its assignee may recover over against the counter surety. And in order to recover in this action the burden was on the plaintiff to show that the casualty company availed itself of this defense. The plaintiff, as assignee of the casualty company, seeking to recover against the Boston Investment Company on the contract with the casualty company, must show performance by the casualty company of all the conditions on its part to be performed.

Neither can it be successfully said that the claim filed in August, 1917, with the receiver in the bankruptcy proceeding amounted to the notice of default contemplated by the bond. It was not notice of such default in the payment of rent due in the previous months of June and July, nor even for the month of August, since, from the record, it cannot be said when in that month the claim was filed, nor whether within five days from the occurrence of the default. And it certainly could not be regarded as a five-day monthly notice for each month thereafter until the termination of the lease in December.

[6, 7] Coming now to the last point we shall consider, it may be conceded that the order in bankruptcy allowing the claim of appellant is in effect a judgment; still we find ourselves unable to agree with the appellant that the respondent is concluded by the judgment. How far a judgment or decree against one party is evidence against another standing in the relation of the parties here is a question involved in much confusion; but the general rule appears to be that judgments are conclusive and binding on parties and their privies, but as to all others that they are neither prima facie nor conclusively binding, for the reason that it would be unjust to bind a person by any proceeding in which he had no opportunity to make a defense, of offering evidence, of cross-examining witnesses, or of appealing if he were dissatisfied with the judgment. It seems to be generally conceded, however, that wherever a surety has contracted with reference to one of the parties in some suit or proceeding in the courts, he is concluded by the judgment. Thus a judgment against a defendant is conclusive upon his bail. The sureties upon an injunction bond assume such a connection with the suit that they are concluded by a judgment in a suit upon the bond. The same will apply against sureties who have become parties to a bond for the redelivery of property, or the release of attached property; to the sureties upon the bond of an executor or administrator or guardian. Likewise, if a surety has undertaken to perform a decree or judgment, or to pay any balance which shall be found to be due by the principal to the obligee, he is bound by the judgment or decree rendered. In all such cases the judgment is binding upon the surety unless he can show that it was obtained by fraud or collusion. Irwin v. Backus, 25 Cal. 214, 223, 85 Am. Dec. 125; Freeman on Judgments (4th Ed.) § 180; 32 Cyc. 136. Those cases are sometimes said to constitute an exception to the rule that only parties to an action are bound thereby; while again it is said that they do not in fact constitute an exception to the general rule at all, but are based upon a fair and reasonable interpretation of the contract. However that may be, here the undertaking, it is clear, is general, indemnifying merely against loss or liability arising under the bond, and it does not come within the terms of the cases just noticed. The respondent therefore is not affected by the judgment in the bankruptcy proceeding.

In Irwin v. Backus, supra, it is stated that as a general rule sureties upon official bonds are not concluded by a decree or judgment against their principal, but administration bonds form an exception to this general rule.

> "There can be no doubt that, where a surety undertakes for the principal that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact. * * * But this rule rests upon the terms of the contract. In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties. They do not agree to be absolutely bound by any judgment obtained against him for official misconduct,

nor to pay every such judgment. They are only held for a breach of their own obligations. It is a general principle that no party can be so held without an opportunity to be heard in defense. This right is not divested by the fact that another party has defended on the same cause of action and been unsuccessful. As the sureties did not stipulate that they would abide by the judgment against the principal, or permit him to conduct the defense, and be themselves responsible for the result of it, the fact that the principal has unsuccessfully defended has no effect on their rights. They have a right to contest with the plaintiff the question of their liability; for to hold that they are concluded from this contestation by the suit against the sheriff is to hold that they undertook for him that they would be responsible for any judgment against him which might be rendered by accident, negligence, or error, instead of merely stipulating that they would be responsible for his official conduct." Pico v. Webster, 14 Cal. 203, 73 Am. Dec. 647.

Accordingly the court in that case held that the judgment against the principal was inadmissible in an action against his sureties. See, also, Ballantine & Sons v. Fenn, 84 Vt. 117, 78 Atl. 713, 40 L. R. A. (N. S.) 698, and notes; 32 Cyc. 136.

The judgment is affirmed.

We concur: BARDIN, Presiding Justice pro tem.; RICHARDS, J.

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51 Cal. App. 347

SANGUINETTI v. SANGUINETTI.

(Civ. 2181.)

(District Court of Appeal, Third District, California. Feb. 10, 1921.)

1. Homestead 🔑175 — Husband entitled to cancellation of declaration of homestead filed by wife contrary to contract releasing rights.

Where a wife, for a valuable consideration, released to the husband any possible interest she might have in his property or that of the community, and thereafter, while the contract was in full force and effect, filed a declaration of homestead in the husband's property, without any rescission of the contract or offer to restore the consideration, the husband was entitled to have the declaration of homestead canceled and title to the land decreed to be in him.

2. Husband and wife 🔑51, 266— Wife's release of interest in property of husband or community valid without separation.

Under Civ. Code, § 158, authorizing husband and wife to enter into any engagement with each other respecting property which either might if unmarried, and the following section, providing that husband and wife cannot by contract alter their legal relations except as to property, and except that they may agree to an immediate separation, a wife may release to her husband her interest in his property or that of the community, though there is no agreement of separation and they continue to live together.

3. Husband and wife 🔑51, 266—Waiver of support, though invalid, held not to affect release of property rights.

The validity of a wife's release for a valuable consideration of her interests in the property of her husband or that of the community was not affected by a further provision of the agreement whereby she waived support by him, even though such waiver was invalid under Civ. Code, §§ 174, 175.

4. Husband and wife 🔑51, 266—Falsity of recital that matrimonial relations were not pleasant held not to affect release of property rights.

The validity of a wife's release for a valuable consideration of her interests in her husband's separate property and the property of the community was not affected by a recital in the agreement that the matrimonial relations had not been pleasant and agreeable, though the court found the contrary.

5. Appeal and error 🔑882(17)—Party may not complain of finding in accordance with her own testimony.

In a suit involving the validity of a wife's release of her interests in her husband's property and that of the community, where the wife testified that the relations of the parties were pleasant and satisfactory, she may not complain that the court so found, though the agreement recited that their relations had not been pleasant and agreeable.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by Luke Sanguinetti against Martha Sanguinetti. From a judgment for plaintiff, defendant appeals. Affirmed.

J. B. Curtin, of Sonora, for appellant.

Snyder & Snyder, of San Andreas, for respondent.

BURNETT, J. The action was brought to have it decreed that plaintiff is the owner of a certain described tract of land; that defendant has no right, title, or estate therein; that a certain declaration of homestead placed thereon by defendant is void and that the same be canceled and annulled. Relief was granted as prayed for, and defendant has appealed from the judgment.

The basis of the action is found in this written agreement executed by the parties on June 6, 1916:

"This agreement, made and entered into this 6th day of June, 1916, by and between Luke Sanguinetti of Vallecito, Calaveras county, California, the party of the first part, and Martha Sanguinetti his wife, of the same place, the party of the second part, witnesseth:

"That whereas the parties hereto are husband and wife and have been such for several years past and have been residents of Vallecito, Calaveras county, California, to this date, but their matrimonial relations have not been pleasant or agreeable and either is entitled to a divorce from the other and for the purpose of settling and adjusting their property rights, this agreement is made as follows:

"That the said Luke Sanguinetti as party of the first part, will on the execution of this agreement pay over to Martha Sanguinetti, the party of the second part, the sum of $5,000.00 of which sum $500.00 has been paid leaving a balance of $4,500.00 which will be paid upon the signing of this agreement and it is understood and agreed that the said Martha Sanguinetti takes and accepts said sum of $5,000.00. of, and in lieu of and as the full relinquishment and conveyance and settlement of her community interest in all the property owned by both parties hereto whether situated in Calaveras county or elsewhere, and for the said $5,000 the said Martha Sanguinetti remises, releases and quitclaims unto said Luke Sanguinetti all her right, title and interest existing at present or that she may be entitled to in the future of, in and to all real and personal property of every kind and nature owned by the parties hereto and in which the said Martha Sanguinetti has a community interest or would be entitled to have and she here expressly waives any and all claims to any future support, maintenance, care or liability of any kind from the party of the first part to her, and that she will contract no indebtedness or incur no bills of any kind or nature henceforth and in which the party of the first part will be liable, and in case he becomes liable for any other sum other than that herein mentioned, he shall have recourse to collect the same from the party of the second part in the manner provided by law for the collection of debts, and the said party of the second part takes and receives said sum in full settlement, of all property rights as between the parties hereto.

"Each party to this agreement hereby waives and relinquishes unto the other any and all right of inheritance or succession of, in and to the property that either might have or enjoy at the time of the death of either as this agreement fully settles all property rights now existing or that could hereafter inure to either party to the agreement.

"In witness whereof, the parties hereto have hereunto set their hand and seal the day and year first above written."

[1] It is not disputed that said contract was the deliberate and voluntary act of the parties and that plaintiff paid to defendant the said sum of five thousand dollars. It appears, also, that the parties were at the time and ever since have been living together as husband and wife. It is true that defendant was absent from home for nearly a year, but it was the occasion merely of a visit to a relative in the state of Washington and it was by consent of the plaintiff. In fact, appellant testified that respondent was always generous in his treatment of her and never objected to her visits away from home. The case, therefore, does not involve any separation of the parties agreed or otherwise, any desertion or kindred subject, but the situation is that the defendant for a valuable consideration waived and released to the plaintiff any possible interest she might have in his property or that of the community, and thereafter, while said contract was in full force and effect, she sought to impose upon a part of said property the charge or burden of a homestead, and this without any rescission of said contract or offer to restore the consideration which she had received.

The foregoing facts would seem to leave no doubt as to the legal soundness of the trial court's conclusion, but the learned counsel for appellant, who prepared said agreement of June 6, believing, no doubt, in the right of married persons to execute such a contract, vigorously assails the judgment herein as opposed to the authorities and the principles of public policy.

[2] The attack, however, is based upon an utterly untenable hypothesis. It assumes that the agreement of the parties was for a separation and that it was canceled by a reconciliation and resumption of the marital rights and privileges. In support of the claim appellant cites such cases as Wells v. Stout, 9 Cal. 479; Sargent v. Sargent, 106 Cal. 541, 39 Pac. 931; Jones v. Lamont, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251; Estate of Martin, 166 Cal. 399, 137 Pac. 2; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168.

In the first of these, the contract was admittedly a "deed of separation." It was claimed that such contracts were invalid. The authorities were reviewed, with his usual care and learning, by Judge Field, and he concluded, that, under the settled law of the United States, such agreements were not invalid. It was stated, however, that "if parties after separation become reconciled and live together, that fact will avoid the deed." But even that was unnecessary to the decision, since the Supreme Court held that the evidence was insufficient to show reconciliation.

The Sargent Case also involved admittedly a separation agreement, and it was expressly provided therein that a reconciliation would render the contract void. The point in the case was, however, whether the contract "was revocable at the option of either of the parties thereto." This question the Supreme Court answered in the negative, and through Judge Van Fleet made this significant declaration:

> "To hold that one competent to contract, who, upon a subject-matter good in law, and for a sufficient consideration, enters into written stipulations and covenants of the most solemn character with another, should, the next moment, without pretense of fraud, mistake, or undue influence, or other cause than a mere change of mind, be permitted to absolutely withdraw from, and set at naught, such obligations, without regard to the desire of the other contracting party, would, to say the least, be a strong departure in the law of contracts."

In Jones v. Lamont the agreement was also for separation, and the question decided was that the contract did not include a waiver or release of the right to succeed to all or any portion of the other's estate. The statement in the opinion, "The utmost that the law permits is that they may agree to live apart. and may make a valid contract as to their property, but this may be terminated at any moment by reconciliation which 'would avoid the contract—as to all features, at least, remaining executory' (Sargent v. Sargent, 106 Cal. 541)," must be regarded in connection with the preceding discussion in reference to the "divorce suit." Of course, it was not intended as an affirmation that there could be no division or settlement of the property rights of the parties independent of an agreement of separation.

In the Brown Case, likewise, there was a written agreement of separation. It was quite properly held that the finding of the lower court to the effect that for some four months after the execution of said agreement "the parties agreed to become and were reconciled, that they thenceforth for several months lived and cohabited together as husband and wife, and that in pursuance of the agreement to so live they further orally agreed to and did set aside and annul said agreement," was sufficient to support the conclusion that said oral agreement was executed and that it resulted in the cancellation of the previous written agreement. As to this, indeed, there is hardly room for a difference of opinion.

Some other cases from different jurisdictions are cited, but they need not be specifically mentioned. In fact, the matter is regulated and determined by the statutory provisions of the various states. What may be the rule elsewhere or what the common or civil law teaches on the subject might be interesting, but the controlling thing here is what is found in our statute and its interpretation by the courts. In fact, it would seem hardly necessary to go beyond the language of section 158 of the Civil Code, as follows:

> "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."

As there is no claim of any advantage being taken by the husband in securing said contract, we may ignore the latter portion of said section. That unmarried persons could lawfully enter into such a contract cannot, of course, be disputed. It simply involves, as we have seen, the conveyance of all interest in real property, a frequent and familiar proceeding.

But it seems to be thought that this conclusion, as far as the community property is concerned, is affected and limited by the next section, as follows:

> "A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation."

It is to be observed, however, that the clause permitting them to alter their "legal relations" in reference to property is not connected with or modified by the provision relating to an agreement for a separation. It might be a fair construction to hold that a contract for the support of either or of the children, in order to be valid, must be coupled with an agreement of separation, but to make this latter contingency a precedent condition for the validity of a contract for the disposition of the community property is to do violence to the language of the section. The law prescribes no such limitation. The plain terms of the statute authorize the husband or the wife to convey to the other all title and interest in either separate or community property.

If any confirmation were needed for a construction that seems unavoidable we may find it in such cases as Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358; Wren v. Wren, 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287; Hoeck v. Greif, 142 Cal. 119, 75 Pac. 670; Estate of Martin, supra.

We may add that while not authoritative the decision of Judge Coffey, together with the note attached thereto in the Estate of Menihan, reported in volume 6, page 535, of Coffey's Probate Decisions, is interesting and instructive.

Moreover, the whole argument of appellant is based upon the assumption that community property is involved in the controversy; but the court found that it was the separate estate of the husband. It is not disputed that this finding is supported by the evidence, and, assuredly, it would not be contended that the wife is not authorized by said section 158 to release to her husband whatever title or interest she might have in his separate property.

[3] As before indicated, in view of the duty imposed upon the husband by sections 174 and 175 of the Civil Code, there may be some doubt whether the waiver of support would be binding while the parties are living together; but that part of the agreement is not involved in this controversy, and it manifestly does not affect the legal integrity of the provisions in reference to the property.

[4, 5] Some contention is made that the parties were bound by the recital in their agreement that "their matrimonial relations have not been pleasant and agreeable" and that the finding of the court to the contrary constitutes serious error. It is apparent, however, that this is a matter of no moment. The consideration for the wife's agreement was the payment to her of the sum of $5,000 and the statement as to their relations may be entirely ignored. Moreover, notwithstanding said recital, the defendant testified that their relations were pleasant and satisfactory, and she is hardly in a position to complain if the court accepted her statement in that particular.

We have read with care the interesting briefs of appellant, but we think they have entirely missed the mark.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem; HART, J.

(51 Cal. App. 277)

HEENAN et al. v. BEVANS. (Civ. 2229.)

(District Court of Appeal, Third District, California. Feb. 4, 1921.)

1. Easements 🔑36(1)—When presumption of grant prevails.

The presumption of the grant of an easement in lands or over the lands of another is sometimes indulged upon the ground that the owner of the land has submitted to the use without objection for such length of time that his conduct cannot be accounted for on any other hypothesis, but the acts done by the party claiming the benefit of the presumption, and his predecessors in estate, must, however, have been in themselves such as the other party, having the right to object, submitted to them without objection, and the law will not allow the land of one person to be taken by another, without any conveyance or consideration, upon slight presumptions or probabilities.

2. Easements 🔑36(1)—Burden of proof upon parties claiming easement by prescription.

The burden is upon a party who claims an easement by prescription to clearly prove by competent evidence all the elements essential to his title, and the user must have been adverse to the true owner and hostile to his title, and it must have been actual, continued, open, and under a claim of right, and must have all the elements necessary to acquire title by adverse possession.

3. Easements 🔑37—Whether use of right of way was under claim of right or merely neighborly accommodation a question of fact.

Question as to whether or not the use of a way over the land of another was under a claim of right or a mere matter of neighborly accommodation is a question of fact to be determined by the court in the light of the relations of the parties, their conduct, the situation of the property, and all the surrounding circumstances.

4. Easements 🔑36(1)—Presumed that use of premises is by permission.

The law will presume that land belongs to the owner of the paper title, and that the use of a way was by permission or silent acquiescence, and presumption of a grant does not arise until this presumption is overcome by evidence showing the use to have been hostile, and that the owner knew of such hostile claim and took no steps to protect his property.

5. Easements 🔑36(3)—Proof must be clear that the adverse claim to right of way was of character to give owner notice.

The presumption that the title to land is in the owner of the paper title thereto, and that the use of a roadway was by permission or silent acquiescence, must be overcome by clear proof that the claim of the right of way not alone existed in the minds of those claiming such right, but that such claim was asserted in such manner that the owner of the land might or ought to know of it.

6. Easements 🔑36(3)—Adverse possession of right of way held not shown.

In an action to establish an easement or right of way over land of defendants, evidence *held* not to show that plaintiffs had gained title to the right to use the roadway by prescription; there being an uninterrupted permissive use for some 30 years.

7. Easements 🔑36(3)—Maintenance of gates and payment of taxes strong evidence in support of mere license to use way.

The fact that at each end of a roadway a gate had been maintained and owner had paid taxes on his full acreage is strong evidence in support of a mere license to pass over the roadway.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Francis M. Heenan and another against James Bevans. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. H. Carlin, of Marysville, for appellants.

W. E. Davies, of Marysville, for respondent.

HART, J. This is an appeal by plaintiffs from a judgment rendered by the court without a jury in favor of defendant. The controversy arises over a purported easement or right of way claimed by plaintiffs over the land of the defendant.

The only question to be decided in the case is: Have the plaintiffs acquired an easement across the land of defendant for a road by prescription? It is the claim of appellants that the findings of the trial court are against the evidence.

The facts may be summarized as follows: On the 11th day of February, 1919, plaintiffs filed in the superior court of the state of California in and for the county of Yuba their complaint, from which we quote the essential paragraphs 1 and 2, as follows:

"I. That plaintiff Francis M. Heenan now is, and for more than ten years last past he has been the owner in fee of that certain tract or parcel of land situate and being in the county of Yuba, state of California, described as follows: The west one-half and the northeast quarter of the southwest quarter and the southeast quarter of the northwest quarter of section 23, township 15 north, range 4 east, M. D. M., containing approximately 160 acres—and plaintiff James P. Heenan during a period of approximately 11 years prior and up to the date of the commencement of this action has been, and now is, in the possession, use, and enjoyment of said lands and premises under and by virtue of a lease from said Francis M. Heenan, the period of which will not expire until on or about the 1st day of October, 1920; that said lands are agricultural lands, and for more than 20 years last past have been and now are being used for the purpose of growing thereon wheat, barley, and similar grain.

"II. For more than 20 years prior and up to the date of the commencement of this action there has been and now is, constructed, maintained, and prior and up to the wrongful acts of defendant hereinafter referred to used by plaintiffs and their predecessors in interest in and to said lands and premises hereinbefore referred to, upon and along the north 16 feet of the southeast quarter of said section 23 a road over which during all of said times plaintiffs and their predecessors in interest in and to said lands and any and all persons and the public generally traveled from a county road extending along the east line of said section 23 over, to, and upon plaintiffs' said lands in the southwest quarter of said section 23, and thence southerly to another county road running along the south line of said quarter section openly, publicly, notoriously and adversely without let or hindrance and under claim of right so to do; that said road during all of said times herein mentioned was, and now is, of great value to plaintiff's said lands as furnishing a ready, convenient, and useful means of communication between plaintiffs' said lands and said county road running along the said easterly line of said section 23; that said road has been heretofore used as aforesaid with gates at each end thereof, namely, one at the east line of said section 23, and the other at the southerly line of said section; that is, at each point where said road enters said county road as aforesaid. And on or about the 1st day of December, 1918, defendant did willfully and wrongfully enter upon said road where it passes along the northerly portion of said southeast quarter of said section 23 and did plow up the same, and he did also remove the said gates theretofore maintained at the said east line of said section 23 and substituted in place thereof four barb wires, thereby rendering the said road impassable and preventing entry thereupon from said county road to the east of said section. And defendant threatens to, and, plaintiffs are informed, believe, and therefore allege, that unless restrained by this court he will continue to keep plowed up said road at said place aforesaid and keep said entrance thereto barred and wired and prevent plaintiffs and all other persons from using the same."

It will thus be observed that the action involves section 23, township 15 north, range 4 east, M. D. M., Yuba county, Cal. It may be explained that the defendant had been for about five years the owner of the northeast quarter of the section, and that in October, 1918, he purchased the southeast quarter of the section. The road in question commences at the east line of the section, is 16 feet in width; its north boundary being the line dividing the section into north and south halves. It extends over the southeast quarter owned by defendant, also across the northeast quarter of the southwest quarter owned by plaintiffs, thence turns southerly and is bounded on the east by the line dividing the southwest quarter into east and west halves and extends to the south line of the section. A county road extends along both the east and south lines of this section 23. This county road leads to Marysville. This road furnished access to the county road at two points on the section, and the judgment prevents the use of that portion of the road only which leads to the highway on the east line of the section.

Defendant filed an answer to the complaint, in which, inter alia, he sets up:

> "That for a number of years plaintiffs, * * * by permission of defendant and his predecessors in interest, have occasionally traveled across the north 16 feet of said quarter section."

The trial court found the ownership of plaintiffs' and defendant's several tracts of land to be as alleged in the complaint, found the existence of the road as therein set forth, but found that the use of said road on the part of plaintiffs and their predecessors in interest had been a permissive one, and not adverse, and judgment followed accordingly. Paragraph 5 of the conclusions of law, found in the transcript, contains the essence of the court's findings and reads as follows:

> "That the use of plaintiffs and other persons during the last 20 years of the said north 16 feet of the southeast quarter of said section 23 has been an uninterrupted permissive use, resting for its enjoyment upon the neighborly spirit of kindness and accommodation existing between plaintiffs' and defendant's predecessors in interest, and that said use has not been adverse or hostile to defendant or his predecessors in interest in said lands, either openly or notoriously to their said title, nor has said use been under any claim of right by said plaintiffs, or either of them, or any other person."

It is, of course, manifest from the allegations of the complaint above reproduced that the plaintiffs claim an easement in the form of a right of way over defendant's land by prescription, and it is their contention here that the evidence without conflict shows a prescriptive title in them to such easement. The latter proposition involves, obviously, an attack upon the finding of the trial court that the plaintiff has no title by prescription or otherwise to the alleged easement over the strip of land in dispute.

[1, 2] We may first with propriety state the principles of law by which the courts are required to be guided in determining whether the elements of prescription are shown by the evidence to be present in a given case, and this can be the more conveniently done by reproducing herein a few excerpts from the well-considered case of Clarke v. Clarke, 133 Cal. 667, 66 Pac. 10 et seq. In that case the defendant, in an action by the plaintiff to quiet title to a strip of land there in dispute, set up the defense of title to a right of way over said strip of land by adverse user and alleged in his answer:

> "That he, and those claiming under him, have for more than eight years last past traveled with vehicles and on foot over a certain right of way across the lot, claiming the right to travel the same, adversely to plaintiff; that he has never, during said time, been interrupted in the use of said right of way; and that plaintiff, during all of said time, had full knowledge of the said travel."

The Supreme Court, in sustaining the decree quieting plaintiff's title to the lot over which the right of way was claimed, thus stated the law applicable to claims of title to land by adverse user or prescription:

> "Prescription, at common law, was a mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment. It had its origin in a grant evidenced by usage, and was allowed on account of its loss, either actual or supposed, and for this reason only those things could be prescribed for which could be created by grant. The presumption of the grant of an easement in the lands or over the lands of another is sometimes indulged. When so, it is upon the ground that the owner of the land has submitted to the use without objection for such length of time that his conduct cannot be accounted for upon any other hypothesis. The acts done by the party claiming the benefit of the presumption, and his predecessors in estate, must, however, have been, in themselves, such as the other party, having the right to object to or complain of, did neither, but submitted to them without objection or challenge. Hanson v. McCue, 42 Cal. 303. The law will not allow the land of one person to be taken by another, without any conveyance or consideration, upon slight presumptions or probabilities. Niles v. Los Angeles, 125 Cal. 576. The burden is upon the party who claims title by prescription to clearly prove by competent evidence all the elements essential to such title. The user must have been adverse to the true owner and hostile to his title. It must have been actual, continued, open, and under a claim of right. It must have all the elements necessary to acquire title by adverse possession. Thomas v. England, 71 Cal. 459."

[3, 4] Again, in the same case, the court further said:

> "The defendant and his tenants were in the habit of passing over the uninclosed strip of land when going to or from their business. The question as to whether or not the use was under a claim of right, or a mere matter of neighborly accommodation, was a question of fact to be determined by the court in the light of the relations of the parties, their conduct, the situation of the property, and all the surrounding circumstances. The court below saw the witnesses, heard them testify, and found the facts against defendant. Defendant testified that he used the way and claimed the right to use it, but it does not appear that any such claim was ever made to plaintiff or to his grantor. It is not sufficient that the claim of right exist only in the mind of the person claiming it. It must in some way be asserted in such manner that the owner may know of the claim. The fact that the owner knew of the travel and occasional use of the property does not even raise a presumption that such use was hostile or under claim of right. If any party who is allowed by silent permission to pass over the lands of another, nothing being said as to any right being claimed, after five years, without showing that he ever communicated such claim in any way to the owner, can thus gain title by prescription, it would be a blot upon the law. An owner could not allow his neighbor to pass and repass over a trail upon his open, uninclosed land without danger of having an adverse title successfully set up against him. If he had several neighbors who so used the land, several separate titles to rights of way might thus be acquired. The law will presume that the land belongs to the owner of the paper title, and that the use was by permission or silent acquiescence. If this presumption is overcome by evidence showing the use to have been hostile, and that the owner knew of such hostile claim, and took no steps to protect his property, for a period of five years, then the presumption changes."

See, also, Abbott v. Pond, 142 Cal. 393, 398, 76 Pac. 60.

Adverting now to the proofs as they are disclosed by the record, we may, in limine, remark that our examination of the testimony has convinced us that therein there is not only a pronounced conflict upon the question whether the plaintiffs have acquired a prescriptive right to the alleged easement over the defendant's land, but also there is ample justification from the evidence for the finding against the existence of such right in the plaintiffs.

The plaintiff Francis M. Heenan gave some testimony which was in a measure corroborated by other witnesses testifying for the plaintiffs, from which, taken alone, the conclusion that the road in question had been used by himself and neighbors openly and notoriously, under a claim of right for a period of approximately 30 years, might be warranted, depending, of course, upon whether the trial court should have regarded it of a character in probative value justly to compel such a conclusion. He testified that he had resided in the neighborhood in which the way is located for 43 years; that, from his earliest memory as a boy, he could say that there had been a road running over and across the strip in question, and that it had been habitually used by his predecessors in interest in his land and by other people residing near his ranch and by the school children attending the district school in that vicinity for at least 30 years; that he and others had during all those years claimed the right to use the road and had used it with the knowledge of the defendant and his predecessors in interest; that on one occasion he did a little work on the road; that at each end of the road there had always been maintained a gate, but he could not say who placed the gates there. He, however, admitted on cross-examination that there was another road about a half a mile in length, leading from his place to the county road, and over and by means of which he and his neighbors could reach the county road. He declared, though, that it was more convenient for him and his neighbors to go to and from their respective ranches to the county road by the way in question. He also admitted that about three years prior to the trial of this action (the action was tried in the year 1918) he called on Mrs. Divver, the grantor and predecessor in interest of defendant in the land over which the alleged right of way is claimed and before Mrs. Divver conveyed the land to defendant, and asked her for a deed conveying to him the right of way over the strip of land in dispute, but that Mrs. Divver refused to give him the deed.

As against the testimony presented in behalf of the plaintiffs, and of which the above is a brief statement in substance, the defendant, testifying for himself, said that he purchased the 160 acres of land across which the alleged right of way extends from Mrs. Mary J. Divver in the year 1918 and immediately thereupon took possession of the property; that he had never seen what might properly be called a road running along and over the strip of land in question, but that he did observe a "kind of trail" or track there; that there was a gate at each end of said trail or track, but neither was a substantial structure; that he had resided in the vicinity of the land he bought from Mrs. Divver for "the last five years," but that he never knew nor had he ever heard that there was a right of way across said land, nor did he know or ever hear that any one ever claimed such a right of way. He stated that he never saw any persons but the Heenans use the road. He further testified that he bought the Divver quarter section for the reason that the natural drainage of his other land (the quarter section north of the Divver land) runs south, and that to drain the north section it is necessary for him to run the drain towards the county road and consequently towards the alleged right of way. He testified that he would not have bought the Divver place but for the fact that he desired the drainage for the north section. (This testimony is important only in that it tends to show that, although he had resided in the immediate neighborhood of the Divver quarter section for five years or more, he had not known of the existence of a right of way over the latter land or never had heard that any one claimed such a right of way.)

In connection with the defendant's testimony the deed from Mrs. Divver conveying to the defendant the southeast quarter section was offered and received in evidence. The deed makes no reservation of the right of way over the strip of land in controversy.

Mrs. Mary Divver, who sold the land directly involved herein to defendant, testified in part as follows:

> "Q. During the time you had possession of that property, was there ever a roadway constructed across the north 16 feet of your property running from east to west? A. Well, about three years ago Mr. Heenan asked permission to go through there as a short cut to his place. Q. Of whom did he ask permission? A. Asked me. Q. Did you give him permission? A. Yes; I gave him permission providing the people who had it leased at that time, Mr. George Carr, did not object. Q. Now, do you know of any claim that was made by any person to a right of way across your property located in southeast quarter of section 23, township 15, north, range 4 east? A. Any claim? Q. Yes. A. No. Q. Did anybody at any time claim to own the right of way on that property? A. No."

The witness further testified:

> That no person except Francis Heenan ever sought to obtain permission from her to cross the said property; that no other person ever spoke to her about crossing the property; "if so, it is so far back I don't remember;" that she was positive that it was "three years ago" that the plaintiff Francis Heenan asked her permission to cross on the north 16 feet of said property; that during the time she owned the property she paid the taxes on the 160 acres. "Q. Do you know if the general public has ever used that road, if there is such a road, across your property? A. Well, I know that on different occasions my husband and I have gone out there and found the fences down; that was before I was asked permission; he always put the fence up; no one had asked us. Q. You have always repaired and maintained the fence across and around your property? A. Well, as a rule, the people who rent have. Q. That is what I mean? A. Yes. Q. But, with the exception of the permission that you state you gave to Francis Heenan three years ago you have not given anybody this permission to cross that property? A. No. Q. And you have not permitted anybody to your knowledge to use it as a public highway? A. No. Q. Now, on the 21st day of October, 1918, you conveyed this property to Mr. James Bevans, did you not, that is, the southeast quarter of section 23, township 15 north, range 4 east? A. Yes. Q. Did you at that time reserve any right of way on the property? A. No. Q. Then you conveyed the whole 160 acres without any reservation whatever? A. Yes."

On cross-examination the witness stated that the permission given to Francis Heenan to use the roadway was not in writing, but merely verbal; that Heenan wrote "to us once and asked us to sell him the road, but we said 'No;'" that no other person had ever asked permission to use the road or for a deed to the strip over and across which it passed; that she and her husband used to visit the part of the section where the road is located about three times a year; that, while there was some evidence of its having been used by somebody, it did not "show very much evidence of traffic, that is having been traveled over."

[5] There is absolutely no evidence, and, indeed, no claim made by the appellants, that a grant of a right of way across the land in question was ever given to any person. And there is no evidence or a well-founded pretense that the owners of the property, either the defendant or his predecessors, ever dedicated the strip of land in dispute to the public as a highway. It follows, then, that, as stated above, the sole issue here is whether the alleged easement exists by virtue of adverse user. As to this proposition, we have already declared that the finding of the trial court that no such right existed or was shown derives support from the evidence. Indeed, we do not hesitate to say that, although a finding, had the court so found, of adverse user upon the evidence presented by plaintiffs, might be secure against successful challenge, yet upon that evidence alone, or in the absence of the adversary showing by the defendant, the court could justly or reasonably have found against the claim of a prescriptive title to the land in dispute, since, as the above cases show, title by prescription or adverse user necessarily rests in presumption, which is the basic foundation of such a title to land, and, in establishing such a title, the presumption that the title to the land is in the owner of the paper title thereto and that the use of the roadway was by permission or silent acquiescence must be overcome by clear proof that the claim of the right of way not alone existed in the minds of those claiming such right, but that such claim was asserted in such manner as that the owner of the land might or ought to know of it. Clarke v. Clarke, supra. It is not clear from the evidence produced by the plaintiffs that the predecessors in interest of the defendant or the latter ever knew or supposed that the use of the strip of land in dispute was being used under a claim of right or in hostility to their title. This proposition is supported by the admission of one of the plaintiffs that, on an occasion about three years anterior to the date of the trial, he undertook to secure from Mr. Divver a deed of conveyance to the strip embracing the roadway.

[6] But, even if it be conceded that upon the testimony presented by the plaintiffs, considered alone or without reference to any impeachment thereof by an adversary showing, a judgment in their favor could well be sustained, it is still justly to be observed that upon no rational theory can there reasonably arise in the mind of any person any doubt about the testimony presented on behalf of the defendant, of which we have above given an epitomized statement, showing that the use of the road in question was entirely under a license from the owners of the land over which it passes. At any rate, such must be the view of this court, since the trial court so declared in its decision, thereby accepting as verity said testimony.

Recapitulating, briefly, that testimony, we find this to be the situation: That the road was not used by the general public; that it was fenced in; that at either end thereof was a gate placed there by the predecessors in interest of the defendant; that the owners of the property—the former as well as the present—had always paid taxes on the full quarter section or 160 acres. But beyond all these considerations is even the more significant testimony of Mrs. Divver (corroborated in a measure by that of one of the plaintiffs) showing, or, at least strongly tending to show, that the plaintiffs themselves never actually supposed that a right of way had ever been established over the property by prescription or otherwise, for one of the plaintiffs, about three years prior to the date of the trial of this action, asked, and was given by Mrs. Divver, permission to use the roadway, and later undertook to secure a conveyance from her of so much of the land in the quarter section involved herein as was necessary for the purposes of the roadway.

[7] The fact that at each end of the roadway a gate had been maintained by the predecessors in interest of the defendant for all the years that the road had been used is of no inconsiderable significance as confirming the proposition that the owners of the property never understood or knew that the use of the road was hostile to their title or under a claim of right. Indeed, such fact "has always been considered as strong evidence in support of a mere license to the public to pass over the designated area, and in rebuttal of a dedication to public use." Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746; Huffman v. Hall, 102 Cal. 27, 30, 36 Pac. 417; Hope v. Barnett, 78 Cal. 14, 20 Pac. 245; De La Guerra v. Striedeal, 159 Cal. 85, 112 Pac. 856; note to 35 L. R. A. (N. S.) 941.

Another fact of more or less significance in support of the mere permissive use of the road is the payment of the taxes by the predecessors in interest of the defendant on the full quarter section. This testimony goes solely to the question whether an easement was for years exercised or enjoyed on the quarter section involved herein in hostility to the title of the owners of the property, under a claim of right, and with the knowledge and acquiescence of the latter; for it is not probable that, if one had knowledge of such an easement, the existence and enjoyment of which would deprive him of the actual enjoyment of a considerable part of his land, he would pay taxes on the whole tract, including the strip the entire title to which was not in him.

But, without any further attempt at analyzing the testimony, it is sufficient to repeat that the testimony presented by the defendant, accepted, as it was, by the court as revealing the truth of the issue before it, was obviously sufficient to justify the finding that the use by the plaintiffs and other persons of the roadway in question during the last 20 years "has been an uninterrupted permissive use, resting for its enjoyment upon the neighborly spirit of kindness and accommodation existing between the plaintiffs and the defendant's predecessors in interest, and that said use has not been adverse or hostile to defendant," etc. Tarpey v. Veith, 22 Cal. App. 289, 292, 134 Pac. 367; Franz v. Mendonca, 131 Cal. 205, 208, 209, 63 Pac. 361; Schulenbarger v. Johnstone, 35 L. R. A. (N. S.) 941, 955.

The judgment is affirmed.

We concur: PREWETT, Presiding Justice pro tem.; BURNETT, J.

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51 Cal. App. 317

In re TURNER'S ESTATE.

HERRICK v. HARMES.

(Civ. 3730.)

(District Court of Appeal, First District, Division 1, California. Feb. 8, 1921. Rehearing Denied March 10, 1921. Hearing Denied by Supreme Court April 7, 1921.)

1. Judgment 🔑735—Order denying right to be appointed administrator held not determination of right of applicant to participate in distribution of estate.

An order dismissing a petition for appointment of an administrator on the ground that petitioner was a nonresident was not a determination of the right of such petitioner as a nonresident alien to receive by devise any portion of the estate under the will; it not appearing from such order that the question of petitioner's right as a nonresident alien to take by devise under the will was before the court or was decided by it at the time of making the order, in view of Code Civ. Proc. § 1369.

2. Aliens 🔑7—Entitled to real estate under will under United States treaty regardless of state law.

A nonresident alien, a subject of Italy, was entitled to receive real estate by devise under a treaty between the United States and Italy in which what is known as the "most-favored nation" clause appears, the treaty overriding Const. art. 1, § 17, amended in 1894, if in conflict, or any state statute.

3. Aliens 🔑7—Not prohibited from acquiring real estate by devise.

Const. art. 1, § 17, as amended in 1894, does not prohibit nonresident aliens eligible to become citizens of the United States under the naturalization laws thereof from acquiring real estate by inheritance or devise, apparently leaving it to the Legislature to determine the extent and condition under which such aliens may hold and dispose of such real estate as shall be thus acquired by them, and hence the Legislature was authorized to pass St. 1913, p. 206, § 1, providing that aliens eligible to citizenship may acquire, possess, enjoy, transmit, and inherit real property, etc.

4. Executors and administrators 🔑315(5)—Two decrees distributing property to be construed together.

Two decrees of distribution of real estate, each giving certain person an undivided half of the same real estate, should have been construed together, and the second decree should not be held erroneous as an attempt to dispose of more than the whole of the property in question, in view of the fact that the complaining party who had received the other undivided half had not complied with the requirement of the first decree in the matter of filing a bond and failed to refer to the fact in the second proceeding.

On Petition for Rehearing.

5. Courts 🔑92 — District Court of Appeal not to disregard as dicta express declarations of Supreme Court.

It is not the province of the District Court of Appeal to treat as dicta and disregard express declarations of the Supreme Court in opinions handed down.

Appeal from Superior Court, City and County of San Francisco; George A Sturtevant, Judge.

In the matter of the estate of Mary E. Turner, deceased, of which J. T. Harmes was administrator. From a decree of distribution, H. S. Herrick appeals. Affirmed.

See, also, 178 Cal. 95, 172 Pac. 759; 39 Cal. App. 56, 177 Pac. 854, and 185 Pac. 171.

H. S. Herrick, of Bakersfield, in pro. per.

Charles A. Christin and Hutchinson, Van Fleet & Christin, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a decree of partial distribution made and entered in the matter of the estate of Mary E. Turner, deceased. The appellant is the brother and heir of said decedent and is also one of the distributees under the decree of partial distribution from which this appeal has been taken. The respondent is the administrator with the will annexed of the estate of said decedent. By the terms of said will certain real property in San Francisco was devised in equal undivided shares to her said brother and to one A. Basletta. There was also devised to Basletta the whole of certain real estate in the county of Fresno. The record shows that a petition for letters of administration with the will annexed was made on behalf of said Basletta, but that upon a hearing thereon said petition was dismissed by the court. Thereafter the respondent Harmes applied for and received letters of administration with the will annexed in said estate. Thereafter, and on January 8, 1920, the court having jurisdiction of said estate made and entered a decree of partial distribution upon the application of said Herrick, wherein it was ordered that there be distributed to said Herrick an undivided one-half of certain real estate in San Francisco devised to him by the terms of said will. It was further provided in said decree that before said Herrick should receive said property he should execute and deliver to the administrator with the will annexed a bond in the sum of $2,000 with proper sureties to be approved by a judge of said court, conditioned for the payment when required of his proportion of the debts due from said estate. Thereafter, and on February 4, 1920, another petition for partial distribution was presented by the said administrator wherein no reference was made to the prior petition for and decree of partial distribution, but wherein, after reciting at considerable length the previous proceedings in said estate, and setting forth in full the terms of the will of said decedent, and of the several contests and controversies which had occurred as between said Herrick and said administrator and other persons, involving the right to administer said estate, and also apparently involving the question as to the right of said Basletta to have and receive any portion of said estate as one of the devisees of said decedent, the administrator prayed for a decree of partial distribution awarding an undivided one-half interest in the real estate of said decedent, situate in San Francisco, to said Herrick, and an undivided one-half interest in the same property to A. Basletta, and also praying that the whole of the lot lying in Fresno be distributed to said Basletta. This petition came regularly on for hearing, whereupon said Herrick presented his opposition to the same in so far as it prayed for the distribution of any portion to said Basletta, upon the ground that as a nonresident alien and a subject of Italy he was not entitled to take by devise any portion of said estate. In his said objections to said petition no reference was made by Herrick to the fact that the court had previously made a decree of partial distribution of the undivided one-half of the San Francisco property referred to in the petition of said administrator to him. Upon said hearing the court refused to sustain the several objections urged by said Herrick against the partial distribution of said estate, according to the prayer of said petition, and thereupon proceeded to distribute, in accordance with the terms of the will of said deceased, an undivided one-half interest in the San Francisco real estate to said Herrick, and an undivided one-half interest therein to said Basletta, and further proceeded to distribute to the latter the whole of the Fresno real estate, conformably to the terms of said will.

Up to the time of the making and entry of this decree no bond had been filed by said Herrick in conformity with the requirements of the former decree of partial distribution of an undivided one-half interest in the San Francisco property to him; but a few days after the making and entry of the last decree of partial distribution he filed said bond, and thereafter took an appeal to the Supreme Court from said last-made decree of partial distribution, which appeal the Supreme Court at a later date transferred to this court for hearing and determination.

[1] The appellant presents three points upon this appeal. The first of these is that the trial court determined the right of A. Basletta as a nonresident alien to receive by devise any portion of the estate of Mary E. Turner, deceased, by its order dismissing the petition filed on behalf of A. Basletta for the probate of the will of said deceased and for the issuance to him of letters of administration therein.

The order of said court upon which the appellant relies in support of this contention reads as follows:

> "This cause coming on regularly to be heard this 23d day of September, 1918, upon the motion of H. S. Herrick, proponent of the last will of said deceased, and said proponent A. Basletta being represented by counsel on said motion, and it appearing to the court that said A. Basletta is a nonresident alien, and not a person interested in the estate of said deceased, and his said petition for the probate of the last wills of said deceased was not signed by him personally, in accordance with the requirement of section 1371, Code of Civil Procedure, but by his attorney in fact J. T. Harmes, it is hereby ordered that said petition for probate so filed by said Basletta be, and the same is hereby, dismissed."

The parties to this appeal have, for some reason, not seen fit to furnish this court with any of the proceedings in said estate prior to the making and entry of this order; but, so far as we are able to determine from the face thereof and from certain indirect references made thereto in other and later proceedings, it would appear that the only matter passed upon by the court in making said order was the right of said A. Basletta to have his petition for the probate of said will and for the issuance to him of letters of administration with the will annexed granted, and that the only determinative part of said order is the concluding portion thereof, in which it is ordered that said "petition for probate so filed by said Basletta through his attorney in fact be, and the same is hereby, dismissed." That sufficient basis existed for the making of this order cannot be questioned, for the reason that under section 1369 of the Code of Civil Procedure, the said A. Basletta, not being a bona fide resident of the state, was not competent nor entitled to act as an administrator in said estate, and for the further reason, as expressly stated by the court, his petition for such letters was not properly signed under the requirements of section 1371 of the Code of Civil Procedure. So far as appears upon the face of this order, or so far as appears from the record in the case, the question of the right of A. Basletta as a nonresident alien to take by devise under the will of said decedent was not before the court, and was not decided by it at the time of making said order or according to its terms. That this was apparently the view of this matter taken by the trial court is evident from its later action in awarding A. Basletta the share of said estate devised to him by the will of said decedent in the decree of partial distribution, from which this appeal is taken, and when the direct question of the right of A. Basletta as a nonresident alien to take by said devise was presented to said court for determination. We find, therefore, no merit in the appellant's said contention.

[2] The next contention urged by the appellant is that said A. Basletta, as a nonresident alien and subject of Italy, is not entitled, under the Constitution and laws of this state, to receive by devise any portion of the real estate of said decedent, and hence that the decree of partial distribution from which this appeal has been taken, in so far as it purports to distribute to said Basletta any property whatever of said decedent, is void. In making this contention the appellant, in his brief, concedes that at the time of the death of said decedent, and also at the time of making said decree of partial distribution, there existed a treaty between the United States and Italy in which what is known as the "most-favored nation" clause appeared; but the appellant contends that, notwithstanding the existence of said treaty and the presence and effect of said clause therein, the Constitution of this state, by virtue of the amendment of section 17 of article 1 thereof, adopted in 1894, must be held to override said treaty and must be construed as denying to nonresident aliens the right to take and hold by succession or devise real estate in California.

We are of the opinion that this court is concluded from attempting to determine either of these two contentions in the appellant's favor by the decision of the Supreme Court of this state in the case of Blythe v. Hinckley, 127 Cal. 431, 59 Pac. 787. That case involved the right of a nonresident alien, a citizen and subject of England, to take by inheritance, real estate in California. The Supreme Court, in passing upon that question, held: First, that the treaty-making power of the federal government with respect to the rights of aliens to inherit property was of controlling force, and that the laws of the individual states upon that subject, in so far as they were in conflict with the treaty provisions, were suspended or controlled during the life of the treaty.

It is true that in that case it appeared that the treaties between Great Britain and this country were silent upon that subject, but, notwithstanding this fact, the Supreme Court there decided that the laws of the several states were subject to treaty control. It is not contended by the appellant herein that the subjects of Great Britain and of a number of other foreign powers were not accorded the right, under treaties existing at the time of the death of said decedent and at the time of the making and entry of the decree herein appealed from, to take real estate by inheritance or devise in this state. In point of fact, the authorities cited in his brief, notably the case of Succession of Rixner, 48 La. Ann. 552, 19 South. 597, 32 L. R. A. 177, and notes thereto, show the existence of such rights under a number of existing treaties between the United States and foreign powers; while in the case last referred to as cited by the appellant himself it is held that a nonresident alien and citizen and subject of Italy is entitled by the "most-favored nation" clause of the Italian treaty to be accorded the same rights of inheritance and succession which the citizens and subjects of other nations under the express terms of the treaties therein referred to enjoy.

We are therefore constrained to hold that the language of the Supreme Court in Blythe v. Hinckley, above referred to, determines this point against the appellant's contention.

[3] It is further claimed by the appellant that the amendment of section 17 of article 1 of the state Constitution, adopted in 1894, has the effect of superseding the decision referred to, and was in fact adopted with the express intent of so doing. It is to be noted that the case of Blythe v. Hinckley, supra, was decided by the Supreme Court six years after the date of said amendment; and it may be inferred that, if any such change in the Constitution as is herein contended for had been

effected by said amendment the Supreme Court would have so declared; but, instead of doing this, it appears that the court in its decision in said case also dealt with the question as to whether section 17 of article 1 of the Constitution was intended to be a limitation upon the powers of the Legislature to deal with the question of the right of succession of nonresident aliens to real estate; and in so doing the court expressly held that the constitutional provision in question was not to be construed as being such a limitation. A cursory examination of section 17 of article 1 of the Constitution, as amended in 1894, will show that it does not expressly prohibit nonresident aliens, eligible to become citizens of the United States under the naturalization laws thereof, from acquiring by inheritance or devise, real estate, but apparently leaves it to the Legislature to determine the extent and conditions under which such aliens may hold and dispose of such real estate as shall be thus acquired by them after the adoption of said amendment. The Legislature of California, acting, apparently, upon this construction of the state Constitution, adopted, in 1913, an alien land act (Stats. 1913, p. 206), wherein, in section 1 thereof, it is provided that—

> "All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

We are of the opinion that the state Legislature was empowered to pass this provision, and that, having done so prior to the death of said decedent, and said statute being in force at the time of her death, she was entitled by her last will and testament to devise to A. Basletta the portion of her real estate assigned to him by the terms of said will.

[4] The third and final contention of the appellant is that, since the trial court by its decree of partial distribution, made on January 8, 1920, distributed to him an undivided one-half of the San Francisco real estate of said decedent, and that since its decree of partial distribution made and entered on March 17, 1920, also distributed to him an undivided one-half interest in the same property, he is entitled to the whole thereof under said decrees, or at least that the second of said decrees was in error in awarding to A. Basletta an undivided one-half of said property, since the court thereby attempted to dispose of more by one-half than the whole thereof.

We find no merit in this contention, since aside from the fact that up to the time of the making of said second degree the appellant had not complied with the requirement of the first decree in the matter of filing the bond provided for therein, and also since in his opposition to the making of said second decree he altogether failed to refer to the fact that he had already received an undivided one-half of said property by said former decree, we are of the opinion that these two decrees should be construed together, and that, when so construed, it must be held that it was not the intention of the trial court to do otherwise than to dispose of the real estate of said decedent, in conformity with the terms of her will, and hence by its second decree to assign to the appellant no more than that share of said property which he had been declared entitled to receive upon the accomplishment of the yet unfulfilled requirements of the first decree. This being our construction of said decrees, it follows that there is no merit in the appellant's contention as to the effect of said decrees.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

On Petition for Rehearing.

PER CURIAM. The petition for rehearing presented by the Attorney General herein is denied.

[5] The case of Blythe v. Hinckley, 127 Cal. 431, 59 Pac. 787, cited in the main opinion herein, was not referred to as one involving the question of the right of the alien therein concerned to inherit real estate in California under a treaty provision, but was relied upon for the reason that the Supreme Court did expressly declare in that case that state laws "in so far as they are in conflict with treaty provisions are suspended or controlled during the life of the treaty." It is not the province of this court to treat as dicta and disregard as such this express declaration of the Supreme Court.

The case of Sullivan v. Kidd, 254 U. S. 433, 41 Sup. Ct. 158, 65 L. Ed. —, cited by the petitioner, does not in our opinion sustain his contention as to the effect of the "most favored nation" clause in treaties upon state statutes undertaking to regulate or restrict the inheritance of real estate by nonresident aliens.

185 Cal. 240

LEZINSKY et al. v. MASON MALT WHISKY DISTILLING CO. et al. (S. F. 8985.)

(Supreme Court of California. March 4, 1921. Rehearing Denied April 2, 1921.

1. Trusts ⚷371(8)—Proof of constructive trust does not support averment of express or resulting trust.

While variance between a complaint to enforce an express trust and a showing of a resulting trust might not be material, that between complaint for declaration of an express or resulting trust, which is based on intention of the parties, and a showing of a constructive trust, which is based on fraud, as a breach of some duty incident to a fiduciary relation, would be material.

2. Limitation of actions ⚷103(2)—When trust is express or resulting, statute runs from repudiation.

The statute does not begin to run against action to enforce an express or resulting trust till repudiation of the trust.

3. Limitation of actions ⚷102(8)—When trust is constructive, statute runs from acts creating trust.

The statute begins to run against action to recover on a constructive trust on the doing of the acts by reason of which the trust arises.

4. Trusts ⚷86—One acquiring property for a consideration furnished by another presumed to hold in trust.

Where title to property is acquired in the name of A. for a consideration furnished by

B., it will be taken, in the absence of countervailing circumstances, that B. is the real owner, and that A. holds the title in trust; that is, that there is a resulting trust.

5. Appeal and error 🔑907(3)—On appeal on judgment roll, finding not necessarily inconsistent with others to be accepted.

A finding must, on appeal on the judgment roll alone, be accepted as it is, though in the absence of explanation, of which none is given in the findings, every natural inference from the other facts found would be contrary to the particular fact found; there being, however, no necessary inconsistency between the particular finding and the others.

6. Trusts 🔑63¾—No resulting trust from unconscious use of another's property in exchange.

There is no resulting trust from the fact that one obtains property by exchange of other property belonging to another; he believing the property to be his own.

7. Appeal and error 🔑931(4)—Findings as to transfer from one corporation to another held not to be implied.

Findings should, if possible, be construed to uphold the judgment; and so the fact, if it existed, that a transfer was made by an old corporation of its property to a new one, being important to plaintiffs, against whom was the judgment, a finding of such transfer cannot be implied from findings that on a certain day the old corporation owned and was in possession of the property, and on that day, pursuant to the proposal of defendant M., accepted by the new corporation, all the personal property was delivered at his instance to the new corporation, and it took possession of the real property, and at all times since has continued to "own," hold, and occupy the same, especially where these findings are in the words of the amended complaint, seeking to charge M., as trustee, under a resulting trust, for the old corporation as to the shares of the new corporation taken in his name, as consideration for such.

8. Appeal and error 🔑907(3)—Finding of knowledge held not so inconsistent with facts as to require disregard on appeal on judgment roll.

The facts, even if they could be considered as appearing, that an old corporation made a transfer of its property to a new corporation, and that defendant knew thereof, would not be so inconsistent with as to allow disregard on appeal on the judgment roll of a finding that he carried out an exchange of the property for stock of the new corporation, believing that the real property, for which he held a tax deed, was owned by him, and that the personal property was owned by his father.

9. Trusts 🔑373—Inference from findings held to be that a defendant took stock through his father and not his brother.

From the findings that C. exchanged property of an old corporation for stock of a new corporation, believing the real property to be his and the personal property to be his father's, and that only a part of the stock was taken by him, the balance being taken by his brother J., the inference is that C. acted on behalf of his father as to the personal property, and that the stock taken by J. represented the personal property, and that he received such stock from his father as the real party to the transaction, so far as concerns the personal property; so that whether he held it on a trust for the old corporation depends, not on the belief of C., but on the question of whether the father would have held it on a trust had it been issued to him.

10. Trusts 🔑102(1)—Trust arises from president of corporation receiving consideration of transfer of its property.

As to anything that the president of a corporation receives as consideration for a transfer or sale of its property, a trust, either resulting or constructive, arises in its favor against him.

11. Trusts 🔑356(1)—To negative trust as affecting purchaser, affirmative showing of payment of value necessary.

To relieve the transferee of stock from the equity existing against his transferor, his father, who held it on a trust, it must affirmatively appear that he took it as a purchaser for value.

12. Trusts 🔑356(1)—Transferee of property held on resulting trust holds on a constructive trust.

The transferee of stock which the transferor held on a trust, even though a resulting trust, would hold it only on a constructive trust, if as between him and the transferor he took and held it for himself, and was not holding it for the transferor.

13. Trusts 🔑86—No presumption of resulting trust from father furnishing consideration for stock issued to son.

There is no presumption that stock issued to a son was held by him for his father, who furnished the consideration; but from the relationship the presumption is that stock was taken by way of a gift.

14. Trusts 🔑76—No resulting trust from defendant's receipt of stock paid for by property of corporation, he having no knowledge of such ownership.

From the fact that the consideration of issue of stock to defendant was the property of an old corporation, no resulting trust arises in its favor, he not being conscious that it was advancing or furnishing it, so that there was not the intent necessary for a resulting trust.

15. Trusts 🔑76—Director held not charged with notice as affecting resulting trust in favor of corporation.

The mere fact that one to whom stock in a new corporation was issued in consideration of property nominally furnished by his father, but really belonging to an old corporation, was a director of such corporation, is not conclusive, especially where such corporation had been practically defunct for years, that he understood it was advancing the consideration necessary for a resulting trust in its favor to arise.

16. Trusts 🔑373—Finding held to negative intention necessary for resulting trust.

Implied in the finding that defendant took and held stock from the beginning as his own is a finding that he did not take it under such circumstances that it can be presumed that he took it with intention of holding it as trustee, necessary for a resulting trust.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Fred L. Lezinsky and another, trustees, against the Mason Malt Whisky Distilling Company and others. From an adverse judgment, plaintiffs appeal. Affirmed.

Theodore A. Bell, A. E. Cooley, and Percy V. Long, all of San Francisco (A. Walter Allen, of San Francisco, of counsel), for appellants.

Thomas P. Boyd, of San Rafael, and Morrison, Dunne & Brobeck and Garret W. McEnerney, all of San Francisco (McWilliams & Hatfield, of San Francisco, of counsel), for respondents.

OLNEY, J. This is an action brought by two individuals as trustees for the creditors and stockholders of an expired California corporation having the name of Mason Malt Whisky Distilling Company against an existing Nevada corporation of the same name, and two individuals, John and Clinton Mason, to have it declared that the stock of the corporate defendant possessed by the individual defendants is held by the latter in trust for the creditors and stockholders of the expired California corporation. Issue was joined upon material allegations of the complaint, a trial was had, findings of fact were made by the trial court, and upon the findings judgment was given for the defendants. The plaintiffs appeal upon the judgment roll alone, and their primary contention is that upon the facts as found judgment should have gone in their favor.

The corporate defendant may be dismissed from consideration. The only relief sought against it is that in case it be held that the individual defendants hold their stock in it as trustees it be required to cancel the existing certificates of the stock and issue new ones in accordance with the trust. The real relief sought is solely against the individual defendants. As to them, the complaint alleges that their stock was acquired by them in consideration for the property of the California corporation which was turned over to the Nevada corporation under an agreement between the former and the two defendants that the latter would hold the stock so acquired as trustees for it until such time as a dividend should be declared upon the stock, when it was to be transferred to its beneficial owner. The transaction occurred in 1905, and the present action was not brought until 1915, but the complaint alleges that no dividend upon the stock was declared until shortly before the commencement of the action, and that until that time the defendants had never repudiated the trust.

[1] As the above statement would indicate a reading of the complaint leaves no doubt but that the trust which it seeks to enforce was an express trust, based on the alleged agreement of the defendants. The trial court found against any such agreement having been made, and also that the defendants had never repudiated the trust until 1915, for the reason that until then they were wholly unaware of any claim that a trust existed. Although such was the finding of the court, the contention of plaintiffs' counsel, a contention which in fairness we should say was apparently made before the trial court as well as before us, is that the existence or nonexistence of an agreement giving rise to an express trust is wholly immaterial; that the complaint alleges and the findings show that the consideration for which the defendants acquired their stock was furnished by the California corporation, so that what is commonly designated as a resulting trust arose in its favor as against the defendants, and that because the facts giving rise to such a trust are both alleged and found the plaintiffs are entitled to judgment upon the findings. We may grant, at least for the purposes of discussion, that it would not be a material variance if the complaint were based upon the alleged existence of an express trust and the findings showed but a resulting trust. But it should be noted at the outset that the variance is material, if the findings show facts which would possibly create a trust, but such trust would be neither an express nor a resulting trust, but what is commonly designated as a constructive one, that is, a trust based on fraud, or, what is really a particular kind of fraud, a breach of some duty incident to a fiduciary relation. The complaint contains no allegations of fraud or breach of fiduciary duty or of facts from which either would appear, and a cause of action based upon such facts is manifestly very different from one to enforce either an express or resulting trust, based as they are upon the intention of the parties, expressed in one case and presumed in the other.

[2, 3] The defense of the statute of limitations would also be materially affected according as the trust was an express or resulting trust on the one hand or a constructive trust on the other. In the first case,

the statute would not begin to run until a repudiation of the trust (Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108), and the complaint alleges and it is found that there was no repudiation by the defendants here until shortly before the commencement of the action. The plaintiff's cause of action, therefore, if it be one to enforce an express or resulting trust, was not barred when the action was commenced. In the case of a constructive trust, however, the statute begins to run at once upon the doing of the acts by reason of which the trust arises (Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88), and any cause of action of that character against the defendants was barred years before. Furthermore, plaintiffs' counsel themselves insist stoutly that they are not seeking to recover upon a constructive, but solely upon a resulting, trust. The question, therefore, as to the existence of a constructive trust is not in the case and may be disregarded, and the sole question is as to the existence of a resulting trust upon the facts found.

[4] The rule is too well established to admit of serious dispute that where property is acquired in the name of A., but for a consideration furnished by B., it will be taken, in the absence of countervailing circumstances, that B. is the real owner, and that A. holds the title in his name as trustee merely, that is, there is a resulting trust with him as trustee and B. as beneficiary. The ultimate question in this case is whether or not a case of that character appears from the facts found. Those facts, so far as material, are these:

The California corporation was organized in 1891 for the purpose of engaging in the business of distilling whisky. It continued in existence until November 30, 1905, when it expired through forfeiture of its corporate franchise for failure to pay the state annual license tax. At that time, and for years before, its stock had been owned one-half by the plaintiff George Lezinsky, and one-half by John Mason, Sr., the father of the two defendants. John Mason, Sr., was the president of the company, and the other plaintiff, Fred L. Lezinsky, was its secretary. The directors were the two Lezinskys and the two John Masons. The corporation acquired a lot in the town of Sausalito with a distillery upon it, and also the good will and business of the John Mason Distillery, which, presumably, was the name of the distillery upon the property, and the formulas and recipes of John Mason, Sr., for making whisky. It was the owner of these things in June, 1905, the title to the real property being in the name of one, Samuel L. Lezinsky, for some reason unexplained, but he holding it as naked trustee only. Whether the corporation in 1905 was a going concern doing business does not appear from the findings, but, according to both sides, the evidence was that it had ceased business some seven years before.

Some time previous to June, 1905, the real estate had been sold for taxes, and a deed to the purchaser executed by the tax collector. On the fifteenth of that month, the defendant Clinton Mason secured a conveyance of the real estate from the purchaser at the tax sale, paying therefor the sum of $430. Four days later the Nevada corporation was organized by John Mason, Sr., his two sons, and two other persons. Like the old corporation of the same name, it was organized for the purpose of engaging in the business of distilling whisky. Immediately after its organization and on June 23, 1905, Clinton Mason submitted to it a written proposal whereby he offered to transfer to it the real property mentioned, with the distillery, the good will, and business of the John Mason Distillery, and all formulas and recipes for making whisky owned by John Mason, Sr., in consideration of the issuance to him of 24.900 shares of the corporation's stock and the issuance to the five organizers, of whom he was one, of 20 shares each. This proposal was accepted by the corporation the same day, and immediately thereupon the personal property was, according to the findings, delivered to it, and it also took possession of the real property. The possession so acquired the corporation maintained from then on, using the property in its business. Four days after the acceptance of his proposal Clinton Mason executed a conveyance of the real property to the corporation, and the stock called for in his proposal was issued, although not exactly as specified in the proposal. Of the 24,900 shares that were to be issued to him, 3,320 shares were issued to third persons, and the balance to himself and his brother equally, 10,840 shares to each. In the following October John Mason, Sr., executed a bill of sale to the corporation of the personal property, and some eight years later Samuel L. Lezinsky, in whose name the title to the real property stood as trustee for the old corporation, conveyed that property to the new corporation. Why this conveyance was made is not found, but it is found that it was made without "any further consideration," presumably further than might be shown by the facts found and already recited that it was made at the instance and request of the two defendants, and with the consent of the plaintiff George Lezinsky, and at his direction, but that it was not requested by the Masons or consented to by Lezinsky for the purpose of performing any agreement with the old corporation.

[5] Along with these findings there is also the most important finding that Clinton Mason, when he made the offer to the corporation, believed that the tax title to the realty

which he had purchased was good, although it was in fact bad, and also believed that his father was the owner of the personal property and had been the owner of the realty at the time of the tax sale. In other words, the finding is that Clinton Mason made his offer in the belief that he was dealing only with property owned by himself and his father, and which they had the full right to deal with for their own benefit and as they pleased. There is no explanation of why Clinton Mason so believed, and, in the absence of any explanation, every natural inference from the other facts found would be to the contrary. But there may well have been a sufficient explanation appearing in the evidence, and in any case the correctness of the findings is not under review, and there is no necessary inconsistency between the particular finding and the others. This being the case, we must accept the finding as it is.

There are also findings that the turning over of the old corporation's property to the new was not done under any arrangement between the old corporation and the defendants, that there was no agreement by the defendants that they would hold their stock in trust, and that they had always held it exclusively as their own.

[6] The case has been discussed before us as if upon the foregoing facts it was the same as to both defendants. We do not so view it. As to Clinton Mason, a determinative finding is the one that he made his proposal to the new corporation and presumably carried through the transaction in the belief that the old corporation had no interest in the property he was assuming to transfer, and that he was himself the owner of the realty and his father the owner of the personalty. If this were his belief, and we must take it that it was, no trust would result as to him from his assuming to convey the property, even if he were not the real owner of it. As to him, the case is not one of his purchasing something, in this case the stock in the new corporation, with a consideration furnished by the old. So far as he is concerned, the old corporation furnished nothing. The furnishing of the consideration, by reason of which a resulting trust arises, is a furnishing, not to the seller of the property bought, but to the purchaser. The whole theory upon which a trust is imposed upon the purchaser in such a case is that, as between him and a third person, it was the latter who furnished the consideration with which the property was acquired, so that it will be presumed that as between them it was intended that the purchase be for the benefit of him who supplied the means with which to make it. Manifestly, this theory has no application to a case where the purchaser uses what he believes to be his own property in making the purchase. So far as he is concerned, the consideration for the sale is what he himself furnishes. The present case, in other words, is, as to Clinton Mason, the not uncommon and very simple one of one who is not the owner of certain property, but believes he is, selling or otherwise disposing of it. No trust in such a case arises as to the proceeds of the sale in his hands. Lumber Co. v. Lowe, 75 W. Va. 715, 84 S. E. 566, L. R. A. 1916E, 718; Gaines v. Lizardi, 1 Woods, 56, 9 Fed. Cas. 1039.

[7] Before, however, dismissing the discussion of the case as to this defendant, notice should be taken of the contention of plaintiffs' counsel that it must be taken from the findings that the old corporation itself transferred its property to the new. There is no express finding to that effect. The contention is based upon the fact that it is found: First, that on June 23, 1905, the old corporation was the owner and in possession of the property; second, that on that day, pursuant to the proposal made by Clinton Mason and accepted, all the personal property was delivered at his instance to the new corporation, and it took possession of the real property; and, third, that the new corporation "at all times since has continued to own, hold, and occupy the same." It is difficult to see how the new corporation could immediately become the owner of the property without a transfer from its former owner, and it is claimed that because of this we must assume that such a transfer was in fact executed. There are two answers to this. In the first place, the findings conform upon these points to the exact language of the complaint, so that the complaint as well as the findings fail to show expressly any transfer by the old corporation to the new. Yet that fact, if it existed, was an important one for the plaintiffs, and we think the wording of the complaint, a third amended complaint by the way, justifies the conclusion that the failure to allege that fact was an intentional one. In view of this fact, and of the rule that findings should, if possible, be construed to uphold the judgment, we think we would not be justified in holding that it was found that the old corporation executed a transfer on June 23, 1905, merely because of the finding that the new corporation from then on continued to "own" the property.

[8] In the second place, assuming that there was such a transfer, there is nothing to show that Clinton Mason was aware of it, or that, if he was, his belief that he and his father were the real owners of the property was affected thereby. The making of such a transfer, if known to him, would have been very material as evidence that he did not have that belief, but it would not be conclusive. There might have been a transfer by the old corporation, and he might have known of it, and yet he might have be-

lieved that he and his father were the real owners, and have carried the transaction through in that belief, and as one solely for his and his father's benefit. We cannot disregard the finding as to his belief, and it is determinative. The judgment must therefore be affirmed as to the defendant Clinton Mason.

[9] As to the other defendant, John Mason, however, the case is not so simple. There is no finding either that he was or that he was not ignorant of the fact that the old corporation was the real owner of the property. Furthermore, he is not protected by the finding that his brother so believed, although it was the latter who purported to deal with the new corporation. The finding is that Clinton believed, not that he, but that his father, was the owner of the personal property transferred, and this fact, taken in conjunction with the fact that a part of the stock taken in return for the property was not taken by him, gives rise to the necessary inference that as to the personal property Clinton was acting merely on behalf of his father, and that the stock which he did not take, but went to his brother, represented his father's interest in the transaction. The case, then, as to John Mason must be taken as one wherein the stock, which he received, he received from his father as the real party to the transaction.

[10, 11] Now it would seem that in view of the fact, not alleged but found, that the father was at the time the president and a director of the old corporation, a trust, either resulting or constructive, would arise in its favor as against him as to anything he might receive by a transfer or sale of its property. Wells v. Robinson, 13 Cal. 133. If this be true, then the defendant John Mason took his stock subject to this trust, for he, in effect, took it from his father, and it does not appear that he took it as a purchaser for value, something which must affirmatively appear in order to relieve him of the equity existing against his transferor. Upon the facts found, therefore, it must, we think, be taken that John Mason took the stock which he received as the successor of his father, and therefore took it subject to a trust in favor of the old corporation.

[12] It does not follow, however, that judgment should go against him in this action. It can go against him only, as we said at the outset, in case such trust was as to him a resulting trust. If the trust was a constructive trust as to the father, it is evident that it is no more than such as to the son. We may therefore dismiss this alternative from consideration, and consider the matter as if the trust subject to which the father would have held the property was a resulting trust. Even so, the son would not himself hold the property subject to a trust of that character, unless it also appeared that as between himself and his father he was not holding it on his own account, but for his father. If, as between himself and his father, he took and held the stock for himself, then, while it would be true that he took and held it subject to the trust to which it was subject in the hands of his father, such trust would as to him be a constructive and not a resulting trust, and one against which the statute of limitations would commence to run immediately. This was directly decided in Norton v. Bassett, 154 Cal. 411, 97 Pac. 894, 129 Am. St. Rep. 162, where, the trustee under a resulting trust dying, and the legal title to the property passing to his son as heir, it was held that while the son took the title subject to the trust, the trust was as to him a constructive one, since it was imposed upon him by operation of law and without his consent and contrary to his intention, with the result that the statute of limitations began to run in his favor at the moment the legal title came to him, i. e., at the death of his father.

[13] Even though it be true, then, that the stock would have been subject to a resulting trust in the hands of his father, and that John Mason took it subject to whatever equity would exist against it in the hands of his father, there was no resulting trust as to him because of these facts, and consequently no judgment is now possible against him because of them, unless it also appears that as between his father and himself he held the stock for the former. There is nothing to show this, and it is directly negatived by the findings. The only thing which appears and which it can be claimed would show that he so held the stock is the fact that as between his father and himself it was his father who advanced the consideration for which it was acquired. This would be sufficient except for the relationship between them, but, in view of that relationship, it is to be presumed that the stock was taken by the son by way of gift or advancement from the father. 1 Perry on Trusts, § 143; 3 Pomeroy's Equity Jur. § 1039; Hamilton v. Hubbard, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860; Rossiter v. Schultz, 185 Pac. 997. There is nothing whatever to rebut this presumption. In addition, there is the direct finding that John Mason has at all times held his stock as his own exclusive property. It follows, then, that even though John Mason took his stock from his father subject to a trust in favor of the corporation, yet such trust was as to him but a constructive trust at best, and any cause of action upon it is not within the present complaint, and was long ago barred by limitation.

[14] The only other alternative upon which it can be claimed that a resulting trust arose as to John Mason is that as between him and

the corporation directly it was the latter who furnished the consideration for the stock. This, as we understand it, is in fact the real contention of plaintiffs' counsel. But they proceed upon the theory apparently that merely because the property of the corporation was actually used as the consideration for the stock, a resulting trust arises. This is not true. A resulting trust is not founded on the simple fact that money or property of one has been used by another to purchase property. It is founded on a relationship between the two, on the fact that as between them, consciously and intentionally, one has advanced the consideration wherewith to make a purchase in the name of the other. The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired. But this presumption is rebuttable, and, if the evidence or the circumstances show that such intention did not exist, no trust arises. It is because of this that no trust will arise in the case mentioned of parent and child upon a showing merely that it was the former who advanced the consideration. Because of the relation between the parties in such a case, the natural presumption is that a gift or advancement was intended. In a number of other respects, which we need not enumerate, the rules in regard to the existence of resulting trusts are consistent only with the theory that such trusts depend upon the intention of the parties. As Prof. Pomeroy says, himself italicizing the word "intention" (3 Pomeroy's Eq. Jur. § 1031):

> "In all species of resulting trusts *intention* is an essential element, although that intention is never expressed by any words of direct creation. There must be a transfer, and equity infers the intention that the transferee was not to receive and hold the title as the beneficial owner, but that a trust was to arise in favor of the party whom equity would regard as the beneficial owner under the circumstances."

The same idea is found in 1 Perry on Trusts, § 126, where it is said:

> "This rule [as to resulting trusts] has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of *convenience and arrangement between the parties* for collateral purposes, and this rule is vindicated by the experience of mankind." (The italics are ours.)

We, perhaps, should say again at this point that we are speaking only of resulting trusts. Wherever by fraud or in breach of a fiduciary relation one uses the property of another to make a purchase in his own name, a trust arises regardless of intention. But such trusts are constructive trusts purely, and, as we have said, there are no allegations here of fraud or breach of fiduciary duty, and any cause of action by reason of a trust depending upon them cannot be considered. If the plaintiffs are to recover it must be solely because of a resulting trust dependent upon the intention of the parties.

It is not sufficient, therefore, that it appear merely that the old corporation's property was used to acquire the defendants' stock in the new. It must also appear, directly or indirectly, that, as between them and it, it was intended that they should acquire and hold the property for it. In the case of Clinton Mason, such intent is flatly negatived by the finding that he believed the property to be his own and that of his father. There is no such finding as to John Mason, but neither is there a finding that such intent existed as between him and the corporation, and in its absence the question is, Are such facts and crcumstances shown that such intent is to be presumed? It is to be presumed if it appear that as between him and the corporation it was the latter who consciously to him advanced or furnished the consideration. But if he were not conscious of that fact, then there was no furnishing of the consideration by it so far as he was concerned, there is no relation between him and it, and there is nothing upon which to predicate a presumption that it was, in the language of Prof. Pomeroy, "the intention that the transferee was not to receive and hold the title as the beneficial owner." Does it appear, then, that it was known to John Mason that the property which was being used to pay for his stock was owned by the old corporation? If this at least does not appear, there is no theory upon which the claim of a resulting trust against him can be sustained.

[15] There is no finding which declares this to have been the fact, nor does it necessarily appear from the facts which are found. That which is found is at most that the defendant's father, in breach, we will assume, since there is no explanation of his conduct, of the fiduciary obligation which he owed the old corporation as one of its managing officials, undertook through the medium of his son Clinton to turn over the possession and enjoyment of its property in consideration for stock issued to his two sons. These facts would give rise to a trust subject to which the son John Mason would hold his stock, but it would as to him be a constructive trust only. But so far as a resulting trust is concerned, there is nothing in them which necessarily infers that he knew that the property was not that of his father, but of the corporation, or that he understood that it was the latter who was advancing the consideration with which to make the purchase. This is true even though, as found

but not as alleged, he was a director of the corporation at the time. That fact would be but evidentiary at best, and it loses much of the significance which would otherwise attach to it by reason of the fact which both sides say appeared in the evidence that the corporation had been practically defunct for years. It is not at all unlikely that he so knew and understood, and it may well be that in the absence of any explanation or counter evidence the trial court would have been justified in so finding upon the evidence alone of the facts which the court finally found. But whether there was any explanation or counter evidence we do not know. It is perfectly possible, for instance, that it appeared that the father represented to his sons, and they believed, that he had acquired the property of the corporation by virtue of some arrangement with it or with its only other stockholder. In any event, we cannot make the finding, and unless the facts which are found are consistent only with the defendant knowing it was the property of the corporation that was being dealt with, so that they are the practical equivalent of such a finding, it must be taken that such fact does not appear. That there is no necessary inconsistency between the facts found and the defendant receiving his stock without being aware that it was the corporation's property which was paying for it, we think fairly plain from what we have already said.

[16] Furthermore, there is the finding, heretofore adverted to, that the two defendants took and held their stock from the beginning as their own exclusive property. Implied in this is a finding that John Mason did not take his stock under such circumstances that it can be presumed that he took it with the intention of holding it as trustee. The result is that while the findings, because of facts appearing in them which are not supported by the averments of the complaint, may very possibly show that he originally held his stock subject to a constructive trust, there is lacking in them the finding of an element essential for the existence of a resulting trust, by reason of which alone the plaintiffs would be entitled here to judgment against him. It follows that the judgment against the plaintiffs must be affirmed as to him as well as to his brother, Clinton Mason.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

On Petition for Rehearing.

PER CURIAM. In denying the petition for rehearing we deem it proper to say that we see no force in the claim that the decision is in violation of any right guaranteed by the federal Constitution.

ANGELLOTTI, C. J., and WILBUR, OLNEY, and SLOANE, JJ., concur.

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51 Cal. App. 253

CALIFORNIA PACKING CORPORATION v. GROVE et al. (Civ. 2232.)

(District Court of Appeal, Third District, California. Feb. 3, 1921. Hearing Denied by Supreme Court April 4, 1921.)

1. Covenants 🔑60—Unless for direct benefit of property does not "run with the land," notwithstanding agreement to contrary.

Only those covenants that are made for the direct benefit of the property and are contained in a direct grant of the property run with the land, under Civ. Code, §§ 1460-1462, and a contract of a landowner to deliver certain peach crops did not run with the land, though the contract provided that it was mutually agreed "that the covenants herein contained shall run with the land herein described, and shall bind both parties hereto, their heirs, administrators, executors and assigns," and neither did such language create a lien upon the land, or bind the assigns of the landowner, and such provision in the contract must be rejected as surplusage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Covenant Running with the land.]

2. Sales 🔑1(4)—Description of land in contract to sell peach crop held sufficiently definite.

Description in a contract of sale of certain peach crops, "The following orchards and lands leased or owned by the seller in the county of ——, state of California, to wit, located ¾ miles southeast of Visalia," and, "Acres, 10; present age, 6; varieties of fruit, Tuscan peaches. Acres 10; present age, 6; varieties of fruit, Phillips peaches"—*held* sufficient to sustain the contract, in view of Civ. Code, §§ 1636, 1643, 1644, 1647, 1649, 1654, 3535, and 3541.

3. Sales 🔑54—Parties giving practical construction of contract bound thereby.

If a contract of sale of certain peach crops was ambiguous in its description of the premises but the parties construed its doubtful terms by a practical application of it to a particular tract of land, they are in some degree concluded to say that it does not describe the particular tract.

4. Vendor and purchaser 🔑22—Law exacts only such description as when aided by evidence will identify the property.

In a conveyance of real property the law exacts only such description as when aided by evidence applying the description to the property will serve to identify it, and it requires no such completeness of execution in an executory contract.

Appeal from Superior Court, Tulare County; William B. Wallace, Judge.

Action by the California Packing Corporation against M. F. Grove and John Adelsbach. Judgment for defendants, and plaintiff appeals. Affirmed as to the last-named defendant, and reversed as to the first-named defendant.

Farnsworth, McClure & Burke, of Visalia, for appellant.

Bradley & Bradley and Power & McFadzean, all of Visalia, for respondents.

PREWETT, Presiding Justice pro tem. This action was commenced for the purpose of recovering an amount due from defendants for failure to deliver certain peach crops, in accordance with the terms of a written contract entered into by respondent Grove and the assignor of the plaintiff. Respondent Adelsbach was made a party by order of the lower court for the reason that he became the purchaser of the real property upon which was grown the fruit mentioned in the contract. The plaintiff in an amended complaint sets forth the contract in full and also all the facts showing a violation thereof and the amount of damages sustained by him. The respondents demurred to the amended complaint upon the ground that it fails to state facts sufficient to constitute a cause of action.

This demurrer was sustained, without leave to amend, and judgment was entered accordingly, and from this judgment the plaintiff appeals. Two points only are presented for the consideration of the court.

[1] 1. The respondent Grove claims that the contract in question runs with the land, and that, upon the conveyance of the premises to his codefendant, the latter was saddled with the burdens of the contract and the former was released therefrom. The contract contains the following provision:

> "It is mutually agreed between the seller and the buyer that the covenants herein contained shall run with the land herein described, and shall bind both parties hereto, their heirs, executors, administrators and assigns."

This provision does not constitute a covenant running with the land. Sections 1460-1462, Civ. Code. Only those covenants that are made for the direct benefit of the property and are contained in a grant of the property run with the land. Sections 1460 and 1462, supra; Long v. Cramer Meat & Packing Co., 155 Cal. 405, 101 Pac. 297. It is so clear that this is not a covenant running with the land that an extended examination of the point would be superfluous. It is quite true that parties may so word a contract that it will create a charge or lien upon land for the performance of the terms of a contract, and yet it may fall far short of creating a covenant running with the land. In this case the language used by the parties is not sufficient either to create a lien upon the land or to bind the assigns of the respondent Grove. The provision that the covenants shall run with the land does not effect that result. The provision must therefore be rejected as surplusage. It could scarcely be contended that the remaining portions of the covenant clause could bind a purchaser from respondent Grove, and, at all events, they could not operate to relieve Grove from his contract. Cal. Packing Corporation v. Emirzian, 187 Pac. 77. And the determination of this last point is really the extent of our inquiry, since the appellant concedes that respondent Adelsbach should not be bound. This relieves us from any concern as to the success of the parties in creating a lien upon the premises. We are of the opinion that respondent Grove is bound, for the twofold reason that no covenant running with the land absolves him and carries the burden over to his grantee and that the parties have not used apt words in other respects either to relieve him or to shift the burden to another.

[2] 2. The second point relied upon to sustain the judgment is that the description of the real property is so defective that the contract cannot be made the foundation for a personal liability on the part of respondent Grove. It must be conceded that the description is somewhat faulty, but we are satisfied that it is quite sufficient to sustain this contract. The description is in the following words:

> "The following orchards and lands leased or owned by the seller in the county of ——, state of California, to wit: Located ¾ miles southeast of Visalia."

And further along in the contract occur the following statements, which may be useful in identification of the property:

> "Acres, 10; present age, 6; varieties of fruit, Tuscan peaches. Acres 10; present age, 6; varieties of fruit, Phillips peaches."

[3] It is fundamental that a contract must be so interpreted as to give effect to the mutual intention of the parties. Civ. Code, § 1636. An interpretation must make a contract lawful, operative, definite, reasonable, and capable of execution, if such interpretation is possible. Civ. Code, § 1643. A contract is to be construed according to its ordinary and popular meaning rather than according to its strict legal sense. Civ. Code, § 1644. A contract may be explained by references to the circumstances under which it was made and the matter to which it relates. Civ. Code, § 1647. Ambiguity must be resolved in that sense in which the promisor believed that the promisee understood the matter. Civ. Code, § 1649. Uncertainty must be resolved against the promisor. Civ. Code, § 1654. "Contemporaneous exposition

is in general the best." Civ. Code, § 3535. "An interpretation which gives effect is preferred to one which makes void." Civ. Code, § 3541. These principles of interpretation, applicable alike to all contracts, are peculiarly illuminating when applied to the facts of this case. It is seen from the allegations of the complaint that the parties were contracting with reference to a fruit orchard containing 20 acres of peach trees of two well-known varieties, and about six years of age; that the promisor clearly intended to sell and the promisee intended to buy the fruit to be grown thereon for a period of five years; that for two years these parties construed this contract as applying to a certain orchard; that for these two years the promisor delivered the fruit to the promisee under this contract and received the stipulated price; and that he now repudiates the contract. It is shown that the respondent Grove did not, at the date of the contract, own any other peach orchard within the county. It is possible that this court might rest its conclusions entirely upon the contemporaneous exposition of the meaning of the contract evidenced by the acts of the parties for a period of two years. While the contract was entirely executory, each party had a right to rely upon its nominated terms; but when they construed its doubtful terms by a practical application of it to a particular tract of land they are in some degree concluded to say that it does not fully describe that particular tract. Upon this point the language of Mr. Justice Sawyer in Mulford v. Le Franc, 26 Cal. 108, is pertinent:

> "But if the meaning of the language of the instrument can be considered doubtful, 'another rule of construction is, that when the words of a grant are ambiguous the court will call in the aid of the acts done under it as a clue to the intention of the parties.'"
>
> "The construction as to the boundary given to a doubtful deed by the parties themselves as shown by their acts and admissions will be accepted as the true one, unless the contrary is shown." 4 Eng. & Am. Ency. 796.
>
> "The construction which the parties have, by their acts, placed upon an ambiguous instrument is entitled to great, if not controlling, weight in determining its proper construction." 17 Am. & Eng. Ency. 24, citing a long array of authorities.

Along a like line is the case of Stanley v. Green, 12 Cal. 162, where the court says:

> "The law will not declare the instrument void for uncertainty, until it has been examined with all the light which cotemporaneous facts may furnish. If these render the intention clear, and the words of the instrument are, by fair rendering, susceptible of a construction to uphold such intention, then they will be so construed, and the instrument enforced."

This doctrine was cited with approval in County of Los Angeles v. Hannon, 159 Cal. 41, 112 Pac. 878. In Pio Pico v. Coleman, 47 Cal. 65, the court says:

> "The parties have themselves so construed the deed by their subsequent acts, and there is no reasonable ground to doubt that this is the correct interpretation of it."
>
> "Undoubtedly, where the location of premises intended to be conveyed can be ascertained from the terms used in the instrument of conveyance, neither the acts nor declarations of the parties are admissible to show their understanding of the description contained in the conveyance. But where the terms used to describe the premises meant to be conveyed are equivocal, ambiguous, or insufficient, the subsequent acts of the parties, while in interest, showing the practical construction put upon the terms of the description by them, may be resorted to for the purpose of ascertaining their intention." Truett v. Adams, 66 Cal. 218, 5 Pac. 96.

Our attention has been drawn to some other authorities in support of the same principle, but it seems unnecessary to cite them.

[4] 3. Independently of any construction based upon the acts of the parties, the language used in the description is sufficiently definite. In considering this point the court is required to keep in mind two leading principles: First, in a conveyance of real property, the law exacts only such description as, when aided by evidence applying the description to the property, will serve to identify it; and, secondly, it requires no such completeness of description in executory contracts. Upon the second point we cite Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386, where the court says:

> "But the rule as to the particularity of description required in executory contracts to convey is extremely liberal in favor of their sufficiency. The rule is, that where the description, so far as it goes, is consistent but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract, and the complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete. * * * But parol evidence cannot be heard to furnish a description. The only purpose for which such evidence can be heard is to apply the description given to the subject-matter. Thus if the description were my farm in Los Angeles county, an allegation in the complaint that I owned but one farm in said county, and where it was situated, would apply the description to the proper subject-matter, and render it certain. But if the description were a farm in Los Angeles county, it could not be rendered certain by the allegation of such extrinsic matter."

Again, in another case, the court says:

> "This, it is to be remembered, is a contract for the sale of land and not a deed of grant of the land, and much greater liberality is allowed in construing the descriptions contained in such contracts. The certainty re-

quired in deeds is not essential where even by parol evidence the property, in contemplation of the parties, to be conveyed can be definitely ascertained. * * * And even in the case of deeds, the ancient strictness of the rule is not adhered to." Lange v. Waters, 156 Cal. 142, 103 Pac. 889, 19 Ann. Cas. 1207.

But in this case now under review, the description of the land and its identity are only incidental to the main purposes of the contract. The contract does not involve the title or right of possession of the land. And it seems that in such case, even a less stringent rule applies than in the case of executory contracts to convey land. As said by this court, quoting from an earlier case:

> "Much greater liberality is allowed in construing and curing defective descriptions in broker's contracts than in a deed of grant of land, for, so far as the statute of frauds is concerned, the terms of the employment are the essential part, and such contracts will not be declared void merely because of a defect, uncertainty, or ambiguity in the description of the property to be sold or exchanged when such defect can be cured by the allegation or proof of extrinsic facts and circumstances." Goodrich v. Turney, 186 Pac. 806.

Carefully analyzing the description in this case, we see that it meets even rather exacting requirements. It is composed of the following elements:

(a) The fruits growing and to be grown during certain years;

(b) Upon the following orchards;

(c) Leased or owned by the seller;

(d) Located three-fourths of a mile southeast of Visalia;

(e) Containing 10 acres of Tuscan peach trees, six years old;

(f) Containing 10 acres of Phillips peach trees, six years old.

It will be noted that each one of these elements helps to identify the premises. It is averred in the complaint that the lands in question are owned by the seller and that he owns no other; that they contain orchards; that these orchards answer in all respects to the calls in the description; and that the premises are three-fourths of a mile southeast from Visalia. It may be that this last call is in fact a little hazy, but in theory it is not.

There is no intrinsic difficulty in locating a point three-fourths of a mile southeast of Visalia. Such a point exists and it is a mathematical point. The complaint informs us that such a point can be and has been found and that thereat is located an orchard of 20 acres, bearing certain fruit trees fulfilling in every particular the calls of the contract. There can be but one orchard at the point in question, but conceding for the moment that a description calling for a point three-fourths of a mile southeast of Visalia might possess such uncertainty as to be in some degree a floating point, still it is only barely conceivable that another orchard should be found in the immediate locality containing 20 acres and bearing fruit trees of the kind and age described in the contract. Such coincidences happen only in theory and not in practice.

Even in the case of deeds, much indulgence is allowed. "The general rule in regard to the construction of the description of the premises in a deed is one of the utmost liberality. The intent of the parties, if it can by any possibility be gathered from the language employed, will be effectuated." Aguirre v. Alexander, 58 Cal. 21, quoting from page 37, "A deed is not to be held void for uncertainty if by any reasonable construction, it can be made available." 3 Washburn on Real Property, 2320. "A deed will not be declared void for uncertainty if it is possible by any reasonable rule of construction to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey." 1 Jones on Real Property, 323.

In Wade v. Deray, 50 Cal. 381, a description for less satisfactory than that found in this case was upheld. In that case there were two descriptions, but one of them was held to be erroneous and was rejected. The following was held to be sufficient:

> "That tract of land now used and occupied by the said Deray as a vineyard, on the road leading from the town of Alviso to the city of San Jose, and about three miles in a southerly direction from the town of Alviso, or the Embarcadero, nearly opposite the old mill, near the mill of James Lick."

Respondent Adelsbach was improperly made a party, and the judgment as to him is affirmed. The judgment as to respondent Grove is reversed and the trial court is directed to overrule his demurrer.

We concur: BURNETT, J.; HART, J.

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HARRIS v. SUPERIOR COURT OF SACRAMENTO COUNTY et al.

(Civ. 2241, Sac. 3221.)

(District Court of Appeal, Third District, California. Jan. 5, 1921. Hearing Denied by Supreme Court March 4, 1921.)

1. States 🔑4—Federal government may avail itself of executive functions of state officers to enforce federal statute.

The federal government may, by statute, avail itself, to a limited extent, where necessary, of the executive functions of state officers to assist in enforcing valid federal statutes enacted, under the Constitution, to promote the public welfare.

2. Intoxicating liquors 🔑198—Warrant may be issued to city police officer for arrest for violation of National Prohibition Law.

Under U. S. Rev. St. § 1014 (U. S. Comp. St. § 1674), a valid warrant may be issued directed to a police officer of a city to arrest for violation of the National Prohibition Law, commonly known as the Volstead Act.

3. Bribery 🔑1(2)—Police officer holding warrant for violation of National Prohibition Law within rule relative to bribery.

In the event of warrant issuing, under U. S. Rev. St. § 1014 (U. S. Comp. St. § 1674), to a police officer of a city for arrest of another for violation of the National Prohibition Law, the police officer would be brought within the rule that where an officer of the law becomes directly or indirectly vested with power to take or not to take some official action he is guilty of bribery, denounced by Pen. Code, § 68, if he corruptly offers for reward to forego official action.

4. Criminal law 🔑95—Police officer charged with bribery in connection with National Prohibition Law could be prosecuted in state courts.

A police officer of a city charged with bribery, in violation of Pen. Code, § 68, in promising, for consideration, not to arrest another if such other should engage in the sale of intoxicating liquor in violation of the National Prohibition Law, commonly known as the Volstead Act, may be prosecuted in the state courts for his violation of the Penal Code; his prosecution not being limited to the courts of the United States.

5. Criminal law 🔑95—Intoxicating liquors 🔑13—State court jurisdiction can try officer charged with a corrupt agreement not to arrest violator of National Prohibition Law; Congress has not exclusive jurisdiction in enforcement of Volstead Act.

Const. U. S. Amend. 18, does not give Congress exclusive jurisdiction in the enforcement of the National Prohibition Law, commonly known as the Volstead Act, and to the extent that Pen. Code, § 68, against bribery, regulates the duties of all persons who act under the law, and prescribes penalties for the violation of such duties, it is a valid statute, assuming concurrent jurisdiction by the state in the enforcement of the National Prohibition Law, giving the state jurisdiction to try a police officer of a city charged with bribery in agreeing not to arrest for violation of the National Prohibition Law.

Opinion of Supreme Court Denying Hearing.

6. Prohibition 🔑10(1)—Writ available only in case of excess of jurisdiction.

The remedy of prohibition is available only in a case of excess of jurisdiction.

7. Prohibition 🔑3(4)—Writ not available to prevent superior court from proceeding with trial of cause wherein indictment attempted to charge offense.

Where the indictment clearly attempted to charge the offense on the part of an executive officer of a city of agreeing to receive a bribe, defined by Penal Code, § 68, it was for the superior court, on appeal from the judgment, to determine as to the sufficiency of the indictment, and alleged defect was not available as a ground for prohibition.

Application for writ of prohibition by E. B. Harris against the Superior Court of Sacramento County of the State of California and Hon. Malcom C. Glenn, as one of the Judges of said court. Writ discharged.

Downey & Downey, of Sacramento, for petitioner.

Hugh B. Bradford, Dist. Atty., of Sacramento, for respondents.

BUCK, Presiding Justice pro tem. This is an application for writ of prohibition to restrain the superior court of Sacramento county from proceeding with the trial of petitioner upon indictment charging that petitioner, while serving as a police officer of the city of Sacramento, agreed to receive a bribe, in consideration of which he promised not to arrest one Argante in the event said Argante should engage in the sale of intoxicating liquor in violation of the National Prohibition Law.

Petitioner claims that the indictment fails to state facts sufficient to constitute a public offense, for the reason that it fails to appear therefrom that petitioner, as a policeman, had any official authority to make an arrest for any violation of the National Prohibition Law. And, as stated by petitioner in his brief:

> "The sole issue for decision, therefore, is whether petitioner was acting in his official capacity as a Sacramento policeman when he is alleged to have agreed not to arrest one Argante should he engage in the sale of intoxicating liquor in violation of the National Prohibition Law."

Section 68 of the Penal Code provides that—

> "Every executive officer * * * who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote,

opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the state prison not less than one nor more than fourteen years," etc.

In construing this section, our Supreme Court, in the case of People v. Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700, which was a case wherein was involved the prosecution of a police officer for promising to accept a bribe upon an agreement that he would not arrest persons engaged in violating a certain gaming ordinance, used the following language:

> "The scope of the definition of bribery is as broad as the duties of the officer who accepts the bribe. It is the duty of a police officer to arrest, with or without warrant, according to circumstances, every person who violates section 330 of the Penal Code. If, therefore, he agreed, in consideration of money paid him, not to arrest any person who should violate section 330, it would seem to the ordinary comprehension that he was bribed with respect to a matter which might be a subject of his official action."

And, quoting with approval from an Alabama case (Barefield v. State, 14 Ala. 603), the opinion continues:

> "The matter, cause, or proceeding must be one which may come before him, that is, comes within his jurisdiction, or which may be brought before the officer, or which may be pending at the time of the corrupt promise. The Legislature, I think, did not intend that the prosecution should depend upon the fact whether the officer actually had it in his power to carry out the corrupt agreement before the indictment was exhibited. It is sufficient, I think, that the subject-matter upon which the bribe was to operate existed, and could legally be brought before the officer in his official capacity. The offense consists, in contemplation of the statute, in poisoning and corrupting the fountain of justice, and although the particular deleterious consequence designed to be effected by the parties has not ensued, the state, nevertheless, has an officer corrupted, and society has lost all protection for its rights, so far as the administration of the law by him is concerned."

The National Prohibition Law (41 Stat. 305) has been held to be constitutional. It was enacted by Congress to give force and effect to the Eighteenth Amendment to the Constitution of the United States, which provides that—

> "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

And provides further that—

> "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

And section 2 of title 2 of the enforcing act provides that—

> "Sec. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this act. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in title 11 of the act approved June 15, 1917 (40 Stats. at Large, p. 217)."

And section 1014 of the Revised Statutes, being also section 1674, U. S. Compiled Statutes, Annotated, provides as follows:

> "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a Supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

From the foregoing it is plain that the National Prohibition Law expressly provides that offenders thereof may be arrested by a justice of the peace or other magistrate of any state where he may be found, agreeably to the usual mode of process against offenders in such state. Under the usual mode of procedure in this state (Pen. Code, §§ 811 to 818, and sections 834 to 838), an arrest by a justice of the peace or other magistrate is accomplished by the issuance of a warrant directed to a peace officer, such as a "sheriff of a county, or a constable, marshal or policeman of a township, city or town," whose official duty it thereupon becomes to execute such warrant by subjecting the party named therein to such restraint as is "necessary for his arrest and detention." It is true that the federal statute does not by name mention policemen, but the statute does mention the official source from which the policeman derives his official authority to act. And it has accordingly been held that a person cannot escape the pains and penalties of bribery by reason of the mere fact that his authority to act in the premises is not specifically conferred upon him by statute.

As stated by the Supreme Court of the United States in the case of United States v. Birdsall, 233 U. S. at page 230, 34 Sup. Ct. at page 514, 58 L. Ed. 930:

> "Every action that is within the range of official duty comes within the purview of these sections. There was thus a legislative basis (United States v. George, 228 U. S. 14, 22) for the charge in the present cases, if the action sought to be influenced was official action. To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the department under whose authority the officer was acting. Rev. Stat. § 161; Benson v. Henkel, 198 U. S. 1, 12; Haas v. Henkel, 216 U. S. 462, 480. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. United States v. Macdaniel, 7 Pet. 1, 14. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery. Haas v. Henkel, supra."

Also, in the case of Krichman v. United States (C. C. A.) 263 Fed. 538, at page 542, the court uses the following language:

> "But in the case at bar, in order to sustain the indictment under which the defendant has been convicted, it is not necessary to hold, and we do not hold, that the defendant at the time the offense charged was committed was an officer of the United States. We do not think he was. But we do hold that he was acting on behalf of the United States in an official function, a function belonging to his superior, the Director General of Railroads, and committed to him for the purpose of being executed.
>
> "Any employé in any department of the government of the United States, who acts in the performance of a duty which is imposed upon that department, or aids in any way in the performance of such a duty, is acting on behalf of the United States in an official function and within the range of official duty, within the meaning of section 39 of the Criminal Code. The words of the section are not to be narrowed to the exclusion of what the Congress intended to embrace. That intention is not to be defeated by an overstrict construction. The rule that a penal law is to be construed strictly 'comes attended,' said the court in United States v. Hartwell, supra, 'with qualifications and other rules no less important. * * * The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the Legislature ought not to be presumed to have intended.'"

See, also, Sears v. United States, 257 Fed. at page 261.

And, furthermore, if the federal statute section (section 1014, R. S.) is operative herein, it is begging the question to suggest that the warrant could not issue because the offense is not triable in the county, as required by section 811 of our Penal Code. For the power to issue the warrant in this instance comes not from the state statute, but comes, if at all, from the federal law. Likewise as regards the suggestion that the city charter of Sacramento forbids its policemen to follow any other profession, but requires that they devote their entire time to the performance of their official duty.

Now, as regards the power vested by the federal statutes in the magistrate to issue the warrant as a part of the usual mode of process to consummate an arrest: From the beginning of our history, in order to give effect to federal statutes, which are the supreme law of the land, and passed under the Constitution to promote the general welfare, use has been always made of the administrative agencies of the several states—sometimes with and sometimes without the express consent of the states. This has been the practice as regards the naturalization of aliens, though in an ante bellum case our Supreme Court, as then constituted, held that Congress had no power to confer jurisdiction upon the courts of a state to naturalize aliens, although, if such power be recognized by the Legislature of a state, it may be exercised by the courts of such state of competent jurisdiction. Ex parte Knowles, 5 Cal. 300. But it is now held that—

> "Whatever may have been the theory of some courts regarding the power of Congress to confer such authority upon the state courts in the past, the question is now settled that Congress has such power, and that state courts may constitutionally exercise the same when authorized by Congress to do so, without legislative authority from the states which created them, provided the exercise of such jurisdiction is not prohibited by state legislation." 2 Corpus Juris, p. 118; Levin v. United States, 128 Fed. 826, 63 C. C. A. 476; Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778.

In the above case, at page 517 of 217 U. S., at page 589 of 30 Sup. Ct. (54 L. Ed. 861, 19 Ann. Cas. 778), the court uses the following language:

"Unless prohibited by state legislation, state courts and magistrates may exercise the powers conferred by Congress under such laws. Stephens, Petitioner, 4 Gray, 559."

See, also, State v. Superior Court, 75 Wash. 239, 134 Pac. 916, also reported in Ann. Cas. 1915C, 452, with notes.

Likewise, in giving effect to its power to regulate commerce with foreign nations and among the states, Congress has, without question of its right and duty so to do, availed itself of the administrative facilities of the several states.

Section 4598 of the Revised Statutes provides as follows:

"Sec. 4598. If any seaman who shall have signed a contract to perform a voyage shall, at any port or place, desert, or shall absent himself from such vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of the peace within the United States, upon the complaint of the master, to issue his warrant to apprehend such deserter, and bring him before such justice."

And also section 4599 authorizes the apprehension of deserting seamen, with or without the assistance of the local public officers or constables, and without a warrant, and their conveyance before any court of justice or magistrate of the state to be dealt with according to law.

In the case of Robertson v. Baldwin, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715, construing these sections, it was contended that—

"Congress has no authority under the Constitution to vest the foregoing power of arrest in the courts or judicial officers of the several states."

But after a review of the development of the national law in that respect, the court held:

"That Congress is still at liberty to authorize the judicial officers of the several states to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself. * * *

"We think the power of justices of the peace to arrest deserting seamen and deliver them on board their vessel is not within the definition of the 'judicial power' as defined by the Constitution, and may be lawfully conferred upon state officers. That the authority is a most convenient one to intrust to such officers cannot be denied, as seamen frequently leave their vessels in small places, where there are no federal judicial officers, and where a justice of the peace may usually be found, with authority to issue warrants under the state laws."

See, also, Dallamange v. Moisan, 197 U. S. 169, 25 Sup. Ct. 422, 49 L. Ed. 709.

Likewise, in regard to bankruptcy proceedings, Congress, in order to give effect to its statute, made provision for punishment for perjury, and provided for the arrest of offenders under the provisions of section 1014 above cited. And accordingly, in the case of McIntosh v. Bullard et al., 95 Ark. 227, at page 230, 129 S. W. 85, at page 87, the court uses the following language:

"But, notwithstanding the justice of the peace had no jurisdiction as a state official to entertain proceedings for a prosecution for this offense under the laws of the state of Arkansas, nevertheless, as an agency and officer designated by the laws of the United States, he did have authority and jurisdiction to arrest and imprison or bail for trial any offender against the laws of the United States. It is provided by enactment of Congress (U. S. Comp. St. 1901, p. 716, § 1014) that 'for any crime or offense against the United States, the offender may by any * * * justice of the peace * * * be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of such offense.' The justice of the peace was designated by Congress as an official upon whom it conferred the authority to issue the warrant for and to bind over the person charged with perjury committed against the laws of the United States. The justice of the peace had therefore the jurisdiction to perform this function; and the warrant issued by him was not illegal and void. Thomas v. Loney, 134 U. S. 372, 10 Sup. Ct. 384, 33 L. Ed. 949."

Likewise Congress, in legislating in regard to territories, has availed itself of the above section 1014. And in the case of Roberts v. Brown, 43 Tex. Civ. App. 206, 94 S. W. 388, which was an action to recover damages for false imprisonment and arrest in Texas for a crime alleged to have been committed by plaintiff in Indian Territory, when the arrest was made under the provisions of the above section 1014, the court, after quoting the section in full, states as follows:

"Under these statutes, the justice of the peace of precinct No. 1 in Clay county was empowered, upon the complaint of appellee Brown, to issue a warrant for the arrest of appellant agreeably to the usual mode of process in this state, and appellee Brown was authorized, and it was his duty, upon receiving such warrant, to arrest appellant and to take him before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction for a hearing, commitment, or taking bail for trial."

Petitioner relies upon, and incorporates in his brief, an opinion rendered last August by the learned Attorney General of the state of Maryland, holding:

"That the police of Baltimore city do not, at this time, by virtue of their official position, possess the power to make legal arrests for violations of the Volstead Act, or validity to execute federal processes issued by virtue of its provisions."

As a basis for this opinion, it is stated therein that—

"Since the federal system has no common-law jurisdiction from which an implied authority might be derived, and since no express power has, by any act of Congress, been conferred upon state officials in connection with the enforcement of the Volstead Act, I have come to the conclusion that, from the standpoint of federal authorization, the police of Baltimore are totally lacking in authority to enforce that measure."

And the opinion disposes of the authority to arrest given by section 2 of the act, as follows:

"And in section 2 it is declared that section 1014 of the Revised Statutes of the United States is made applicable in the enforcement of this act. Section 1014, however, although referring to a number of state officials, and authorizing them to arrest and imprison any one guilty of misdemeanor or offense against the United States, makes no reference whatever to policemen or similar officers."

And, continuing the opinion states:

"The inference naturally is that no authority whatever to arrest or issue the warrant was possessed by the magistrate, except that expressly conferred by the act itself."

And the opinion also states:

"In Dallemagne v. Moisan, 197 U. S. 169, an arrest by the chief of police of San Francisco was held to be illegal because the act of Congress did not include that official among the parties authorized to make that particular kind of arrest."

An analysis of the case cited by the Attorney General would seem to indicate that the statute referred to has been accorded by the Supreme Court of the United States a much broader and less sectional construction than that given to it by the learned Attorney General of the state of Maryland. In the case cited the court states:

"The proceeding arises on habeas corpus, to inquire into the validity of the detention of defendant in the city prison of San Francisco, in the state of California. His application for the writ was addressed to the District Court of the United States for the Northern District of California, and it showed that he was a citizen of France and was imprisoned by virtue of a requisition in writing, signed by the French consul general residing in San Francisco, and addressed to the chief of police of San Francisco, Cal., requiring his arrest as one of the crew of the French ship Jacques, then in that port, on account of his insubordinate conduct as one of such crew. (The requisition contained all the averments of facts which would warrant the arrest of the petitioner under the provisions of the treaty of 1853 between the United States and France.) The petitioner also averred that at the time of the making of his application for the writ the ship was not in the port of San Francisco, but had departed therefrom some time before. The petitioner was arrested by the chief of police, under such requisition, on the 1st day of May, 1903, and since that time had been confined in the city prison of San Francisco."

The arrest in question was made in pursuance of the provisions of the eighth article of the consular convention between the United States and France, which provided as follows:

"The respective consuls general, consuls, vice consuls, or consular agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the consuls, when they ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls."

In construing the treaty in its relation to the state of California, the court uses the following language:

"The first objection made by the defendant is to the validity of the requisition of the consul general, because it was directed to the chief of police of San Francisco, he being an officer of the state as distinguished from a federal officer, the defendant contending that a federal treaty cannot impose on a state officer, as such, a function violating the Constitution of the state which he represents in his official character. It has long been held that power may be conferred upon a state officer, as such, to execute a duty imposed under an act of Congress, and the officer may execute the same, unless its execution is prohibited by the Constitution or legislation of the state. Prigg v. Pennsylvania, 16 Pet. 539, 622; Robertson v. Baldwin, 165 U. S. 275. As to the objection that there was any statute or any constitutional provision of the state prohibiting the execution of the power conferred by the treaty upon the state officer, we think it unfounded. We find nothing in the Constitution or in the statutes of California which forbids or would prevent the execution of the power by a state officer, in case he were willing to execute it. The provisions in the Constitution of the state, cited by counsel for defendant, relate in substance only to the general proposition that no person should be deprived of his liberty without due process of law. The execution of a treaty between the United States and a foreign government, such as the one in question, would not violate any provision of the California Constitution; the imprisonment is not pursuant to a conviction of crime but is simply a temporary detention of a sailor, whose contract of service is an exceptional one

> (Robertson v. Baldwin, supra), for the purpose of securing his person during the time and under the circumstances provided for in the treaty, as concerning the internal order and discipline of the vessel. * * *
>
> "The chief of police voluntarily performed the request of the consul as contained in the written requisition, and the arrest was therefore not illegal, so far as this ground is concerned."

The court, however, does hold that the foregoing section should be construed in connection with "the act of Congress, approved June 11, 1864 (13 Stat. 121 [U. S. Comp. St. §§ 7629–7631])," which provided "for the issuing of a warrant for the arrest of the individual complained of, directed to the marshal of the United States, and requiring him to arrest the individual and bring him before the court or person issuing the warrant, for examination, and if, on such examination, it appeared that the matter complained of concerned only the internal order or discipline of the foreign ship, the court should then issue a warrant committing such person to prison," etc. And the court accordingly held that—

> "This statute having been passed by the United States for the purpose of executing the treaties it had entered into with foreign governments, must be regarded as the only means proper to be adopted for that purpose. Consequently, the requisition of the consul general should have been presented to the district court or judge, etc., pursuant to the act of Congress, and the arrest should have been made by the marshal as therein provided for. Therefore the arrest of the seaman by the chief of police was unauthorized."

It would therefore, from the foregoing appear that the arrest by the chief of police of San Francisco was held to be illegal, not, as stated by the Attorney General, "because the act of Congress did not include that official among the parties authorized to make that particular kind of arrest," but because the act explicitly required that the "warrant for the arrest should be directed to the marshal of the United States," requiring him to arrest the individual. And the case further does hold, affirming Robertson v. Baldwin, supra, that there is sufficient comity between the federal and state government to render an arrest by a state officer valid, when such state officer acts in pursuance of an authorization conferred by a federal statute, if there is "nothing in the Constitution or in the statutes of California which forbids or would prevent the execution of the power by a state officer in case he were willing to execute it."

The case of John Bad Elk v. United States, 177 U. S. 529, 20 Sup. Ct. 729, 44 L. Ed. 874, also cited by the Attorney General, involves simply the right of a policeman to arrest without a warrant a person charged with the commission of crime on an Indian reservation. In that case it was held that—

> "By section 1014 of the Revised Statutes, the officers of the United States named therein, and certain state officers, may, agreeably to the usual mode of process against offenders in such state, order the arrest of an offender for any crime or offense committed against the United States. This section has no application. Referring to the laws of South Dakota, we find no authority for making such an arrest without warrant."

And the case of Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458, holds simply that (quoting the syllabus):

> "A police officer of a state, or a private citizen, has no authority as such, without any warrant or military order, to arrest and detain a deserter from the army of the United States."

It does not appear that section 1014 was incorporated in the act pertaining to deserters from the army, as it has been incorporated in the Volstead Act. And the court in its opinion expressly held that "section 1014 of the Revised Statutes [quoting at length] manifestly applies to proceedings before the civil courts alone," as distinguished from military courts, and the opinion of the court contains the following pregnant language:

> "Sections 836, 837, 849, of the Penal Code of California of 1872, affirming the authority of a peace officer, without a warrant, or a private person, to make an arrest 'for a public offense committed or attempted in his presence,' as well as in cases of felony, and requiring the person arrested to be taken forthwith before a magistrate, evidently have in view civil offenses only, and if they could be construed to include such offenses against the United States, certainly do not include offenses which are not triable and punishable except by court-martial."

[1] Irrespective of the reasoning by which it has been arrived at, but, nevertheless, based upon a progressive spririt of state and federal comity, and a developed nationality as opposed to mere sectionalism, the rule seems to be well established in our country that the federal government may, by statute, avail itself, to a limited extent, where necessary, of the executive functions of state officers to assist in enforcing valid federal statutes enacted under the Constitution to promote the public welfare.

[2, 3] It would therefore appear that the petitioner has not brought himself within the reason of the rule which holds that the "crime of bribery cannot be predicated upon the offer of a reward not to perform duties for the performance of which there was no legal or constitutional warrant." United States v. Boyer (D. C.) 85 Fed. 425. There was, and is, under the rule, sufficient potency in the federal statute (1014, Revised Statutes) to permit the issuance of a valid warrant, directed to the petitioner, to arrest Argante for the violation of the National Prohibition Law. And in the event such a warrant under the foregoing authority should be

issued, petitioner would then be brought within the rule that, where an officer of the law becomes directly or indirectly vested with power to take or not to take some official action, he is guilty of bribery if he corruptly offers for a reward to forego official action. People v. Jackson, 191 N. Y. 293, 84 N. E. 65, 66 L. R. A. 490, also reported 15 L. R. A. (N. S.) 1173, 14 Ann. Cas. 243; State v. Lehman, 182 Mo. 424, 81 S. W. 1118, also reported 103 Am. St. Rep. 670; State v. Potts, 78 Iowa, 656, 43 N. W. 534, also reported 5 L. R. A. 814; People v. Bunkers, 2 Cal. App. 197, 84 Pac. 364, 370; State v. Ellis, 33 N. J. Law, 102, also reported 97 Am. Dec. 707.

[4] Petitioner also contends that—

> "He is acting solely under the laws of the United States, and it is axiomatic that where crime is committed in the execution of the laws of the United States, prosecution must be had in the courts of the United States—the offense is one against the United States, and not against the state."

And in this connection he cites Thomas v. Loney, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949, and People v. Kelly, 38 Cal. 145, 99 Am. Dec. 560.

Each of these cases was a prosecution for perjury committed by a witness before a federal tribunal. In each case it was held that the state court was without jurisdiction to try the offense, for the reason that the defendant, being a witness under federal jurisdiction, and owing no duty to the state in the premises, could not at the same time be delinquent in the performance of any duty which he owed the state. But in the case at bar the petitioner exercised his authority to execute the warrant of arrest by virtue of the official position which he holds under the laws of the state. He at no time ceased to be a public officer of the state, and his capacity to speed the enforcement of the federal statute by executing the warrant issued thereunder by the designated magistrate was based upon the faithful performance by him of his sworn duty to the state. It would therefore be in derogation of its authority for the state of California to forego jurisdiction to punish its own official for an offense denounced by its own statute. In this instance the offense strikes directly at the integrity of the state. 2 Wharton on Criminal Law, § 1275, and State v. Whittemore, 50 N. H. 245, also reported 9 Am. Rep. 196; Rump v. Commonwealth, 30 Pa. 475.

[5] Also it should be borne in mind that by the constitutional Amendment 18 itself, Congress is not given exclusive jurisdiction in the enforcement of the act. And therefore, to the extent that our penal statute against bribery regulates "the duties of all persons who acted under the law," and goes "to prescribe penalties for the violation of such duties" (People v. Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700), our penal statute is a valid statute, assuming concurrent jurisdiction by the state in the enforcement of the National Prohibition Law. And this gives our own court jurisdiction to try the petitioner. Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 273.

The writ will therefore be discharged.

We concur: BURNETT, J.; HART, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [6, 7] The petition for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District is denied, entirely without reference to the question discussed in the opinion of the court and without any intimation of our opinion as to the correctness of the views expressed therein. The judgment of the District Court of Appeal that a writ of prohibition be denied was correct, for the reason that no case for prohibition was made. As was stated in the opinion of Mr. Justice Hart in Kitts v. Superior Court, 5 Cal. App. 469, 90 Pac. 980, the remedy of prohibition is available only in a case of excess of jurisdiction, "and consequently the principle declared upon a similar point in the case of Ex parte Ruef (on habeas corpus) 150 Cal. 665, 89 Pac. 605, is pertinent" where the claim is that the indictment or information does not state facts sufficient to constitute a public offense. In the case cited we said:

> "We think the true rule is that, where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus. Here the indictments clearly attempt to charge extortion, a crime defined by section 518 et seq. of the Penal Code, and within the jurisdiction of the superior court."

The rule so declared in the Ruef Case has since been uniformly followed by this court. See, also, In re Hughes, 159 Cal. 360, 362. It was expressly held to apply in regard to the remedy by prohibition in Whitney v. Superior Court (decided January 26, 1920) 187 Pac. 12. In the case at bar the indictment clearly attempted to charge the offense on the part of an executive officer of agreeing to receive a bribe, a crime defined by section 68, Penal Code, and it was for the superior court, in the exercise of its jurisdiction and subject to review on appeal from the judgment, to determine as to the sufficiency of the facts stated to show such crime. The alleged defect in the indictment is not available as a ground for prohibiting the superior court from proceeding with the trial of the cause.

The petition for a hearing in this court is denied.

All concur.

51 Cal. App. 442

ZARILLO v. LE MESNAGER. (Civ. 3494.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1921. Hearing Denied by Supreme Court April 18, 1921.)

1. Set-off and counterclaim 🔑29(3)—Mortgagee sued for conversion may counterclaim for mortgage debt.

In mortgagor's action against mortgagee for conversion of mortgaged truck in which mortgagee filed cross-complaint for judgment on the mortgage debt, it was proper for court to render judgment for mortgagee for amount of mortgage debt after offsetting damages sustained by mortgagor because of conversion.

2. Appeal and error 🔑909(1)—Existence of fact found by court assumed.

Appellate court will assume the existence of fact found by the trial court where there was evidence to sustain the finding.

3. Chattel mortgages 🔑136—Mortgagee waived mortgage lien by conversion of property.

Mortgagee by conversion of mortgaged property waived his mortgage lien.

4. Pleading 🔑4—That counterclaim was called cross-complaint was immaterial.

That counterclaim was designated a cross-complaint was immaterial, since it is immaterial by what name a pleading is called, whether cross-complaint or counterclaim, if it contains a statement of facts and sufficient prayer for relief sought.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Donico Zarillo against Louis Le Mesnager. Judgment for defendant, and plaintiff appeals. Affirmed.

Will D. Gould, of Los Angeles, for appellant.

Lewis Sherman Jones and Frank C. Hoyt, both of Los Angeles, for respondent.

JAMES, J. Plaintiff sued to recover the value of a certain motortruck, alleging that defendant had unlawfully converted the same to his own use. The value of the truck was alleged to be the sum of $2,000. Judgment was entered in favor of the defendant for the sum of $324.25 with interest and costs, from which judgment plaintiff has appealed.

There was an answer and an alleged cross-complaint in which the transactions concerning the motortruck had between the plaintiff and the defendant were set out. In it defendant alleged that he took possession of the motortruck of the plaintiff in a claim and delivery action based upon a condition of a chattel mortgage which was a lien against the truck in his favor. He set forth the facts concerning the mortgage transaction in his alleged cross-complaint and in the prayer thereof demanded judgment in the sum of $1,024.25, with interest and attorney's fees as being due him upon the mortgage obligation, and further prayed for a decree of foreclosure. The court found the facts generally as they were pleaded in the answer and alleged cross-complaint, determining, however, that the defendant had converted the motortruck to his own use after obtaining possession thereof, and found further that the value of the motortruck was $700, and offset this value against the debt owing by the plaintiff to the defendant, the resulting figures entering into the judgment being as first above stated.

[1] So far as the facts are concerned the bill of exceptions show that there was evidence to sustain all the findings of the court. The plaintiff objected to any evidence being introduced under the cross-complaint on the ground that it was improperly made a pleading in the action, and consistently insisted upon that point throughout the trial. It may be admitted as sound law that a judgment of foreclosure would not have been proper to be entered as against the plaintiff in his action of conversion. However, the court did not render a judgment meeting the prayer for that particular equitable relief, but took the account of the defendant and adjusted the two debts with the result stated. The cross-complaint set out all of the facts respecting the existence of the mortgage debt.

[2, 3] Assuming, as we must, that defendant had converted the mortgaged property to his own use, he thereby waived his mortgage lien, and the plaintiff, by suing in conversion, adopted this condition as being established. Story & Isham Co. v. Story, 100 Cal. 30, 34 Pac. 671. In the case cited there was a counterclaim as against the cause of action for conversion, the counterclaim being based upon a cause of action connected with the property alleged to have been converted. The court therein, confirming the right in the defendant to have her accounts adjusted against the plaintiff, said:

> "By treating the goods as the property of the defendant and suing merely for their value, the plaintiff has elected to treat the obligation as of a fixed value, and it is immaterial in what form it stated its cause of action. In either case it would be competent for Mrs. Story to show that by virtue of the agreement between them the property had been subjected to the payment of the plaintiff's obligation to her, and that she had made such application, and to ask that the remainder of the unperformed part of the contract should be enforced."

[4] If it may be said that the matter set up by the defendant should have been presented by way of counterclaim rather than cross-complaint, the answer is, as has often been held, that it is immaterial by what name a pleading is called, whether cross-complaint or counterclaim, if it contains a

statement of facts and sufficient prayer to authorize the relief sought. The cross-complaint here did set out the facts concerning the debt of the plaintiff and judgment was asked for the amount due. We find no error requiring us to disturb the judgment as entered.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

51 Cal. App. 265

FURLONG v. WHITE et al. (Civ. 2267.)

(District Court of Appeal, Third District, California. Feb. 4, 1921. Hearing Denied by Supreme Court April 5, 1921.)

1. Brokers 🔑88(14)—Finding as to agreement merged in written agreement in suit on one-half profits on sale of land held sufficiently certain.

In a suit for one-half the profits on a sale of land wherein defendant who sold the land himself alleged in full an uncontroverted written agreement certain in its terms wherein it was expressly agreed plaintiff was to share in the profits only in the event he sold the land, a finding that such agreement expressed the terms of a prior oral agreement merged therein sufficiently specified the terms of the prior agreement; and, even if it were uncertain as to some of the terms of the contract, it would not necessarily be a sufficient reason to reverse a judgment for defendant.

2. Pleading 🔑291(2)—Where answer sets up contract as defense, plaintiff may controvert it for fraud, undue influence, etc., without filing affidavit showing such facts.

Where defendant sued on contract has pleaded a written instrument in defense, plaintiff may controvert such instrument by evidence of fraud, mistake, undue influence, compromise, payment, statute of limitations, estoppel, and like defenses under Code Civ. Proc. § 462, without filing an affidavit setting up such ground.

3. Pleading 🔑67—Plaintiff not compelled to anticipate defense founded on subsequent agreement, but it would be proper to allege it and its invalidity.

While plaintiff, seeking an accounting under an oral contract, was not compelled to anticipate a defense founded upon a subsequent agreement, yet, knowing of its execution and that it was inconsistent with the terms of the contract sued on, it would have been commendable practice to express the alleged grounds of invalidity asserted against such agreement.

4. Appeal and error 🔑882(17)—Party failing to request further findings held not estopped from objecting to insufficiency of findings.

Although appellants' counsel refused to object to the insufficiency of the findings or request others, they were not thereby estopped in urging the insufficiency of the findings to support the judgment.

5. Attorney and client 🔑14—Attorneys are required to aid the court in avoiding error.

Counsel are officers of the court; and, while it is their duty to protect their client's interest, they are under an equally imperative obligation to aid the court in avoiding error and in determining the cause in accordance with justice and established rules of practice, and, failing therein, their clients are not entitled to favors within the court's discretion.

6. Appeal and error 🔑301—Sufficiency of findings reviewable on appeal from judgment, although not specifically mentioned in motion for new trial.

If appellant wished to object that the judgment is based upon findings which do not determine all of the material issues, and hence the decision against the law, and presents a case demanding new trial, he should have specifically mentioned such ground in his motion; nevertheless the question is reviewable on appeal from the judgment.

7. Appeal and error 🔑901—Party attacking sufficiency of findings must show error.

When a party relies on the insufficiency of the findings to support the judgment, to reverse a cause for denial of a new trial, he must show the appellate court, not only that no finding was made upon a material issue, but also that evidence would justify a finding in his favor.

8. Brokers 🔑86(1)—Evidence held to show that former oral agreement was consideration for written contract.

In an action for an accounting for profits on a sale of land in which an agent was to share, under an oral agreement, evidence including a declaration in a subsequent written agreement *held* to show that the oral agreement was the consideration for the latter agreement to be pleaded as a defense.

9. Brokers 🔑86(1)—No probability of fraud as related to representations as to meaning of contract, in view of intelligence of parties.

There is no probability of fraud as related to representations as to the meaning of a contract as affecting the right to share in the profits of a sale by the principal, where it appears both parties are above the average in mentality, are of mature years, have had wide and varied experience, and are proficient in the use and understanding of English.

10. Appeal and error 🔑171(1)—Party trying case on one theory may not change to another on appeal.

Where a cause was tried upon the theory that a particular question was in issue, it is too late to contend for the contrary on appeal.

11. Brokers 🔑40—Contract construed as requiring agent to sell land to acquire right to accounting for profits.

A contract construed to require that the agent himself must sell the land to acquire a right to an accounting for profits on a sale.

12. Appeal and error 🔑1027—Cause not to be reversed for errors which would not change result.

A case need not be reversed for errors, where it is perfectly apparent from the views of the trial judge that such errors or irregularities would be corrected upon a new trial, and that the same judgment would again be rendered.

Appeal from Superior Court, Butte County; W. M. Finch, Judge.

Action by Herbert W. Furlong against Richard White and others, for an accounting. Judgment for defendants, and plaintiff appeals. Affirmed.

Alan C. Van Fleet, of San Francisco, Jerome D. Peters, of Chico, and H. F. Chadbourne, John S. Partridge, and Charles A. Christin, all of San Francisco, for appellant.

Guy R. Kennedy, of Chico, W. H. Carlin, of Marysville, U. S. Webb, Atty. Gen., and Frank English, Deputy Atty. Gen., for respondents.

BURNETT, J. The action was to compel defendant White to account to plaintiff for a one-half interest in the profits ensuing from the sale of certain property in Butte county, known as the Lott ranch. The judgment, from which the appeal is taken, was in favor of all the defendants, but it may be stated that it is not disputed that the decision is correct as to the defendants other than said White.

The complaint alleges that by virtue of certain instruments in writing, dated January 2, January 15 and March 12, 1917, constituting virtually the same contract, one Lott, who was the owner of said property, gave defendant White an option to purchase it. That on February 17, 1917, defendant Richard White entered into a certain contract and assignment with plaintiff, wherein it was recited that White was the owner and holder in his own name, but for the use, benefit, advantage, and profit of both parties to the agreement, of the said option; that the parties would share equally and mutually co-operate with each other in promoting a sale of the property under option, and said agreement containing this clause:

> "Now this indenture witnesseth that the said party of the first part [Richard White], for and in consideration of the premises, has assigned, transferred and set over to the party of the second part [H. W. Furlong] and by these presents does hereby assign, transfer and set over to the said party of the second part an undivided and equal one-half interest in and to that said above-described option from said Charles F. Lott to said Richard White as the same is evidenced by said agreements of January 2, 1917, and January 15, 1917, and the undivided one-half and equal share or interest in and to all advantages or profits to be derived from or that may accrue from said option, either by direct purchase thereunder or sale to others or otherwise."

The complaint then alleges that in October, 1917, defendant White entered into an agreement with the State Land Settlement Board for the sale of said Lott ranches to said board for the sum of $165,000, and that he has failed to account to plaintiff for one-half of the profits derived from said sale. It may be added that copies of the instruments to which plaintiff refers are attached to the complaint and made a part thereof.

Defendant White in his answer admitted the execution of said option and the purported assignment of February 17, but he alleged that this latter instrument was executed in connection with, and really as part of, a prior oral agreement between plaintiff and defendant White, and that on the 27th day of September, 1917, said prior oral agreement and said agreement of February 17, 1917, were both merged in and supplanted by a written agreement dated September 27, 1917, which agreement in effect, as stated by appellant, "provided that in the event that Furlong obtained a purchaser for the Lott ranch then, and in that event only, should Furlong receive one-half of the net profits derived from such sale. The September agreement further provided that Furlong's right to sell the property should not be deemed exclusive, and contained an express reservation of the right on the part of White to sell the property." It was further alleged that, on May 7, 1918, defendant White sold a portion of said Lott ranch to said State Land Settlement Board, and that "said sale of said lands as evidenced by said contract of May 7, 1918, aforesaid, and the said delivery of said deed in accordance therewith was negotiated, carried on, conducted, and consummated wholly by the defendant Richard White on the one side and said State Land Settlement Board on the other, plaintiff taking no part whatsoever therein; that as a matter of fact neither after the 27th day of September, 1917, nor at any time in said complaint or in this answer set forth or referred to did plaintiff make or consummate any sale of said lands and premises or report to the defendant Richard White any purchaser who was ready, willing, and able to purchase said lands and premises, or any part or portion thereof." Defendant White, therefore, claimed that plaintiff was not entitled to any portion of the profits of said sale, and with this claim the court agreed.

Appellant in his opening brief declares that his contention "turns wholly on the sufficiency of the findings as a matter of law, and is not concerned with the insufficiency of the evidence to support the same." As to this, it cannot be doubted that the judgment that plaintiff take nothing follows as a logical and necessary conclusion from the facts found by the court. It is also true that these findings of fact cover all the material issues that are expressly raised by the pleadings. We deem it unnecessary to detail these findings. Indeed, the controverted facts are few. Appellant admits that—

The "entire controversy turns on the effect of the two agreements between White and Furlong, the agreement and the assignment of February 17, 1917, and the agreement of September 27, 1917."

But the court found that the contract of February was superseded and supplanted by the contract of September. The parties had the legal right to substitute this latter for the former. This is not and cannot be disputed. Hence we must look to the September contract to measure the rights of the parties. But appellant admits that "The September agreement, however, provided that in the event that Furlong procured a purchaser, then and in that event only would Furlong receive one-half the profits. The September contract completely changes the February contract. Instead of a partnership agreement, a joint venture, we have what purports to be a contract between a principal and his agent. Furlong is no longer on an equal basis with White, but is dependent wholly on his success in making a sale for his share in the profits." The court further found—and the fact is admitted—that the sale was made entirely by White. According to appellant's own interpretation of said agreement of September 27, therefore, no other conclusion could be drawn than the one in favor of defendant.

However, appellant's real objection probably is that the court failed to make certain material findings that would have operated to nullify the effect of the finding as to said agreement of September 27, and would have required the court to give full force and effect to said agreement of February 17, according to its terms.

[1] Of these the first specification is that—

> "The findings leave us in ignorance as to the terms of the 'prior oral agreement,' except in so far as we discover that the agreement of September 27 'expressed the terms and conditions and intent of said prior oral agreement.' The court erred in not making a direct finding as to the terms of this prior agreement."

Herein appellant is entirely in error. The execution of said agreement of September 27 was not denied, its terms appeared in the instrument, which was set out in full, and the court found that it contained the expression of the parol agreement. There is no uncertainty as to the terms of the contract embodied in said written instrument. The finding, therefore, leaves us in no doubt as to what said parol agreement was. But even if the finding were uncertain as to some of the terms of said contract, it would not necessarily be a sufficient reason to reverse the judgment.

[2] The other objections are entitled to more serious consideration. They relate to the validity of the said contract of September 27. Herein appellant says:

> "If we can show that the September contract is invalid, then the February contract becomes the measure of the rights of the parties, and the plaintiff must prevail."

It is claimed that the learned trial judge entertained a similar view, as shown by his declaration:

> "If the agreement of September 27 had not been executed, then it would be perfectly clear that the plaintiff ought to prevail in this action."

The validity of said September agreement is assailed upon the grounds that it was without consideration, and that it was secured by fraud and undue influence. These elements were not pleaded, but since said agreement appeared for the first time in the answer, it is the claim of appellant that these defenses are pleaded by operation of law. The decisions are indeed to the effect that where the defendant has pleaded a written instrument in defense, the plaintiff "may controvert the instrument by evidence of fraud, mistake, undue influence, compromise, payment, statute of limitations, estoppel, and the like defenses, under section 462 of the Code of Civil Procedure." Moore v. Copp, 119 Cal. 429, 51 Pac. 630. Nor in such cases is the plaintiff required to file an affidavit setting up any such ground upon which he may rely, although such affidavit was filed herein by plaintiff.

[3] It may be added that plaintiff was not compelled to anticipate any defense founded upon the September agreement. Janes v. Throckmorton, 57 Cal. 368. However, as he knew of the execution of the subsequent agreement of September 27, and that it was inconsistent with the terms of the February contract, it would have been commendable practice for him in his complaint to have expressly alleged the grounds of its asserted invalidity. If so, the court would have been less likely to overlook these elements in making the findings.

[4, 5] It is seriously claimed by respondents, however, that appellant should be precluded from urging any such objection by reason of the fact that he had an opportunity, but declined to offer any amendments to the findings. In that respect the record shows as follows:

> "After receipt by counsel for plaintiff of a copy of the trial court's written opinion in this case, counsel for plaintiff did address a communication to the said trial judge, under date of December 14, 1918, as follows: 'We have not been served with any copy of the proposed findings and when they are served, will desire to be heard on the settlement of the same.'
>
> "The said findings of fact and conclusions of law, as finally signed by the said trial court, were served by counsel for defendants upon counsel for plaintiff on January 3, 1919.
>
> "On January 26, 1919, the said trial judge wrote to counsel for the plaintiff as follows:
>
> "'Will you please send me any proposed amendments to the findings in the case of Fur-

long v. White, which you desire to make by the last of this week.'

"On January 29, 1919, said counsel for plaintiff did reply to the said trial judge by communication as follows:

" 'In re Furlong v. White et al., I beg to acknowledge receipt of your letter of January 26th, and to advise you that we have decided not to submit any amendments to the findings as proposed.'

"The said findings and conclusions of law were thereupon signed and filed by the said trial judge."

Counsel should not forget that they are officers of the court, and while it is their duty to protect and defend the interests of their clients, the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice.

We do not think that appellant is thereby estopped from urging the point, nor do we question the good faith of counsel, but we are of the opinion that the trial judge in denying the motion for a new trial was justified in making this comment:

> "In those cases where an issue arises out of the evidence rather than the pleadings, and the party in whose behalf such issue is so raised, after being served with proposed findings by the other party, remains silent as to such issue, knowing from the court's opinion that the issue must be found against him, there is nothing in such conduct to appeal to the court's discretion, if any there be, when the party moves for a new trial because of failure to find upon the very issue concerning which he remained silent, particularly where he was expressly given the opportunity to speak."

[6] The answer of appellant is, of course, that the court had no discretion to deny the motion, since a judgment based upon findings, which do not determine all the material issues, is a decision against law, and presents a case demanding a new trial. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828.

However, in his motion for a new trial he should have specifically mentioned this ground. Kaiser v. Dalto, supra; Haight v. Tryon, 112 Cal. 6, 44 Pac. 318.

Nevertheless, the question is reviewable upon the appeal from the judgment. Emirzian v. Asato, 23 Cal. App. 251, 137 Pac. 1072; Math v. Crescent Hill Gold Mines Co., 31 Cal. App. 636, 161 Pac. 140.

[7] But another principle operative to defeat appellant is this: When a party relies upon this ground he must show to the appellate court not only that no finding was made upon a material issue, but also that the evidence would justify a finding in his favor. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098.

If the finding must have been adverse, its omission is not sufficient to authorize a reversal of the judgment. Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Estate of Carpenter, 127 Cal. 582, 60 Pac. 162.

In the opening brief of counsel no quotation is made of any testimony, nor is reference made to any part of the transcript in which may be found any evidence of fraud, undue influence, or want of consideration. For that reason we would be entirely warranted in assuming that no such evidence is contained therein. If parties are too indifferent to point out the evidence upon which they rely, they cannot expect an appellate court to search for it through a voluminous record. However, we have read the entire transcript, and we are satisfied that this contention of appellant cannot be maintained.

[8] As to the consideration for said agreement of September 27, the lower court was warranted in holding that no other consideration than that supporting the original parol agreement was required. This follows for the reason that said instrument of September 27 did not constitute a new or additional contract between the parties. It was simply a written memorial or expression of the parol contract which was agreed upon by the parties in the beginning, and it was therefore supported by the consideration for said parol agreement. Of this there can be no possible doubt. The parties themselves in said September instrument deliberately declared that—

> "At and prior to the date of the execution of said option the parties hereto had entered into an oral agreement between themselves—which said agreement is now in force and effect. Such agreement and understanding between the parties has never been formally executed or reduced to writing. * * *
>
> "Whereas, it is desirable and for the mutual satisfaction and protection of both parties hereto that the agreement relating to said option between them should be definitely stated and executed in writing," etc.

It is admitted by appellant that—

> "If the prior oral agreement was a valid and subsisting agreement at the time of the execution of the September contract, then it may well be said that the September contract required no new consideration."

We could not expect to find better evidence that it was "a valid and subsisting agreement" than the written declaration of the parties to that effect. We may add that there was abundant parol evidence, admitted without objection, as to the terms of said contract, and that the purpose of the parties in executing said September instrument was simply to preserve written evidence of said original contract. But appellant replies:

> "We contend, however, that the September contract cannot be held to be 'the written expression of the original contract,' for the 'original contract' was merged in and supplanted by the February contract, and was no longer in existence."

As to this, though, the parties themselves should be the best judges. They not only declared in the September instrument, as we have already seen, that said parol contract was in force, but they also stated that the purpose and effect of the February agreement were to protect "the interests" of Furlong in said parol agreement, and "the assignment to the party of the second part set out in Exhibit A hereto annexed shall be binding upon and enforceable against the said party of the first part for the purpose of securing and protecting the party of the second part, his heirs and legal representatives in whatever interest he or they may have under the terms and conditions of this agreement." Here, again, parol evidence was also received without objection that said February agreement, although in the form of an absolute assignment, was executed as security for the enforcement of whatever rights or interest appellant might have in said "original agreement." There can, indeed, be no doubt of the sufficiency of the evidence to support such conclusion, and we do not understand appellant to contend that this purpose could not be shown, notwithstanding the instrument is in the form of an assignment. The situation does not involve the question of parol evidence being received to vary the terms of a written instrument or of a parol agreement being merged into a written contract, but the theory, which the trial court adopted, and which is supported by the evidence, is that the parties entered into an oral contract providing that if appellant should sell the property he would be entitled to a commission, but that respondent White should have the privilege of selling the same without accounting to appellant; that this contract remained in force throughout the entire transaction, and was recognized and declared by the parties to be the measure of their rights; that the February instrument was executed to secure the enforcement of this contract, and the parties thereafter embodied said oral contract in the written instrument of September 27, and therein also defined and limited the purpose and effect of said February instrument.

[9] In reference to the claim of fraud relating to the representations of White as to the meaning of the September agreement the trial judge declared:

> "In this connection it is important to consider the mental capacity of the two men. Both appear to be above the average in mentality. Both are of mature years, and have had wide and varied experience. Both are proficient in the use and understanding of the English language."

In view of these facts we consider it highly improbable that plaintiff did not understand the significance of this final instrument.

As to undue influence, there was not between the parties the relation of attorney and client. It is true that Mr. White was and is an attorney at law, and for that reason was requested to draft said written instruments, but the evidence shows without substantial conflict that the parties dealt at arm's length, and that each was keen and alert to protect his own right and interest in the transaction. The record justifies this statement of the trial judge:

> "The charge of undue influence may well be omitted from discussion, as I do not find any evidence to show that Furlong's mind was dominated by that of White, or that the will of the latter was substituted for that of the former in the execution of the agreement."

We are not unmindful of the contention of respondent that the findings of the court do actually cover these considerations, but we deem it unnecessary to inquire as to that.

[10] The point is made that it was not proper to show that the February agreement was really intended as security, since there was no allegation in the answer to that effect, the averment being that the February agreement was executed "as a part of the prior oral agreement." As to this it is sufficient to say that the evidence was received without objection; in order words, the case was tried upon the theory that the question was in issue, and it is now too late to contend for the contrary. In reference to the finding upon this matter it may be said that, while it contains said language of the answer, it also recites that said agreement of February 17 was merged in and supplanted by the written instrument of September 27, "which said instrument of September 27, 1917, expressed the terms and conditions and intent of said prior oral agreement and said agreement of February 17, 1917, aforesaid, and is in writing and is in words and figures following, to wit." Then follows a copy of said September agreement, which shows beyond peradventure that the parties intended the February contract to constitute security for the performance of the oral contract. Thus does the finding fully support the theory upon which the case was decided.

[11] In the closing brief, in direct conflict with his admission in his opening brief, appellant contends that even the September instrument does not limit his right to an accounting to the situation wherein a sale should be made by himself. For the first time he asserts that, construing the instrument as a whole, it is a fair inference that he was entitled to his allotment whether the sale was made by him or by White. We can see no merit in this contention. The instrument, as we have seen, purports to be and is a full expression of the rights of the parties, and it contains no provision for any participation in the profits by appellant except upon condition that he find a purchaser. The provision that—

> "The party of the first part has agreed and does hereby agree, that for and in consideration of the party of the second part promoting a sale and finding a purchaser or purchasers of the lands and premises * * * and a sale being made to such purchaser * * * the party

of the second part shall be entitled to and receive, and the party of the first part agrees to pay him, one-half of the net profits arising from such sale, the same to become due and payable upon the full completion of such sale and the full payment of the purchase price thereof,"

—necessarily implies that it was only upon such condition that the party of the second part was to be entitled to a part of the profits. But if any further assurance were needed it can be found in the provision reserving to the party of the first part the right to sell said property himself or through other agents.

We are not disposed to notice specifically the decisions cited by appellant, as they involve familiar principles not in conflict with anything herein determined.

[12] On account of the earnestness with which the able counsel for appellant have urged their contentions, we have considered them somewhat at length, but we find no substantial reason for reversing the judgment. We may add that, if for any of the reasons urged by them, which may possess some merit, the cause should be reversed, it is perfectly apparent from the views expressed by the learned trial judge that the asserted errors or irregularities would be corrected upon a new trial, and a judgment would be rendered again in favor of respondent.

However, we are satisfied that within the limits prescribed for the exercise of our jurisdiction, we cannot disturb the finding below.

The judgment is therefore affirmed.

We concur: PREWETT, Presiding Justice pro tem.; HART, J.

(51 Cal. App. 289)

BUCKLEY v. GADSBY et al. (Civ. 3662.)

(District Court of Appeal, First District, Division 1, California. Feb. 5, 1921. Hearing Denied by Supreme Court April 5, 1921.)

1. Boundaries 🔑48(3)—Fence does not prevail over descriptions in absence of long acquiescence.

A fence built by former owner of parcel of land between two lots on which he built houses, and which he conveyed to predecessors of plaintiffs and defendants, respectively, will not prevail or control over the legal descriptions of the lots by metes and bounds in the conveyances to them in the absence of long years of acquiescence in the boundary fixed by the fence.

2. Boundaries 🔑48(1)—No acquiescence in absence of proof of boundary.

Where court is unable to determine where a fence originally stood, it cannot hold that the parties ever acquiesced in a boundary line originally evidenced by such fence.

3. Judgment 🔑747(5)—Decree quieting title held not res judicata in boundary dispute.

Judgment, in an action instituted by owner of lot, quieting title to the lot as described in a conveyance to her, was not res judicata in a subsequent boundary dispute with an adjoining lot owner.

4. Judgment 🔑747(½)—In action to restrain construction of bulkhead along boundary, held properly excluded in boundary dispute.

In an action in ejectment arising out of a dispute as to boundary, a judgment enjoining defendants from building a bulkhead upon plaintiff's side of "the line where the fence formerly erected by one formerly ran" or from "removing said fence and from placing the same in any other location than where it now is or formerly was," was properly excluded, where it could not be ascertained from anything contained in the judgment roll where the fence was at the time of such judgment or where the same "formerly was."

5. Judgment 🔑739—Quieting title held inadmissible in boundary dispute, where premises in present action were expressly excluded.

In ejectment arising out of boundary dispute, a judgment in a former suit to quiet title, which quieted the title of plaintiff to certain portions of premises described in her complaint and expressly excluded the fragments of land in controversy, and as to these the trial court found that the plaintiff was not, but the defendant was in possession at the time of the commencement of the proceeding, was properly excluded, since the court in the suit to quiet title had no jurisdiction over the title to premises not shown to have been in the quiet and peaceable possession of plaintiff when she commenced her proceeding.

6. Ejectment 🔑114—Judgment held to sufficiently describe premises.

Judgment, in ejectment arising out of boundary dispute between adjoining lot owners, sufficiently described the property in controversy, where it determined that plaintiff was entitled to recover the premises described in her complaint and decreed that such premises were referred to and described in two certain surveys which are a part of the public records of the city and county, and further described the premises in dispute as being embraced within the exterior boundaries of a certain lot having a frontage of 25 feet by a uniform depth of a certain number of feet as described in the language of plaintiff's original deed.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by Sophie E. Buckley against F. L. Gadsby and others. Judgment for plaintiff, and defendants appeal. Affirmed.

G. Gunzendorfer, of San Francisco, for appellants.

H. M. Anthony, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action of ejectment. The premises involved in the action consist of five small strips or plots of land lying along a line between two larger portions of Mission block 109 in the city of San Francisco, which are owned respectively by the plaintiff and defendants herein.

The facts of the case as disclosed by the evidence are these:

In the year 1892 one Daniel Einstein became the owner of that portion of Mission block 109 having a frontage of 100 feet on Twenty-Second street by a uniform depth of 100 feet 6 inches. It was then unimproved and was somewhat precipitous, lying, as it did, upon the eastern slope of what is known as "Sanchez street hill." Einstein presently undertook to improve this property by first causing a survey to be made of its exterior boundaries and by proceeding to have it graded and subdivided into four lots; each having a frontage of 25 feet on Twenty-Second street and a uniform depth of 100 feet 6 inches. The lines dividing these lots were determined by the person grading and subdividing the tract through the use of a cotton string stretched from stakes driven in the ground at the front and back lines of the lot corners. Einstein began in the same year building cottages on these lots; the first of these being erected on the most westerly lot, which was in 1897 transferred to Catherine E. Gadsby, the predecessor of the defendants herein. Upon the adjoining lot a cottage was also erected, which lot, with its improvements, Einstein in 1898 conveyed to the predecessor of the plaintiff herein, who subsequently transferred the same to her. The deeds conveying the title to these respective lots described each by metes and bounds as being distant a definite number of feet from a common point, and as having a frontage of 25 feet on Twenty-Second street by a uniform depth of 100 feet 6 inches. Between these two lots, Einstein, at the time of the erection of the cottages thereon, built a division fence upon the line marked by the use of the string as before stated; but whether such fence was upon the correct boundary line between these two lots as shown by the descriptions in the deeds to the respective parties cannot be definitely ascertained from the evidence in the case. The parties, however, went into possession of their respective holdings as defined by this fence and for a while abode therein in neighborly amity without any particular inquiry, discussion, or knowledge as to just where the true line between their respective properties lay. It presently began to be noticed by both owners that the surface of the land lying along the rather steep sidehill upon which their lots were located was sliding, an effect due probably to defective subsurface drainage and that its trend was to the southward so as to cause the land and improvements of the lot owned by the defendant herein to encroach upon the lot then owned by the plaintiff's husband. One of the first observed effects of this movement of the soil was that the defendants' house had been projected a few inches across the supposed or accepted line between the lots, and when this was seen to be so the defendants raised their house and moved it back a little. Another effect was seen to exist in the condition of the fence between the properties, which in places became loose and irregular in outline, falling down in places. At times one or other of the parties undertook to put back the fence in place, but in doing so apparently did not satisfy the other party; in fact, discords over the location of the boundary arose and became accentuated as time went by.

In the year 1908 the wife of the defendant Gadsby herein commenced a proceeding under the McEnerney Act to have her title quieted to the lot, describing the same according to the metes and bounds of her original deed, and there being no appearances in that proceeding a decree was entered quieting her title to said described premises. In the year 1909 the plaintiff herein undertook to repair or replace a bulkhead along the front of her property, which had apparently been displaced by the sliding of the soil, and also attempted to extend the same inward along what she took to be the division line between the two properties. Defendant Gadsby's predecessor objected to this work upon the ground that it involved a trespass upon her premises, and she therefore commenced an injunction suit against the Buckleys, husband and wife, to restrain them from further proceeding with said work. In her complaint in said action she alleged that she was and for many years had been the owner of the house and lot on Twenty-Second street designated as number 3706, while the defendants were alleged to be the owners of the adjoining house and lot designated as 3704, which said two premises had been for many years separated by a fence erected by their common grantor and intended by him to form the boundary line between said two lots of land, which fence had ever since been maintained by the parties as such boundary line. She further alleged that the defendants were threatening to enter upon the premises of the plaintiff and remove said fence and put it in a different place in the course of building said bulkhead, wherefore she prayed that they be enjoined from so doing. The defendants, though regularly served with process in said action, did not appear to contest the same, and judgment was accordingly entered, which followed the language of the complaint in describing the lots of the respective parties by their house numbers, and which enjoined the defendants from building any bulkhead in front of the plaintiff's premises and from removing said division fence or placing "the same in any other place than where it now is or formerly was." No appeal was taken from this judgment. In the year 1910 the plaintiff herein commenced a proceeding under the terms of the McEnerney Act to establish and quiet her title to the lot upon which she resided, describing the same according to the boundaries of her deed as being 25 feet on Twenty-Second street by a uniform depth of 100 feet 6 inches. The defendant Gadsby herein appeared in that proceeding, and in his answer therein denied that the plaintiff was in possession of that portion of the premises described in her complaint, which consisted of those five fragmentary parcels thereof which are in controversy in the present action, and further affirmatively alleging that the said defendant himself was the owner and in quiet and peaceable possession thereof at the commencement of said proceeding by virtue of the transfer to him of the adjoining premises by Catherine E. Gadsby, his wife. The defendant further pleaded by way of estoppel the judgment theretofore entered in the injunction suit above referred to. Upon the trial and submission of that proceeding upon the issues thus presented the trial court made and entered its decree quieting the title of the plaintiff therein to those portions of the premises described in her complaint of which she was in possession, but as to the five fragmentary parcels of which the defendant Gadsby claimed to be the owner and in possession the trial court found that at the time of the filing of the plaintiff's complaint in said proceeding said Gadsby was in the actual and peaceable possession thereof. It therefore made no further finding as to the rights of the respective parties in and to said fragmentary parcels of land, but merely undertook by its decree to quiet the title of the plaintiff to the remainder of the lot described in her complaint of which she was admittedly in possession. This judgment also became final, no appeal having been taken by either of the contesting parties.

Thereafter and on May 4, 1915, the plaintiff commenced the present suit in ejectment to recover possession of those same five fragmentary plots of land to which defendant Gadsby had asserted ownership in the proceeding last above referred to. The defendant Gadsby appeared and answered, setting up substantially the same matters in the way of ownership and estoppel embraced in the answer filed by him in the former proceeding. Upon the trial of the cause the respective parties introduced their original deeds showing each to have been entitled by the descriptions contained therein to a 25-foot lot on Twenty-Second street of uniform depth, and each also in turn gave testimony as to the existence and location of the division fence, and as to the fact and effect of the sliding of the soil observed to be taking place not long after their respective ownerships began and which had caused the improvements upon the lot of said defendant to invade the plaintiff's premises as the same was described in her original deed. The said defendant, in addition to his testimony as to the location of said fence line and his long-continued possession of the fragmentary parcels lying upon his side thereof, offered to introduce in evidence the judgment roll in the case of Catherine E. Gadsby, Plaintiff, v. All Persons, above referred to, and which judgment roll the court admitted in evidence. The defendant then offered the judgment roll in the case of Sophie Buckley v. All Persons, also above referred to, but to the admission of this record the plaintiff objected, which objection the trial court sustained. The defendant then offered the judgment roll in the case of Catherine E. Gadsby v. Sophie Buckley and Daniel Buckley (the injunction suit above referred to), to the admission of which the plaintiff objected, which objection the court also sustained.

Upon the submission of the cause the trial court made its findings and decision in the plaintiff's favor, and directed a decree to be entered thereon adjudging that the plaintiff was the owner and entitled to the possession of the premises described in her complaint. The said defendant's motion for a new trial was thereafter made and denied, whereupon he took and has prosecuted this appeal.

The appellant's first contention is that the finding by the court that the plaintiff was the owner and entitled to the possession of the lot of land having a full 25 feet frontage on Twenty-Second street by a uniform depth of 100 feet 6 inches, as the same is described in the original conveyance to her predecessor, is unsupported by the evidence in the case.

[1] This contention rests upon several separate claims put forth by the appellant, the first of which is that the respective ownerships of the parties hereto in their adjoining properties are to be determined not alone or chiefly by the descriptions in their deeds, but rather by the facts that Einstein, who originally owned and subdivided the tract which embraced both these lots and who erected the buildings upon each and built the fence between them prior to any transfer to the predecessors of the parties hereto, had thereby determined the boundaries of each lot, and that these facts rather than the description by metes and bounds in the descriptions in the deeds of the respective parties control the location of the dividing line between their respective properties. In making this contention the appellant relies upon the case of Bullard v. Kempff, 119 Cal. 9, 50 Pac. 780. An examination of that case, however, shows a quite different situation than that presented in the instant case. There the original owner had so built the houses which he erected upon the respective lots afterwards sold by him that they stood upon and marked to the extent of their depths the dividing line be-

tween the lots, and as to the remainder of said line in front and rear of said houses he had terraced the lots and constructed permanent bulkheads, thus making each lower lot three feet below the next above it. These facts the Supreme Court held might be taken into account in determining whether one of the later lot owners was entitled to a temporary injunction to restrain his immediate neighbor from removing said bulkhead with a view to placing it upon the line called for by the descriptions of the deeds. The Supreme Court, while indicating that these facts were proper to be taken into account in passing upon the matter of granting or refusing a temporary injunction, expressly refrained from finally determining the rights of the parties in the premises. Its decision, therefore, cannot for that reason be regarded as a controlling authority in the instant case. The inapplicability of that case to the facts of the present case may also be seen to consist in this difference: That while in that case the improvements made by the original owner were so permanent as to be practically controlling proof of his intent as to the location of the division line betwen the lots of his subdivision, the fence erected by Einstein was no such permanent structure, and hence, even if its original location were known, it could hardly be said to overcome the specific descriptions in his conveyances defining the dimensions of the lots under consideration in the instant case.

[2] There is another reason why the decision in said former case is not to be given application to the facts of the case at bar. The court therein referred to the affidavits of the parties showing long years of acquiescence in the boundaries fixed by the permanent character of the structures marking the same. It is contended by the appellant in the present case that the evidence introduced herein shows a similar acquiescence in the boundary line, but with this statement we cannot agree, since the proofs herein sufficiently show that within a very brief period of time after the occupancy by the respective parties of their holdings the surface movement began to be observed and commented upon and its effects noted and for the time being corrected, but that ere long discords began to arise between the parties which finally resulted in the diversified litigation above referred to and which has continued in one form or other ever since. There has never been an agreement between the parties, express or implied, that the line as originally marked by the fence in question should constitute the boundary line between their premises. In addition to this, there is no satisfactory or sufficient evidence in the record which would have enabled the trial court, or which enables us, to determine just where said fence was originally placed, or whether or not it was upon the correct boundary line between these two properties as the same is delineated by their respective deeds and as said fence stood before the lands of the one began to slide down upon the lands of the other. The evidence sufficiently discloses that from the time when the effects of this shifting quality in the surface of the soil of these lots became noticeable the fence was at times and places in a loose, wobbly, and falling condition, and that it was from time to time replaced by the respective parties without particular regard for its original line or location. The various surveys made by the respective parties after the troubles had been brought to court when they show the fence at all, show it to be out of alignment either from the effects of the slide or from the acts of the parties in making its several replacements. This being the state of the record, we are unable to determine where the fence did originally stand, and hence cannot hold that the parties ever acquiesced in a boundary line which would place the fragmentary parcels of land involved in this litigation upon the defendant's side of said boundary.

And for a like reason we are constrained to hold that the cases cited by counsel for the appellant, and more particularly the recent decisions of the Supreme Court in Young v. Blakeman, 153 Cal. 477, 95 Pac. 888, Price v. De Reyes, 161 Cal. 488, 119 Pac. 893, and Silva v. Asevedo, 178 Cal. 495, 173 Pac. 929, cannot be given application to the case at bar.

[3] This brings us to the final contention of the appellant, which relates to the effect of the judgments rendered for or against the parties in those several actions or proceedings—instituted by one or other of them during the years of litigation preceding the commencement of the present action. In none of these, as we shall see, was the precise question at issue which would have rendered the judgment therein res adjudicata as to the matters involved in this action. The first of these proceedings was that instituted by Catherine E. Gadsby, the predecessor of defendant F. L. Gadsby, wherein she sought to have her title quieted to the 25-foot lot described in her original deed. The trial court admitted the judgment roll in that case, but manifestly the judgment obtained therein would in nowise affect the present controversy.

[4] The next case was that of Gadsby v. Buckley, a case commenced in 1909, by the present defendant's predecessor, to enjoin the Buckleys from attempting to build a bulkhead along the boundary between the two lots, in which case the trial court by its judgment granted an injunction upon the defendant's failure to appear. The defendant in the present case offered the judgment roll in that case in evidence, claiming that it determined the boundary line between the parties in that action, and, hence, in

this one. The trial court herein refused to admit such judgment in evidence, and of this refusal the appellant herein complains. A cursory inspection of the judgment in that case, however, shows that it concludes nothing tangible as to the actual location of the boundary line between these two lots or of the fence originally marking the same. It refers to the premises of the respective parties by house numbers, which, of course, sheds no light upon the boundaries, and it enjoins the defendants from building a bulkhead upon the plaintiff's side of "the line where the fence formerly erected by one Daniel Einstein formerly ran," or from "removing said fence and from placing the same in any other location than where it now is or formerly was"; but where said fence was at the time of said judgment or where the same "formerly was" cannot be ascertained from anything contained in said judgment roll. It follows that the trial court properly held that said judgment determined nothing decisive of the case at bar, and, hence, properly excluded the same.

[5] The next proceeding was that of Sophie Buckley v. All Persons, instituted in 1910, wherein the plaintiff sought to have her title quieted to premises, the description of which embraced within their boundaries the fragmentary parcels of land involved in the present action. The defendant in the present action appeared in that proceeding to oppose the effort of the plaintiff therein to include in said proceeding said fragmentary parcels of land, asserting that he and not the plaintiff was the owner and in peaceable possession thereof at the time of the institution of that proceeding; that cause came to trial and upon its submission the trial court rendered a judgment quieting the title of the plaintiff therein to those portions only of the premises described in her complaint and expressly excluding said fragmentary parcels of land, and as to these the trial court found that the plaintiff was not, but the defendant was, in the quiet and peaceable possession thereof at the time of the commencement of the proceeding. Further than this the trial court did not go, and decided nothing as to the ownership and right of possession of said fragmentary parcels of land, being evidently and correctly of the opinion that in that sort of special proceeding it had no jurisdiction over the title to the premises not shown to have been in the quiet and peaceable possession of the plaintiff when she commenced her proceeding. It will thus be seen that the judgment therein also concluded nothing material to the present controversy, unless possibly to determine that the defendant Gadsby was in the quiet and peaceable possession of the parcels of land in dispute herein on July 7, 1910, the date of the initiation of that proceeding. The appellant herein complains that notwithstanding the exclusion of said judgment by the trial court it has made a finding to the effect that the said appellant was not in the quiet and peaceable possession of the premises herein on July 7, 1910, contrary to the effect of said judgment, which he therefore insists should have been allowed in evidence. It is true that the trial court made such a finding, and it is probably also true that the trial court should have admitted said judgment in evidence for the sole purpose of furnishing proof of that fact, but the fact itself is immaterial to the issues in this case, since it sufficiently appears that the defendant Gadsby herein has never had such a quiet, peaceable, and undisputed possession of the premises in question for such a period of time as would have invested him with the title thereto by adverse possession. Whatever error the trial court may, therefore, have committed in this particular matter we hold not to have been prejudicial to a degree justifying a reversal of the case.

[6] Finally, the appellant contends that the judgment herein is fatally defective for the reason that it does not definitely fix the location of the boundary line between the parties. The trial court does, however, determine that the plaintiff is entitled to recover the possession of the premises described in her complaint, and it further decrees that said premises are referred to and described in two certain surveys which are part of the public records of the city and county of San Francisco, to which reference is made, and the trial court further describes the premises in dispute as being embraced within the exterior boundaries of that certain lot having a frontage of 25 feet on Twenty-Second street by a uniform depth of 100 feet 6 inches and which is described in said decree in the language of the plaintiff's original deed. We think that these several descriptions render certain said decree so as to enable an officer executing the same to definitely locate the premises in dispute.

We do not deem the other points urged by appellant sufficiently important for separate consideration.

Judgment affirmed.

We concur: WASTE, P. J.; BARDIN, Justice pro tem.

51 Cal. App. 416

VON DER KUHLEN v. HEGEL et al.

(Civ. 3475.)

(District Court of Appeal, Second District, Division 1, California. Feb. 16, 1921.)

Judgment 🔑253(1)—Recovery of moneys not asked for in prayer unauthorized.

No recovery can be had in an action to foreclose a mortgage for taxes alleged in the body of the complaint, or for 8 per cent. interest, where judgment for the taxes was not asked for in the prayer, which only asked for 7 per cent., under Code Civ. Proc. § 580.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Charles Von Der Kuhlen against Kate Hegel, a single woman, and others. From a judgment for plaintiff, the named defendant appeals. Reversed.

Charles J. Kelly and D. A. Stuart, both of Los Angeles, for appellant.

H. L. Sacks, of San Francisco, for respondent.

SHAW, J. Defendant Kate Hegel appeals from a judgment foreclosing a mortgage executed by her to secure the payment of a promissory note in the sum of $12,000 and interest thereon at 7 per cent. per annum, payable quarterly.

Defendants' demurrer to the original complaint was sustained, and thereupon plaintiff filed an amended complaint praying judgment against defendants "(a) for the sum of $12,000, together with interest thereon at the rate of 7 per cent. per annum from the 19th day of October, 1918; (b) for the sum of ——— paid for taxes from the ——— day of ———, 191—," followed by a demand for attorneys' fees, costs, order of sale, etc. Upon entry of defendant's default for failure to answer, judgment was rendered against her for the principal of the note in the sum of $12,000, and interest computed from July 19, 1918, amounting to $441, and $120.22 for taxes alleged in the body of the complaint to have been paid by plaintiff. Section 580, Code of Civil Procedure, provides:

> "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint." Staacke v. Bell, 125 Cal. 309, 57 Pac. 1012.

And in Brooks v. Forington, 117 Cal. 219, 48 Pac. 1073, it is said:

> "The relief 'demanded in his complaint' is held to refer to the relief asked in the prayer—the feature of the pleading to which alone reference may be had in default cases, to ascertain what relief plaintiff seeks—and the rule of the statute applies in its strictness to actions of foreclosure alike with those of any other character."

Under the rule stated, plaintiff was not entitled to judgment for interest other than as demanded at the rate of 7 per cent. per annum from the 19th day of October, 1918; nor, since no demand was made for any sum on account of taxes paid, was he entitled to judgment therefor in the sum of $120.22. It thus appears that in rendering judgment the court erred in allowing $441 for interest, when the amount should have been $233.33, and likewise erred in allowing $120.22 for taxes, the total of which is $327.89 in excess of the amount which should have been awarded to plaintiff.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

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51 Cal. App. 424

BRADEN v. CLINE. (Civ. 3336.)

(District Court of Appeal, Second District, Division 1, California. Feb. 16, 1921. Hearing Denied by Supreme Court April 14, 1921.)

1. Replevin 🔑8(3)—Plaintiff entitled to possession against sheriff, unless latter showed better right.

Plaintiff, in possession of personalty in leased premises, not only under claim of ownership by purchase, but also by virtue of renting the property from its owner, was entitled to the property as against the sheriff, unless the latter showed a better right thereto.

2. Affidavits 🔑18—Appeal and error 🔑1051(1)—Affidavit of plaintiff as to abandonment of attachment lien inadmissible, but error harmless, in view of establishment of fact otherwise.

In an action for possession of personal property against a sheriff, in support of plaintiff's contention that the lien of attachment was lost by abandonment and surrender of possession of the property by defendant sheriff, plaintiff's affidavit to such effect was improperly received in evidence over defendant's objection; but the error was harmless to defendant, where the fact was otherwise established.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by A. Claude Braden against John C. Cline. From judgment for plaintiff, defendant appeals. Affirmed.

C. F. Culver, of Los Angeles, for appellant.

Hahn & Hahn, of Los Angeles, for respondent.

SHAW, J. This action, wherein judgment was rendered for plaintiff and from which defendant appeals, grew out of the following facts: At a time when plaintiff, claiming to be the owner thereof, was in possession of certain personal property described in the complaint, the defendant, as sheriff, seized the same under and by virtue of an execution issued upon a personal judgment for money rendered in an action brought by Joseph Uhlein against Edward J. Sheehan, a nonresident, upon whom service was obtained by publication, and on May 16, 1918, the property was by the sheriff sold under execution to Uhlein. At the time of the commencement of the action, August 19, 1916, a writ of attachment was levied upon the property, of which Sheehan was concededly the owner. While it appears that the writ of attachment was duly levied upon the property, the court found that on September 16, 1916, the sheriff withdrew the keeper placed in charge of the property, which was located in a building owned by D. E. Myers and of which Sheehan was lessee, and surrendered possession of the building, together with custody of the property, and thereafter exercised no control over the same until May, 1918, when, after the lapse of nearly two years, he as sheriff again took possession of the property under the writ of execution so issued upon the judgment in said action. About March 1, 1917, plaintiff leased the building from Myers, and, through a purported agent of Sheehan, rented the property involved, paying $25 per month for the use thereof, up to February 28, 1918, when he purchased the same from D. E. Myers, whose title to the property was based upon its purchase at a sale thereof under an execution issued upon a judgment obtained by Myers against Sheehan. It is conceded by both parties that this judgment was void on its face, and hence Myers acquired no title to the property which he purported to transfer to plaintiff.

[1] Nevertheless, plaintiff was in possession of the property, not only under claim of ownership by purchase, but also by virtue of renting the same from its owner, Sheehan, and however weak his claim might be, he was entitled to the same, unless the sheriff showed a better right thereto. Since Sheehan was a nonresident, no enforceable personal judgment could be rendered against him; hence, if by reason of an abandonment of the attachment, the property was not subject to the lien thereof, the act of the sheriff in seizing the property was wrongful.

[2] In support of plaintiff's contention that the lien was lost by abandonment and surrender of possession of the property by the sheriff, his affidavit to that effect was received in evidence over defendant's objection. This ruling undoubtedly was error. Nevertheless, it cannot be deemed to have prejudiced defendant's case because facts are established by uncontradicted evidence which conclusively show that defendant had, at the request of Uhlein, surrendered custody of the property to another representing the attaching creditor, and that defendant had had no control thereof for a period of some two years before the levy of the execution issued upon the personal judgment so rendered against Sheehan in favor of Uhlein, during which period, extending from about March 1, 1917, to May 6, 1918, plaintiff had been in the absolute possession and control of the property, claiming the right thereto both as lessee of Sheehan and as purchaser from Myers. Whether or not the sheriff was justified in thus surrendering possession of the property so attached, because plaintiff refused to pay the compensation of a keeper, is immaterial. The important fact is that he voluntarily relinquished possession and control of the property, by reason of which the lien due to the levy of the writ was lost and possession of the property restored to Sheehan as completely as though the writ had been discharged by an order of court.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

51 Cal. App. 429

HARRISON et al. v. ZIEGLER. (Civ. 3682.)

(District Court of Appeal, First District, Division 1, California. Feb. 17, 1921.)

1. Landlord and tenant ⟹124(1)—Implication passing easements to lessees arises from necessity or intention.

Rights and easements may and do pass to lessees by implication; but, where the express words of the grant are insufficient, implication which supplies such words flows either from reasonable necessity, or, considering all the circumstances, from the manifest intention of the parties.

2. Landlord and tenant ⟹124(1)—Door, passageway, and toilet facilities held not appurtenant to restaurant premises.

Door, passageway, and toilet facilities in a hotel building *held* not appurtenant, on any score of necessity, to the adjoining restaurant premises leased by defendant, the owner of both the hotel and such premises, to plaintiffs, so that there was no implied easement preventing defendant from closing them to plaintiffs.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Trefon Harrison and another against Mary Ziegler. From a judgment refusing injunction, plaintiffs appeal. Affirmed.

E. B. Coil, of Los Angeles, for appellants.
H. V. Weisel, of Anaheim, for respondent.

WASTE, P. J. Plaintiffs, as lessees of a certain building used as a restaurant and café, seek to enjoin the defendant, the surviving lessor, from interfering with the beneficial use of the leased premises. A temporary restraining order issued against the defendant was dissolved upon the trial of the cause. Judgment was entered for the defendant, and the plaintiffs appeal, contending that the evidence amply supports the allegations of their complaint and entitles them to the relief sought.

The defendant, Mary Ziegler, is the surviving wife of John Ziegler, deceased, and is the owner of the Valencia Hotel in the city of Anaheim. This building has its main entrance on Center street, in that city, and the easterly portion of the ground floor of the hotel was formerly equipped for the purpose of and was used as a saloon until January 1, 1919. On or about February 1, 1917, defendant and her husband leased to plaintiffs for a term of five years, under a written lease, a building adjoining the hotel on the east side and next door to the saloon, which structure also has its main entrance on Center street, and in which premises the plaintiffs are conducting a restaurant known as the Valencia Café. The leased premises are described in the lease as "the room known as the 'Valencia Café,'" and the lease further provides that the lessees are to have and enjoy uninterrupted occupancy of said room known as the Valencia Café during the term of the lease.

The barroom in the hotel building extends back to a hallway, which also connects with the rear part of the lobby of the hotel, and from which access is had to a toilet and lavatory located in the rear of the building. At the time the lease was entered into there was and is now a doorway opening from the easterly end of this hallway into the restaurant premises of the plaintiffs. Upon the advent of national prohibition the defendant, in remodeling the premises formerly used as a saloon, planned to remove the toilet and lavatory, and sought to close, and had actually begun the work of closing, the hallway and door leading to the restaurant. Thereupon plaintiffs brought this action, seeking to enjoin the defendant from proceeding with the work.

No mention is made in the lease between the parties of the doorway opening from the hallway into the restaurant, or of the use of the doorway; neither is the use of the toilet and the lavatory room in the rear of the hotel premises by plaintiffs, or by their patrons, provided for in the lease. Appellants contend, however, that the hallway and the door leading therefrom into the café are appurtenant to the restaurant premises and were intended to be covered by the lease. They also claim that the washroom and toilet were reasonably necessary and essential to the enjoyment of the leased premises. In support of their position evidence was introduced, the effect of which was that during the negotiations leading up to the signing of the lease, John Ziegler, who appears to have been acting in the premises for himself and his wife, showed the plaintiffs the door leading from the restaurant premises, the passageway and the adjacent toilet facilities, and assured plaintiffs that they would have access to and use of the same and have the "same privilege as other people." Other testimony would indicate that there was no such express promise, but merely an "understanding" that certain "privileges" enjoyed by former lessees were to be "transferred." Some other features were discussed, including the use by plaintiffs of a sample room in the hotel for serving special parties. Ziegler also said that plaintiffs could use a part of the garage on the premises for a storeroom, when he did not want to put his car in there.

It is in evidence that at one time Mrs. Ziegler said to Gathas, one of the appellants, that if the plaintiffs desired to use the lavatory and toilet room, they should keep it clean, or it would be locked. Gathas replied that he did not care, and Mrs. Ziegler might lock the place, if she so desired. Harrison, the other appellant, testified that the passageway was more used by the hotel guests in patronizing the saloon than in using the restaurant. On behalf of the respondent it was further shown that practically all of the patrons of plaintiffs' café used the Center street door of the building, and a very few used the door opening from the restaurant into the rear passageway. Very few of the restaurant customers used the lavatory and toilet facilities in the rear of the former saloon. At the time of the trial ample toilet facilities had been constructed in the rear of the restaurant, and were easily accessible through the kitchen of the leased premises.

On this and other evidence the trial court found that only a small number of the guests of the hotel, who patronized the restaurant of plaintiffs, used the passageway and door in the rear of the lobby as an entrance into the café. It further found that the doorway entering into the hall from the restaurant was used by plaintiffs, their employees, and to some extent by their customers, in going to and from the toilet room and lavatory in the rear of the saloon, but that the use of these facilities by plaintiffs was unnecessary, for the reason that the restaurant is equipped with separate and adequate toilet and lavatory facilities. It also found that the use of the door between plaintiff's restaurant and the hallway of defendant's hotel is not appurtenant to the room leased to the appellants, and that the closing of the door and hallway will not cause plaintiffs or their restaurant business to suffer any damages. The application for an injunction was, therefore, denied.

[1] The use of the door, passageway, and toilet facilities was not expressly included,

nor even alluded to, in the lease. Nothing whatever is mentioned but "the room known as the 'Valencia Café.'" Did the right to use the door, passageway and toilet facilities pass to the appellants with the room known as the Valencia Café by necessary implication? Rights and easements may and do pass to lessees by implication; "but, where the express words of the grant are not sufficient, the implication which supplies those words flows either from a reasonable necessity, or, considering all the circumstances, from the manifest intention of the parties." Hill v. Shultz, 40 N. J. Eq. 164, 166. In this case, as in that, the question is:

> "Since the parties did not adjudge it important enough to contract respecting the use" of the doorway, passage. and toilet facilities "in plain terms, is the necessity so strong as to make the demands of the appellants appear reasonable"?

[2] It is very clear from the findings of the trial court, which we think are amply supported by the evidence, that the use of the door, passageway, and toilet facilities in connection with appellants' business was merely a convenience, but is not necessary to the beneficial use of the property. The door, passageway, and toilet facilities are therefore not appurtenant to the restaurant premises, and there is no implied reason which will prevent the respondent from closing the same. Jemo v. Tourist Hotel Co., 55 Wash. 595, 104 Pac. 820, 30 L. R. A. (N. S.) 926, 19 Ann. Cas. 1199; Walker v. Clifford, 128 Ala. 67, 29 South. 588, 86 Am. St. Rep. 74.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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51 Cal. App. 406

FLOURNOY v. EVERETT et ux. (Civ. 3415.)

(District Court of Appeal, Second District, California, Division 1. Feb. 15, 1921.)

1. Landlord and tenant ⚷115(1)—Lease not fixing definite term created tenancy from month to month.

Written lease, evidenced by writing which was a mere memorandum, containing no statement of a definite term, but merely fixing the amount of rental to be paid, created a tenancy from month to month.

2. Landlord and tenant ⚷291(14)—Allowance of attorney's fees to landlord, where charge not asserted in complaint, erroneous.

In an action of unlawful detainer, wherein the complaint asserted no charge for attorney's fees incurred by plaintiff against defendant tenants, allowance of $50 on such account to plaintiff was erroneous.

3. Landlord and tenant ⚷291(14)—In unlawful detainer, court could include in damages rental value for period after suit brought.

In an action of unlawful detainer, though the complaint only assigned default by defendant tenants in the payment of two installments of rent of $35 each, it was proper for the court, as damages, to include the rental value of the premises for the period after suit was brought up to the time of judgment.

4. Appeal and error ⚷907(3)—Evidence must be held to have sustained the finding upon appeal on judgment roll.

Where the appeal is on the judgment roll, and no evidence is exhibited to the appellate court for examination, it must be decided that the evidence sustained the findings.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Jeanette W. Flournoy against E. E. Everett and wife. From judgment for plaintiff, defendants appeal. Reversed.

M. O. Graves, of Los Angeles, for appellants.

Geo. E. Cryer, of Los Angeles, for respondent.

JAMES, J. Appeal taken by the defendants from a judgment entered in favor of the plaintiff. Judgment was for the possession of certain described premises and for the sum of $268.50 damages, together with costs.

Plaintiff alleged in her complaint that defendants were tenants occupying a certain apartment in a building controlled by the plaintiff, and that the rental required to be paid was the sum of $35 per month, payable on the 13th day of each month in advance. She alleged the nonpayment of the rental accruing on the 13th day of December, 1919, and the 13th day of January, 1920. She alleged that on the 20th of December, 1919, she had served written notice on defendants, requiring them to pay the rent then due or deliver up possession of the apartment. Prayer was for restitution of the premises, for damages in the sum of $70, and that such damages be trebled in amount. Defendants answered, claiming that they had tendered the amount of rent due, and that the plaintiff, in violation of a written lease agreement, had attempted to increase the amount of rent. The cause came on for trial, and was determined by findings of fact filed April 28, 1920. Judgment was entered on the same day.

[1] It is the contention of appellants that certain writing introduced in evidence was in effect a written lease for a term from September 13, 1919, to September 13, 1920; that writing was a memorandum which contained no statement of a definite term, but merely fixed the amount of rental to be paid,

If in fact it was the intention of the parties to make the writing express a lease agreement for a definite term, the language is not certain enough to import such an agreement. We think that the trial judge properly held that the tenancy was one from month to month.

It is the further contention of appellants that certain findings are not within the issues made by the complaint, and that the findings do not support the judgment as entered. We confess that we are utterly at a loss to understand how a part of the items included within the court's findings were arrived at. In that portion of the findings wherein the amount of rental which had accrued is determined, the court's language is as follows:

> "Installments due December 13, 1919, $36; January 13, 1920, $36; February 13, 1920, $75; March 13, $75; April 13 to April 26, 1920, $32.50; 1920, $75; April 13 to April 26, 1920, $32.50."

The court further determined that the plaintiff had suffered damages on account of attorney's fees incurred, amounting to $50, and that defendants were entitled to a credit in the amount of $36 as having been paid by the defendants on February 24, 1920. The total amount calculated by the court as being included within its findings, except costs, was the sum of $268.50. Particular items found by the court to be due, which seem to be duplicates, or erroneously inserted, are the last two, to wit, the one reading "1920, $75," and the one reading "April 13 to April 26, 1920, $32.50." Taking the sum of the remaining items and deducting the $36 credit allowed from the amount leaves exactly the sum for which judgment was entered.

[2] The appellants properly complain of the allowance of $50 as for attorney's fees incurred by the plaintiff, this if for no other reason than that the complaint asserted no such charge against the appellants. If we concede, which we do not, that attorney's fees are recoverable in an action of unlawful detainer, it is plainly essential that the complaint should show that the plaintiff had incurred a liability on that account. Respondent insists that, as the court in its conclusion of law stated that the amount of the judgment "should be trebled," and as the judgment itself included only the amount of $268.50, appellants are not in a position to complain. We must assume, notwithstanding that the court determined first that the amount should be trebled, that a determination was later made not to treble such amount, and that the judgment as entered was entered advisedly. It has already appeared that the sum as totaled by the court in favor of plaintiff improperly included at least the item of $50 for attorney's fees. It is fairly inferable also from an inspection of the findings that the other two items to which we have referred could not properly find place in the computation as made by the trial judge.

[3] While the complaint only assigned default in the payment of two installments of $35 each, it was proper for the court, as damages, to include the rental value of the premises for the period after suit brought and up to the time of the making of judgment. Keyes v. Moy Jin Mun, 136 Cal. 129, 68 Pac. 476.

[4] As to whether the evidence sustained the findings, of course, must be decided in the affirmative, because the appeal is on the judgment roll, and no evidence was exhibited to us for examination.

For the reasons given, judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

(51 Cal. App. 427)

PRELUZSKY v. RITTIGSTEIN. (Civ. 3061.)

(District Court of Appeal, Second District, Division 1. California. Feb. 16, 1921.)

1. New trial 🔑8—May be granted as to one of several defendants.

Where judgment was obtained in a malicious prosecution action against two defendants, and only one defendant moved for a new trial, there was authority in law for an order granting a separate new trial as to such defendant.

2. Appeal and error 🔑977(3)—Order granting not set aside, where justification is debatable.

Where the trial court in the exercise of its authority has granted a new trial, and the case-made shows a reasonable or even fairly debatable justification under the law for the action taken, such action will not be set aside.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Abe Preluzsky against Joseph Rittigstein and another for malicious prosecution. Judgment for plaintiff. From an order granting the named defendant's motion for a new trial, plaintiff appeals. Affirmed.

Isaac Pacht and John S. Cooper, both of Los Angeles, for appellant.

Michael F. Shannon and Ernest L. Kolb, both of Los Angeles, for respondent.

CONREY, P. J. The plaintiff brought this action against Joseph Rittigstein and C. H. Phillips to recover damages for the malicious prosecution of a criminal action against this plaintiff. The action was tried before a jury, which rendered a verdict in favor of the plaintiff and against both defendants. Judgment was entered in accordance with the verdict. Thereafter defendant Rittigstein alone moved for a new trial. An order having been entered granting that motion, plaintiff has appealed therefrom.

[1] Counsel for appellant first suggest that since the defendant Phillips did not move for a new trial, and the judgment against him had become final, there is no authority of law for an order granting a separate new trial of the action as against the other defendant. There is no merit in this contention. Fowden v. Pac. Coast Steamship Co., 149 Cal. 151, 86 Pac. 178.

[2] Next it is contended that the uncontradicted facts so completely established plaintiff's cause of action against Rittigstein that the court has abused its discretion in granting to him a new trial. But in fact the evidence is not thus clear and uncontradicted. There is in the record evidence tending to show that both Rittigstein and Phillips were instrumental in causing the criminal prosecution to be instituted, and likewise some evidence tending to prove that Rittigstein did not have probable cause to believe that Preluzsky was guilty as charged. On the other hand, it was Phillips alone who filed the criminal complaint. There is evidence which might well have warranted a jury in refusing to believe that Rittigstein caused that prosecution to be commenced, and likewise in not believing that the commencement of such prosecution was without probable cause. On that state of the record it was within the scope of the duties of the trial court to consider and determine whether the evidence was sufficient to justify the verdict. Where the court, in the exercise of its authority therein, has granted a new trial, and the case-made shows a reasonable or even fairly debatable justification under the law for the action taken, such action will not be set aside. Harrison v. Sutter Street Ry. Co., 116 Cal. 156, 47 Pac. 1019. The rule just now stated is plainly applicable to the case at bar.

The order is affirmed.

We concur: SHAW, J.; JAMES, J.

51 Cal. App. 440

W. J. BUSH & CO. v. VAN CAMP SEA FOOD CO. (Civ. 3495.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1921.)

Corporations ⚷503(3)—Motion of defendant corporation to change venue properly denied.

Where a New York corporation having an office and branch factory in National City, San Diego county, sued defendant, a California corporation having a legal residence and principal place of business in Los Angeles county, to recover damages for breach of contract by defendant's refusal to accept and pay for merchandise made for it by plaintiff at its branch factory, the suit being brought in San Diego county, defendant's motion for change of venue was properly denied under Const. art. 12, § 16, permitting suit against a corporation where contract is made, or where the obligation arises or breach occurs, or in the county of the corporation's principal place of business.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by W. J. Bush & Co., a corporation, against the Van Camp Sea Food Company. From an order denying motion for change of venue, defendant appeals. Affirmed.

Patterson Sprigg, of San Diego, and Kemp & Clewett, of Los Angeles, for appellant.

Wright & McKee, of San Diego, for respondent.

JAMES, J. Plaintiff brought this action in the superior court of the county of San Diego against the defendant corporation to recover damages for breach of contract alleged to have been suffered by reason of the refusal of the defendant to accept and pay for certain merchandise. It was alleged that defendant was a corporation organized under the laws of California; that in August, 1918, it entered into a written contract to purchase the merchandise in question from the plaintiff; that it had refused to accept and pay for the merchandise, except a small portion thereof; and that the merchandise had not been resold. The difference between the value thereof to the plaintiff and the price agreed to be paid was stated to be the sum of $2,856. The written contract referred to was attached to the complaint as an exhibit and made a part thereof. The contract was dated at New York and provided that delivery of the merchandise should be f. o. b. National City. Defendant filed a demurrer, together with a demand for change of place of trial to Los Angeles county; it being asserted that that county was the legal residence and principal place of business of the defendant. An affidavit accompanying the demand was made by the president of the defendant corporation, in which affidavit it was reasserted that the principal place of business of defendant corporation was in the county of Los Angeles, and that it had no other or different place of business, nor any place of business in the county of San Diego. In opposition to the demand for a change of place of trial, an affidavit was submitted on behalf of the plaintiff wherein it was set forth that plaintiff was a corporation organized under the laws of the state of New York;

that it had and maintained an office and branch factory in the city of National City, county of San Diego, state of California, and that the factory at the latter place manufactured the merchandise contracted for by the defendant, and that the merchandise was actually manufactured at National City by the plaintiff; that the contract alleged was to be performed at National City according to its terms. The motion was presented to the court and denied, and the defendant has appealed from the order.

The order made by the trial judge is fully sustained by the decisions of this state, wherein the provisions of the state Constitution relating to the place of trial of actions where corporations are involved are construed. Section 16 of article 12 of the Constitution provides as follows:

> "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

In the case of Trezevant v. Strong Co., 102 Cal. 47, 36 Pac. 395, where the contention was made that the corporation had the right to insist upon trial of an action against it in the county of its residence, the court said:

> "The Constitution, however, can receive no such construction. That instrument * * * gives to a plaintiff the right to sue a corporation in either of the counties therein referred to, and the option thus given includes something more than simply the bare right to choose the county where the complaint shall be filed in the first instance, and confers upon a plaintiff the right also to prosecute such action in the county where it is commenced, unless the place of trial is changed for some other reason than that of the residence of defendant."

And, quoting from National Bank v. Superior Court, 83 Cal. 498, 24 Pac. 159 the court further says:

> "By this decision it is settled that, where a corporation is sued in any one of the counties mentioned in this section, it cannot demand a change of venue, as matter of absolute right, but only as in other cases and for other reasons than that the county in which the action is commenced is not the proper county."

Pertinent to the conclusion just announced are the cases also of Tingley v. Times-Mirror Co., 144 Cal. 205, 77 Pac. 918, and Hammond v. Ocean Shore Development Co., 22 Cal. App. 167, 133 Pac. 978.

The order appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

51 Cal. App. 447

LOPEZ v. PAYNE, County Auditor, et al. (Civ. 3451.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1921. Hearing Denied by Supreme Court April 18, 1921.)

1. Officers ⚷95—Only de jure officers entitled to compensation.

The right of a person in an office to collect compensation for his services depends altogether on his de jure character, for the right to compensation is attached to the title of the office and not to the mere exercise of the functions thereof.

2. Sheriffs and constables ⚷28—Constable holding over held not de jure officer under rule of necessity.

One appointed temporary constable by the sheriff in a township in Los Angeles county, there being no established eligible list of civil service candidates, was not entitled to receive compensation by holding over after the expiration of 60 days and 20 days after an eligible list was created by the civil service commission; such appointee not being a de jure officer under the rule of necessity by reason of the demands of the community in the direction of having peace preserved on failure of sheriff to appoint a successor.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Application for writ of mandate by P. L. Lopez against H. A. Payne, as County Auditor of the County of Los Angeles, and others. From a judgment granting the writ, defendants appeal. Reversed.

A. J. Hill and Edward T. Bishop, both of Los Angeles, for appellants.

J. J. Wilson, of Los Angeles, for respondent.

JAMES, J. Plaintiff prosecuted this proceeding to obtain a writ of mandate to compel defendant county auditor to issue to him a warrant upon the treasury of the county of Los Angeles for the sum of $274.84, alleged to be due and owing to plaintiff for services rendered in his official capacity as constable of the township of San Fernando. Three members of the county civil service commission were made parties defendant for the purpose of requiring them to make the necessary certificate of the fact alleged that plaintiff was entitled to the compensation demanded. There was a demurrer and answer, and, after hearing had, peremptory writ was issued in accordance with prayer of the petition. Defendants have appealed from the judgment.

It was admitted by the parties and found by the court that the office of constable of the township in question was one which was subject to the regulations of the civil service department of Los Angeles county, under the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

provisions of the freeholders' charter and rules of the commission made pursuant thereto. The county charter makes the sheriff of the county the head of the constabulary and gives that official power to appoint the constables. In the county charter and in those provisions establishing the civil service (article 9, § 34), authority is given to the civil service commission to make rules and to provide, among other things, for temporary appointments where no eligible list has been established by examination, and in that connection this provision occurs:

> "But no such temporary employment shall continue longer than sixty days, nor shall successive temporary appointments be allowed."

The civil service commission in making its rules adopted the following:

> "Whenever there are urgent reasons for filling a vacancy in any position for which no examination has ever been held, the head of the department may appoint some person to fill the vacancy to serve until an eligible list for such position is created and an appointment made therefrom, or until twenty days after such eligible list is created, if no appointment is made during the twenty-day period."

[1] Further facts important to the determination of the controversy are: On the 4th of January, 1918, there was a vacancy in the office of constable of San Fernando township, and, there being no established eligible list of civil service candidates, the sheriff appointed the petitioner to fill the place. Petitioner accepted the appointment and performed the duties of the office continuously until the 18th of August, 1918. After said appointment the civil service commission, in order to establish an eligible list from which an appointment to the office might be made, caused a competitive examination to be held (in which examination petitioner did not participate, although it is admitted that he had notice of the holding thereof), and on the 20th day of March, 1918, regularly certified such eligible list as being in effect, which list contained the names of three persons who were eligible for and willing to accept appointment to the office. The sheriff failed to make appointment from such eligible list, and the petitioner was allowed to and did continue to hold office up to the time before stated. Under the terms of the county charter the temporary appointment could be legally made only for a period of sixty days. Under the rule of the civil service commission the temporary appointment would expire by limitation 20 days after the creation of a list of persons eligible to be appointed to the office. It is for the services rendered subsequent to the expiration of the 20 days referred to that compensation was sought to be secured by this proceeding. There seems to be no dispute between the parties but that the holding over of the petitioner in office after the creation of the eligible list was a de facto officer merely, unless by reason of some rule of necessity a different conclusion should be enforced. Such a conclusion, if valid, must find its support in the argument that the demands of the community in the direction of having peace preserved in the township were of such paramount importance as to override the ordinary rule of law applicable to the condition. For it is settled beyond the possibility of debate by the decisions that the right of a person in an office to collect compensation for his services depends altogether upon his de jure character, for the right to compensation is attached to the title to the office and not to the mere exercise of the functions thereof. Bannerman v. Boyle, 160 Cal. 197, 116 Pac. 732; Anderson v. Lewis, 29 Cal. App. 24, 154 Pac. 287; Legerton v. Chambers, 32 Cal. App. 602–605, 163 Pac. 678; Norton v. Lewis, 34 Cal. App. 621, 168 Pac. 388.

[2] Respondent in support of his argument that the rule of necessity demands that petitioner be held to have been a de jure officer and entitled to compensation during the holdover period, cites the case of People ex rel. Stratton v. Oulton, 28 Cal. 44. We have carefully examined the facts and reasoning of that decision. Its chief claim to respect would seem to be the fact of its considerable age, its having been decided in 1865. In that case the court actually held that a state librarian who continued in office after the term legally fixed by his appointment (there being no law expressly providing that the incumbent should hold until the appointment of his successor) was entitled to collect the compensation, for the reason that the state library was required to be kept open during certain hours and, if the plaintiff there did not see that it was open during the appointed time, it perchance might not be opened at all. Why the court should there have assumed that, upon the retirement of the incumbent and incumbering official, an appointment would not have been made to fill the place, we cannot understand. A board authorized to make such appointment existed and was possessed of the right to fill the vacancy. And what would be the result here if the trial judge can be said to have been correct in his conclusions? The result would be that any official affected by the county civil service regulations and having the power to appoint subordinate officers could, whenever the opportunity came to make a temporary appointment, continue his appointee in office until compelled by legal proceeding to act and perform the function with which the law invested him. We are not ready to conclude that this may be done, nor are we willing to assume that, had the petitioner here ceased to exercise the duties of constable of the township after the term of his appointment had ended, the sheriff would have been guilty of so grave a dereliction of duty as to leave the office unfilled. In addition to

the fact that the sheriff was invested with the power to appoint the constables, there was imposed upon him by the charter the larger and more important duty as the head of the constabulary department of the county to see that the county was efficiently policed. The petitioner here was put upon notice of the limitation as to his appointive term. He declined to participate in the competitive examination, which might have resulted in establishing his eligibility to the office. His continuing in the service would seem to have been a mere act of speculation; a speculation upon the chance of a court lending its aid in nullifying both the charter and rules of the commission made to further the reasonable operation of the civil service system. In the case of the very plain provisions of the law we have no difficulty in concluding that the writ should not have been granted. While the point is not here involved, it should be understood that we do not intend to declare that the rule of the civil service commission can in any event have the effect to continue the term attached to a temporary appointment beyond the 60-day period fixed as a maximum limit by the charter.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

51 Cal. App. 401

PRIMMER v. C. C. HARRIS OIL CO.
(Civ. 3473.)

(District Court of Appeal, Second District, Division 1, California. Feb. 15, 1921.)

1. Mines and minerals ⚷118—Right of lessor of oil lands to use property without interfering with wells not taken away.

Under the lease whereby defendant oil company, sued for injuries when a storage tank collapsed, held the property from the lessor, *held* that the right of the lessor owner to make such use of the premises as would not interfere with the operation of two oil wells by defendant company was not taken away.

2. Evidence ⚷471(17)—Question properly excluded as calling for conclusion of witness.

In an action against an oil company for injuries when its storage tank collapsed, demolishing a building in which plaintiff child was sleeping, objection to question as to whether in making inspection of an oil tank it was necessary to dig under the earth to ascertain whether water has percolated through the oil and dirt was properly sustained, as the question called for the conclusion of the witness.

Appeal from Superior Court, Los Angeles County, Charles Monroe, Judge.

Action by Una Primmer, a minor, suing by her guardian ad litem, Georgie Primmer, against the C. C. Harris Oil Company, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Cates & Robinson, of Los Angeles, for appellant.

Peyton H. Moore and H. A. Massey, both of Los Angeles, for respondent.

JAMES, J. Plaintiff, a minor, by her guardian, prosecuted this action against defendant corporation, claiming damages for personal injuries alleged to have been suffered by reason of negligent act of the defendant. Verdict in her favor was returned by the jury, and judgment thereafter entered accordingly. This appeal, taken from the judgment so entered, followed.

At the time of the accident which resulted in the injuries complained of, plaintiff was sleeping in a small house located at the rear of a main dwelling on a lot in the city of Los Angeles. The whole of the ground was not of great extent, being of average city lot dimensions. Upon a portion of the lot were located two oil wells, which were operated by the defendant corporation under a lease from the owner of the lot, Mrs. Cummins, who was the grandmother of the plaintiff. A few feet distant from the small dwelling in which the child was sleeping was an oil storage tank belonging to appellant. This tank was elevated above the surface of the ground about 18 feet, and stood upon timbers which were imbedded in the earth. On the night in question it was discovered that the tank was overflowing, and members of the plaintiff's family were awakened. In a very short while, however, the tank collapsed upon its foundations, and demolished, in part at least, the building, in which the child was sleeping, burying the child under the débris, from which she was extracted with difficulty in a seriously injured condition. There was ample evidence to show that the supporting foundation timbers, under the stilts upon which the tank was standing, were decayed and in an unstable condition. There seems to be no real dispute as to the jury having had ample evidence of a competent kind to warrant the conclusion that defendant had not exercised ordinary care in protecting persons to whom it owed that duty from the possibility of injury from the collapsing of the tank. We will therefore give no further attention to that feature of the case.

[1] It may be further stated that it appeared in evidence that the plaintiff was occupying the house with her mother and as a part of the family of the owner of the lot. The question arises in the case as to what the character of the occupancy was, that is, whether plaintiff and her mother were on the property as of their own right or as mere licensees of defendant corporation.

In the latter case it is argued, and we think properly, that the rule of ordinary care which the trial judge imposed upon the defendant by his instructions to the jury would not apply. On the other hand, if it was sufficiently shown that the owner had not, by the leasing of the premises, deprived herself of the right to occupy for dwelling purposes that portion where the rear house was situated, then the instructions of the court were correct and the judgment right, unless there is merit in other questions suggested in the brief of appellant. We think that the trial judge correctly concluded as a matter of law that, under the terms of the lease by which the defendant corporation held the property from Mrs. Cummins, the right of the owner to make such use of the same as would not interfere with the operation of the two oil wells by appellant was not taken away. The lease itself, which was introduced in evidence, after describing the portion of the premises let, proceeded with this language.

> "And so much of that part of said lot lying south thereof as shall be necessary for the purpose of operating the two oil wells situated on said lot ninety-six. * * * And it is further understood and agreed that the second party's rights apply only to the operating of the two wells as hereinbefore mentioned (no other well being permitted on said lot No. 96)."

The main dwelling house to which we have referred was mentioned in the lease, but it seems to be conceded that that house was not upon the portion of the lot described in the lease. However, in corroboration of the idea that there was reserved to the owner of the lot all rights of use, except such as might interfere with the practicable operation of the two wells, C. C. Harris, who had been connected with the defendant corporation for about 11 years and up to March of 1914, testified as follows:

> "All the use we had of it, any use of the property, was just where the derricks stood. That was the only use we had for it. We had a cable crossing from the front of the lot to the rear of the lot, which was the only obstruction that we placed on their lot at all outside of the two derricks. With regard to her use of the remainder, I can't tell you how much of the lot she used. She had access to use any part of it that she cared to. She did use any part she wanted. They had shrubbery there, and I think they used any part of the lot they saw fit. * * * Whether the back portion of this lot was used by Mrs. Cummins, and for a chicken yard, and for the children to play in, I do not know that positive. I think it was. I think it was fenced in. * * * We did not go in on the lot at all. We had a tank there, and there is an alley behind. We pulled the rods from that alley, and pulled the other rods from the street. That is the way we operated the property. There was no occasion to go in except to repair this cable when it was broken. That rear fence was hers."

Not only would it appear by fair inference from the terms of the lease that Mrs. Cummins had the right to have and use the dwelling house at the rear of the lot, but from Mr. Harris' testimony, it would seem that that construction had been given to the lease by the parties themselves. The lease term commenced September, 1903, and continued for 5 years. After the expiration date in 1908, the lessees and their assigns continued to use the premises for the same purposes and under the same conditions as to rental, etc., and this condition obtained up to and at the time of the accident referred to.

One of the points made by appellant is that the court erred in not allowing a witness, Snyder, who was an employee of the defendant, to testify as to whether the company had given permission to Mrs. Cummins to construct the small house in which the child was sleeping at the time she suffered injury. The plaintiff's mother had testified that she had occupied the rear house for about 5 years previous to the accident; hence the house had been there for that period of time at least. The witness Snyder, to whom reference has just been made, testified that at the time of the trial he had been manager of the company for about 3½ years, but did not testify that he had had any connection with the company prior to that time, or any knowledge of conditions as to the construction of the dwelling house. However, the point of the alleged error is lost as to the ruling first complained of when it is observed from the record that the witness answered fully the first question asked of him before objection was made, and the answer was not stricken out. The second question was as to whether during the preceding 3 years, which was subsequent to the time that the small house was built, the defendant corporation had rented to plaintiff's parents any portion of the lot. The court's ruling in sustaining an objection to this question coincided with his theory of the case that plaintiff had the right to be in the dwelling house, which right was derived from the lease conditions themselves. We have already expressed the view that this position of the trial judge was correctly taken.

[2] Error is also assigned because of the ruling of the trial court sustaining an objection to a question which had to do with the matter of care exercised by the defendant in the management of the oil tank. The question was as follows:

> "And in making inspections of oil tanks where the earth is mixed with oil around the foundations, is it necessary to dig under the earth to ascertain—is it considered necessary to dig under there to ascertain whether water has percolated through the oil and dirt?"

The objection was that the testimony called for would be incompetent, and that it would constitute the conclusion of the witness. We think that the objection was rightly sustained. The witness might properly have been asked as to what could be observed upon the surface of the ground, and what could be observed by digging beneath the surface, but whether, as the question required him to say, he considered it necessary to act in a particular way, certainly was open to the objection made, for the answer would be expressive only of the witness's opinion or conclusion.

The complaint of the plaintiff was answered without demurrer, and it states the facts both as to the occupancy of the dwelling and the occurrence of the accident in concise and sufficient language.

We have carefully examined the record presented in connection with the points made and the argument of counsel, and no substantial error appears to support the claim for a reversal of the judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(51 Cal. App. 417)

FULMELE v. LOS ANGELES INV. CO.

(Civ. 3428.)

(District Court of Appeal, Second District, Division 1, California. Feb. 16, 1921.)

1. Election of remedies 🔑14—One defrauded has election to rescind, or to affirm contract and sue on it.

A party who by fraudulent means has been induced to enter into a contract, as for the purchase of its capital stock from a corporation, may, on discovering the facts constituting the fraud, and by prompt action to such end, rescind the contract; on the other hand, he may affirm the contract, and recover according to its terms, but having brought action for rescission he has waived his right to recover on the contract itself, and cannot in such action enforce any of its terms.

2. Corporations 🔑82—Contract to repurchase property at any time may be enforced within reasonable time.

A contract of resale may be made in connection with a contract of sale of shares of stock, and a contract to redeem and repurchase such property "at any time" may be enforced if the purchaser elects to take advantage of the option within a reasonable time.

3. Corporations 🔑80(10)—Buyer of stock held guilty of laches in failing to rescind for fraud.

Under Civ. Code, § 1691, in view of the facts, purchaser of investment company's stock from the company *held* guilty of laches in failing to rescind promptly on discovery of the fraud.

4. Corporations 🔑80(10)—One in exercise of voting rights as stockholder not permitted to enforce right to rescind for fraud purchase of stock.

One who seeks to withdraw from a corporation under claim of right to rescind for fraud his purchase of stock from the corporation should not be permitted to enforce such right to rescind while at the same time exercising his voting rights as a stockholder, such action on his part constituting a ratification of the contract.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by John T. Fulmele against the Los Angeles Investment Company, a corporation. From judgment for defendant, plaintiff appeals. Affirmed.

Warran D. Isenberg, of Los Angeles, W. A. Marin, and D. E. Keefe, of East St. Louis, Ill., for appellant.

O'Melveny, Millikin & Tuller, James Westervelt, Warren B. Pinney, Flint & Jutten, and Henry S. Mackay, all of Los Angeles, for respondent.

CONREY, P. J. On the 19th day of December, 1912, respondent sold to appellant 361 shares of its capital stock and received a certificate therefor in consideration of the sum of $1,498.15 then and there paid. The complaint alleged two classes of facts which induced him to enter into this transaction: First, that respondent represented and stated that appellant could at any time demand and respondent would upon such demand being made, redeem and repurchase from plaintiff said shares of stock and return and repay to plaintiff the consideration paid therefor; also that respondent made sundry representations of fact which are set out in the complaint, each and all of which were false, and by respondent known to be false, but which were believed and relied upon by appellant. The complaint further alleged that upon about the 1st day of May, 1913, and on divers dates thereafter, the plaintiff in person demanded of the defendant the return of his money from the defendant, and tendered and offered to defendant said certificate of stock and everything of value received from the defendant; that the defendant refused to accept said shares and certificate of stock and refused to pay, etc. It was further alleged that on or about the 21st day of October, 1914, the plaintiff first learned that said representations so made by defendant and relied upon by plaintiff were false and untrue, and that immediately thereafter plaintiff gave notice in writing of rescission of said agreement for the purchase of said shares of stock. Upon the facts stated in the complaint, appellant prayed for judgment against respondent for the rescission of said contract; for judgment in the sum of $1,498.15 with interest, and generally for equitable relief.

By its answer, respondent denied the making of the promise and representations set out in the complaint, and further pleaded that plaintiff had notice and knowledge of the matters on which he bases his right to rescind at least as early as January 1, 1914, and that plaintiff has been guilty of laches and on that ground should not be allowed to recover, and further that by voting the stock at the annual meeting of stockholders of January, 1915, the plaintiff ratified the sale.

The findings of the court recite that at the trial the plaintiff commenced to submit his evidence and in part did submit evidence in support of the allegations contained in the several subdivisions of paragraph V and in paragraph XIV of his amended complaint, which are the allegations referring to said promise and representations and relating to the offers and demands alleged to have been made by the plaintiff as above stated. The findings further state that thereupon the court of its own motion ordered that before proceeding further with plaintiff's case the issue of laches and the issue of ratification be tried; that both parties submitted their evidence on said issues, which, after argument, were submitted to the court for decision. The court thereupon made its decision in the form of findings of fact and conclusions of law, whereby it was determined that the plaintiff take nothing by this action. Judgment was entered accordingly. From this judgment the plaintiff has appealed.

[1] It is evident that in the trial of the case the court regarded the action as one for rescission of the sale upon the ground of fraud, and disregarded those allegations of the complaint under which appellant now claims that by the terms of the contract of sale he had the absolute right to return the stock to the defendant at any time and have returned to him the consideration paid. It does not appear that appellant objected to this construction of the nature of the action, nor could he well do so. The two remedies were inconsistent. A party who by fraudulent means has been induced to enter into a contract may, upon discovering the facts constituting fraud and by prompt action to that end, rescind the contract, or, on the other hand, he may affirm the contract and recover according to its terms. Having brought this action for rescission, as by his complaint, and the relief demanded therein, he distinctly appears to have done, he waived his right to recover upon the contract itself, and cannot in this action enforce any of its terms. If at the trial the plaintiff had insisted that his action was based upon the contract as well as upon his claimed right of rescission, the defendant might well have required that plaintiff elect upon which of these two inconsistent causes of action he would go to trial.

[2] We do not doubt that a contract of resale may be made in connection with a contract of sale of shares of stock, or any other property, and that even a contract to redeem and repurchase such property "at any time," may be enforced if the purchaser elects to take advantage of such option within a reasonable time. Schulte v. Boul. Gardens Land Co., 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013; Brooks v. Trustee Co., 76 Wash. 589, 136 Pac. 1152, 50 L. R. A. (N. S.) 594 et seq. But as we have seen, that was not the remedy demanded by the complaint herein, or by appellant at the trial. Viewing the action, therefore, as one to rescind a contract upon ground of fraud, and assuming that the evidence if fully presented would have established the alleged fraud in the contract and sale, the merits of this appeal rest wholly upon the view which should be taken of appellant's contention that under the evidence introduced he was not guilty of laches nor did he ratify the contract after discovery of the facts constituting the fraud.

Briefly stated, the alleged false representations were that the stock of respondent corporation was worth $10 or $15 a share; that the company had a guaranty fund of about $200,000 deposited in the Globe Savings Bank as a trust fund to be used in buying back the capital stock of the company from purchasers thereof; that said fund was sufficient to protect all purchasers buying said stock from loss; that plaintiff could rely upon the defendant repurchasing the stock at any time plaintiff should desire to resell it; that the corporation was paying certain large annual dividends amounting to 28 per cent. of the par value of its capital stock, which dividends were less than it was able to pay; that a certain published statement of the corporation's assets and liabilities was among the representations shown to and relied upon by appellant in purchasing said stock.

In June, 1913, appellant went to respondent's place of business and without any trouble resold to respondent 121 shares of stock of the corporation which he had purchased at the same time when he purchased the 361 shares. It appears from his testimony that early in the following month, or later in the same month, he requested respondent to accept from him the 361 shares and return his money to him under the contract. Respondent's officers told him that he would have to sign a card and take his turn and that he would be notified when his turn came; that the president of the corporation said to appellant, "If you have got to have money, you can take your stock down to the exchange and get $2.50 for it, but I would not advise you to do that because you paid $4.15, and we will have money for you in a very short time"; that it would not be many weeks or months before appellant could have his money. A day or two after that interview appellant left the state of California and was absent more than a year. In the fall of 1913 there occurred what is commonly known as a "run" on the Globe Savings Bank, and before the end of that year appellant received information not only of the run on the bank, but also of the fact that an association of stockholders of defendant corporation giving itself the significant title of a "protective association" had been organized. Before the end of the year 1913 he had sent to the protective association a proxy to be voted at the annual election of 1914. Having returned to Los Angeles about September, 1914, appellant attended meetings of the protective association at which the troubled affairs of the corporation were discussed. On the 21st day of October, 1914, he served upon respondent a notice of rescission (Exhibit A of complaint), wherein he disclaimed any right, title, or interest in the shares of stock and demanded the return of the money paid by him therefor, all on the ground that the contract was made upon false and fraudulent representations of respondent, made as an inducement to him to enter into the contract of purchase of the stock. Nevertheless, appellant afterwards, on the 12th day of November, 1914, signed and executed a proxy authorizing the persons named therein to represent him and vote his stock at the annual meeting of the stockholders to be held in January, 1915, and under that proxy said shares were voted.

When in June, 1913, appellant was informed by the officers of the corporation that he could not have his stock redeemed or resold forthwith, and that for the satisfaction of his demand he must await his turn, that fact alone was sufficient to warn any reasonable man that very probably the representation theretofore made to him that a fund of $200.000 was on deposit in bank as a trust fund to be used in buying back the shares of stock of small stockholders was untrue, and that sundry other of the representations upon which he had relied would prove to be untrue. Not only did he obtain further information of the same tendency while he was absent from California, but upon his return in September, 1914, he accumulated much further information of like character. Yet he waited until October 21st before attempting to rescind his contract upon grounds of fraud, and until December 8, 1914, before filing his original complaint in this action. In the meantime, although he had disclaimed all interest in the stock, he gave a proxy whereby he caused it to be voted at the next annual meeting of stockholders.

[3, 4] Upon these facts we are satisfied that the court was justified in sustaining both and each of said defenses of laches and of ratification. A party must rescind promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind. Civ. Code, § 1691; Marten v. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107; Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 159 Pac. 163. And as to ratification: While the party entitled to relief may either avoid the transaction or confirm it, he cannot do both; if he adopts a part, he adopts all; he must reject it entirely if he desires to obtain relief. Any material act done by him, with knowledge of the facts constituting the fraud, or under such circumstances that knowledge must be imputed, which assumes that the transaction is valid, would be a ratification. Pomeroy, Eq. Juris. (4th Ed.) § 916, p. 1914. In the same work, at section 964, it is said:

> "If the party originally possessing the remedial right has obtained full knowledge of all the material facts involved in the transaction, has become fully aware of its imperfection and of his own rights to impeach it, or ought, and might with reasonable diligence, have become so aware, and all undue influence is wholly removed so that he can give a perfectly free consent, and he acts deliberately, and with the intention of ratifying, the voidable transaction, then his confirmation is binding, and his remedial right, defensive or affirmative, is destroyed."

In Marten v. Burns Wine Co., supra, wherein the plaintiff sought to rescind a contract of sale to him of shares of capital stock, it appeared that on the same day when the plaintiff discovered the facts constituting the fraud, he was present at a stockholders' meeting of the corporation and voted for the levy of an assessment on its capital stock; that at a later day he attended another meeting of the stockholders, and afterwards paid the assessment as levied without objection. This was held to be in effect an affirmance of the contract, and the plaintiff was not permitted to disaffirm "after having with full knowledge of the fraud dealt with the subject-matter thereof under circumstances and to an extent that amount to a ratification." Replying to respondent's citation of that case on the matter of ratification, appellant seeks to differentiate that case and the case at bar in this, that there the voting at the meeting of stockholders was for the levy of an assessment, whereas this was only an annual meeting for the election of directors. But it does not require much imagination to realize that an election of a new board of directors of a corporation which is in such condition that its stockholders have deemed it necessary to organize a protective association, is a meeting the result of which may have important consequences to all stockholders. Under such circumstances, one who seeks to place himself outside the pale of the corporation under a claim of right to rescind the sale of the stock to him by the corporation should not be permitted to enforce such right to rescind while at the same time exercising his voting rights as a stockholder.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

51 Cal. App. 445

HOLLOWAY v. HOLLOWAY. (Civ. 3488.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1921.)

1. Divorce 🔑37(22)—Husband's desertion not justified by wife's objection to husband's illicit relations with other women.

Husband's desertion of wife because of her objections to his adulterous and illicit relations with other women entitled wife to divorce, since her objections did not justify desertion.

2. Divorce 🔑12—That wife could have based action on ground of adultery did not preclude her from suing on other ground.

That wife might have based her divorce action upon the ground of adultery did not preclude her from suing for divorce on any other grounds prescribed as a cause for divorce under Civ. Code, § 92.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Lena M. Holloway against William H. Holloway. Judgment for plaintiff. Defendant appeals. Reversed, with direction to enter decree for plaintiff.

John C. Miles, of Los Angeles, for appellant.

SHAW, J. Plaintiff herein sued for a divorce, alleging that defendant, on the 25th day of December, 1916, willfully and without cause, deserted and abandoned, and has ever since said date, and for more than one year next preceding the commencement of this action, so continued to desert and abandon, her, without her will or consent.

Defendant made default, and upon trial of the case the court, on October 30, 1919, found that on December 25, 1916, defendant voluntarily left the common abode of plaintiff and himself "because of the plaintiff's objections to the defendant indulging in adulterous conduct with a servant," and that such "voluntary absence from the plaintiff has continued ever since said date. * * * The court further finds that the plaintiff did not refuse to continue to live with the defendant, but that the plaintiff remonstrated with the defendant over his conduct with other women, and from the evidence this was the cause of the defendant leaving the plaintiff." As a conclusion of law, the court found that plaintiff was not entitled to any relief.

[1, 2] It thus, we think, clearly appears that defendant was guilty of the desertion of plaintiff. The effect of the court's action in denying the relief prayed for was to hold that defendant's desertion of plaintiff was due to her fault in objecting to his adulterous conduct with a servant and remonstrating with him as to his illicit relations, and hence he was justified in the act of desertion. In this we cannot agree with the learned trial judge. While she might, as stated by the court, have based her action upon the ground of adultery, such fact did not preclude the assertion of the right to a decree based upon any other existing ground prescribed in section 92, Civil Code, as cause for divorce.

The judgment is reversed, and the trial court directed to enter an interlocutory decree of divorce in favor of plaintiff upon the findings.

We concur: CONREY, P. J.; JAMES, J.

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51 Cal. App. 367

PRINGLE v. CITY OF SANTA CRUZ et al. (Civ. 3708.)

(District Court of Appeal, First District, Division 2, California. Feb. 14, 1921.)

1. Waters and water courses 🔑209 — Presumption of rights of consumer arise where water company permitted use of water without collecting rentals.

Where a water company and city acquiesced for 40 years in plaintiff's free use of water, it must be presumed that such acquiescence followed from a belief that such use was conformable to the rights of plaintiff, and to the rights of his grantor, and it must be presumed that the transaction was not a gratuity, but was based on value received, and that the water company and city and their agents ascertained the facts, and did their duty in not collecting rentals therefor, under Code Civ. Proc. § 1963, subds. 4, 15, 19, and 20.

2. Waters and water courses 🔑209—Burden on city to show plaintiff's use of water was permissive.

Where plaintiff had proved a continuous free occupancy and use of water for a period of 40 years, he established a prima facie case, and it then devolved upon water company and its successor, a city, to show that plaintiff's use was permissive, or without the knowledge of the water company and city, under Code Civ. Proc. § 1963, subds. 11, 12.

3. Waters and water courses 🔑209—Finding that plaintiff's possession of water was not hostile not supported by evidence.

In an action against a city, restraining and prohibiting defendant from discontinuing plaintiff's service of free water, a finding that plaintiff's possession was not hostile *held* not supported by the evidence.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by Charles E. Pringle against the City of Santa Cruz and others. From a judgment refusing an injunction, plaintiff appeals. Reversed.

E. C. Kramer and Charles B. Younger, both of Santa Cruz, for appellant.

Geo. W. Smith, of Santa Cruz, for respondents.

STURTEVANT, J. The plaintiff commenced this action to obtain a decree restraining and prohibiting the defendant city from discontinuing his service of free water which he had theretofore received out of a water main now owned by the city of Santa Cruz. The defendant answered, a trial was had on the merits, judgment went for the defendant, and the plaintiff appealed. The plaintiff claimed a prescriptive title. The court found that the plaintiff's use was open, notorious, uninterrupted, and with the knowledge of the defendant, but that it was not hostile. The plaintiff contended, and now contends, that his use was hostile. The sole question involved is this:

> "Was the finding that plaintiff's possession was not hostile supported by the evidence?"

The record is very short, and contains no conflicts. Prior to 1868 Daniel Ross, the plaintiff's grantor, had owned and occupied certain lands bordering Branciforte creek in Santa Cruz county. About 1876 the Santa Cruz Water Company so constructed a water system that it took water out of the creek at a point seven miles above the Ross lands and led the water in flumes and pipes down the stream and piped it across the property of Ross. In 1878 the employees of the company tapped its pipe on the Ross land and connected a supply pipe of three-fourths of an inch in diameter. Thereafter, and continuously down to the date of the trial, Daniel Ross used that quantity of water on the land described in the plaintiff's complaint. The books of the company thereafter contained under the heading "Rate,' the word "Free." After Daniel Ross had been so using the water for some time the then president of the water company called at the house of Daniel Ross, and the occurrence was told by Mr. J. M. Ross in these words:

> "I heard a conversation between my father and A. W. Bowman concerning the receipt of this water. That conversation took place in the early part of 1880—I don't know just exactly the date. It took place in our front yard, right inside the property. Just as near as I can remember the conversation, father wanted an inch of water instead of the three-quarters, and Mr. Bowman agreed with him that that would be all right. Then he says, 'We will have that in writing,' and Mr. Bowman told him to go over to the office, but, before my father got to the office, Mr. Bowman was called to San Francisco, so it was never put in writing, but Mr. Bowman at that time agreed to give him one inch of water. My father was receiving water through a three-quarter inch pipe at that time."

At this point it should be noted that, if Ross was a licensee, enjoying such a bounty, it was quite extraordinary that he should request or demand that his benefactor should increase the extent of the benefaction. If the increase was to be an additional gratuity it was yet more extraordinary that Ross should then request that his benefactor should reduce to writing the extent of the gift.

[1] June 27, 1903, Ross sold the land to the plaintiff by a deed which was immediately recorded in Santa Cruz, and which deed contained a clause:

> "Together with all the water rights and privileges now owned, occupied, and enjoyed by the party of the first part."

That clause would indicate that Ross and Pringle each, in turn, claimed the water right as owner. The plaintiff had held the title to the land only about one year when August Hihn, president of the water company, called. The plaintiff described the visit as follows:

> "They came around and asked me to show my water right, August Hihn did, after I had been there. It was in 1904, and I showed him my deed with the water right in it, and they never bothered me after that."

That incident shows that the water company was advised that the plaintiff was claiming as owner, as the grantee of Ross. The incident was sufficient to put the company to further inquiry. From 1914 to 1916 R. B. Zieber was the collector of the water company before it sold out to the defendant city. While so acting he was advised by Mr. Hihn "not to make any effort to collect from this property; that they had a free water right." The use, under these circumstances, continued over 40 years. It was uninterrupted. It continued when water was plentiful and when it was scarce. The plaintiff says:

> "I had all I wanted to use at the time water was so scarce; I had plenty of water to use if I wanted to use it."

In addition to the small fragments of evidence contained in the foregoing there are certain disputable presumptions which we must bear in mind. As the record was made in the trial court, and as it stands before us, it shows no debt or obligation at any time owing by the water company to the plaintiff or plaintiff's grantor. On the other hand, from the year 1878 daily to the date of the trial, the duty rested on the agents of the water companies to charge and collect all rentals and account therefor to their stockholders. We must presume that the water company and its agents ascertained the facts and did their duty. Code Civ. Proc., § 1963, subds. 4, 15. We must presume that the transaction was not a gratuity, but was based on value received. Code Civ. Proc., § 1963, subds. 19, 20. We must presume that when the water company acquiesced for 40 years in the plaintiff's free use of the water, such acquiescence followed from a belief that such use was conformable to the rights of the plaintiff and to the rights of his grantor.

Let it be conceded that the burden of proving that his holding was hostile rested on the plaintiff (Janke v. McMahon, 21 Cal. App. 781, 133 Pac. 21), such burden was met by the testimony hereinabove set forth.

[2, 3] Moreover, when the plaintiff had proved a continuous free occupancy and use of the water for a period of 40 years as though he were the owner, he established a prima facie case. It then devolved upon the defendant to show that plaintiff's use was permissive or without the knowledge of the defendant. 15 Cyc. 125; Code Civ. Proc. § 1963, subds. 11, 12; Gurnsey v. Antelope Creek Water Co., 6 Cal. App. 387, 92 Pac. 326; Cheda v. Southern Pacific Co., 22 Cal. App. 373, 376, 134 Pac. 717; Davis v. Crump, 162 Cal. 513, 518, 123 Pac. 294. The finding that plaintiff's possession was not hostile was not supported by the evidence.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

(51 Cal. App. 409)

In re SEAMAN'S ESTATE.

SEAMAN v. BANK OF SAUSALITO

(Civ. 3764.)

(District Court of Appeal, First District, Division 1, California. Feb. 16, 1921.)

1. Wills 🔑220—Creditor of testator not entitled to contest, but may resist probate in county other than that of residence.

A creditor of a decedent, as such, is not a person interested in the will, or entitled, under the provisions of Code Civ. Proc. § 1307, to contest its probate, but such creditor has such an interest in the estate that he would be entitled to resist its probate in a county other than that in which decedent was a resident at the time of his death.

2. Wills 🔑221—Creditor of testator entitled to have order of probate in wrong county vacated.

Where it is made to appear that a will has been admitted to probate in the wrong county, and that testator's creditor has been deprived thereby of opportunity to present his claim, and that he has made a timely and satisfactory showing, he is entitled to have the order of probate vacated and set aside to give him opportunity to be heard in the matter.

3. Wills 🔑355—Motions to vacate probate in wrong county made and determined on affidavits.

Motions by testator's creditor to vacate and set aside probate of the will in the wrong county whereby the creditor has been deprived of opportunity to present his claim are usually made and determined on affidavits alone as authorized by Code Civ. Proc. § 2009.

4. Judgment 🔑348, 363, 373—Motions 🔑59 (1)—Judgment may be set aside for fraud, etc., independently of statute, when motion seasonably made.

A judgment or order may be set aside on the ground of fraud, mistake, or lack of jurisdiction independently of Code Civ. Proc. § 473, when the motion is based on such ground and is seasonably made.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of George B. Seaman, deceased. Motion of the Bank of Sausalito, a creditor of decedent's estate, to vacate order admitting his will to probate presented by Russell G. Seaman, executor. From an order vacating order admitting the will to probate, proponent appeals. Affirmed.

James H. Boyer, of San Francisco, for appellant.

George H. Harlan, of San Rafael, for respondent.

KERRIGAN, J. This is an appeal from the order granting the motion of the Bank of Sausalito, a creditor of the estate of George B. Seaman, deceased, to vacate an order admitting to probate the last will of deceased. The motion was based on alleged fraud practiced upon respondent by Russell G. Seaman, the executor of the estate, and also upon the grounds of surprise, mistake, and excusable neglect of the respondent and its officers caused by said fraud. The motion was heard and submitted upon affidavits filed on behalf of the respondent and upon its proposed verified answer. According to said affidavits, which were undisputed, the deceased at the time of his death was a resident of Marin county, and was indebted to the respondent in the sum of $2,500 secured by a mortgage on real property standing in the name of and belonging to the deceased and situated in said county, a proceeding to foreclose which had been pending for some time. It also appears that the will of the deceased was filed for probate in the city and county of San Francisco, and that the filing of the same there was fraudulently concealed from the respondent, the officers of which did not learn of the filing of said will until the time had elapsed for the filing of claims.

This is not a proceeding, as appellant appears to contend, to contest the will or its probate. Its purpose is merely to set aside the order admitting the will to probate so that the respondent may be heard on the proposition as to which county, Marin or San Francisco, has jurisdiction of the administration of the estate.

[1, 2] It must be conceded that a creditor as such is not a person interested in the will

or entitled under the provisions of section 1307 of the Code of Civil Procedure to contest its probate, but it cannot be seriously doubted, we think, that such creditor has such an interest in the estate that he would be entitled to resist its probate in a county other than that in which said decedent was a resident at the time of his death. If this be true, it follows that where, as here, it is made to appear that the will has been admitted to probate in the wrong county, and the creditor has been thereby deprived of an opportunity to present his claim, and that he has made a timely and satisfactory showing, he is entitled to have the order vacated and set aside so as to give him an opportunity to be heard in the matter. Brownell v. Superior Court, 157 Cal. 703, 109 Pac. 91; Levy v. Superior Court, 139 Cal. 590, 73 Pac. 417; Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317.

[3] It is also established law in this state that motions of this kind are usually made and determined upon affidavits alone, as authorized by section 2009 of the Code of Civil Procedure. Van Loan v. Van Loan, 142 Cal. 423, 76 Pac. 37.

[4] The appellant also contends that the order appealed from was based upon the sole ground that the court has no jurisdiction to make the same, and that this is a denial upon all the other grounds specified in the motion, and that lack of jurisdiction is not one of the grounds included in section 473 of the Code of Civil Procedure; hence not a valid ground for such motion. It is true that in the recitals of the order it is stated that the motion is based on the absence of jurisdiction to admit the will to probate. The notice of motion, however, was not so limited, and it appears to us on a reading of the whole order that this reference to the grounds of the motion, reciting one of them, was only intended to be a formal reference to such motion, and that the court's order thereon being, as it is, general in terms, may be supported by any valid ground contained in the motion. But, even if we construed the order as based on the ground claimed by the appellant, the point is without merit; for under the law in this state a judgment or order may be set aside on the ground of fraud, mistake, or lack of jurisdiction independently of section 473, Code of Civil Procedure, when, as here, the motion is based on such ground and is seasonably made. Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232; Norton v. A., T. & S. F. Ry. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; People v. Thomas, 101 Cal. 571, 36 Pac. 9.

The order is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

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